UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – BEAR, STEARNS & CO. INC., Defendant.	Civil Action No. 03 Civ. 2937 (WHP) **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM IN RESPONSE TO JULY 3, 2003 ORDER**
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – JACK BENJAMIN GRUBMAN, Defendant.	Civil Action No. 03 Civ. 2938 (WHP)
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – J.P. MORGAN SECURITIES INC., Defendant.	Civil Action No. 03 Civ. 2939 (WHP)

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – LEHMAN BROTHERS, INC., Defendant.	Civil Action No. 03 Civ. 2940 (WHP)
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, Defendant.	Civil Action No. 03 Civ. 2941 (WHP)
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – U.S. BANCORP PIPER JAFFRAY, INC., Defendant.	Civil Action No. 03 Civ. 2942 (WHP)

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – UBS WARBURG LLC, Defendant.	Civil Action No. 03 Civ. 2943 (WHP)
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – GOLDMAN, SACHS & CO., Defendant.	Civil Action No. 03 Civ. 2944 (WHP)
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – CITIGROUP GLOBAL MARKETS, INC., F/K/A SALOMON SMITH BARNEY INC., Defendant.	Civil Action No. 03 Civ. 2945 (WHP)

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – CREDIT SUISSE FIRST BOSTON LLC, F/K/A CREDIT SUISSE FIRST BOSTON CORPORATION, Defendant.	Civil Action No. 03 Civ. 2946 (WHP)
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – HENRY McKELVEY BLODGET, Defendant.	Civil Action No. 03 Civ. 2947 (WHP)
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, – against – MORGAN STANLEY & CO. INCORPORATED, Defendant.	Civil Action No. 03 Civ. 2948 (WHP)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

MISCELLANEOUS:

Plaintiff Securities and Exchange Commission ("SEC" or "Commission") submits this Memorandum in response to the Court's July 3, 2003 Order ("Order"). In its Order, the Court raises four sets of questions and invites the Commission to propose a timetable for nominating three candidates each for Distribution Fund Administrator and Investor Education Fund Administrator. We address these matters in turn.

I. Companies and Relevant Time Periods Referenced in the Complaints

After observing that "[e]ligibility to participate in the Distribution Fund is limited to investors who (i) purchased (ii) equity securities (iii) of a company referenced in the complaint (iv) through the investment bank defendant named in the complaint (v) during the relevant time period described in the complaint," the Court asks the SEC to "submit, for each proposed judgment: (1) the name(s) of each qualifying equity security; and (2) the relevant time period." Order at 5.

A. Attached hereto as Addendum 1 is a table identifying, separately for each defendant investment firm, each company mentioned by name in the pertinent Complaint.[1] The table also identifies the relevant time period alleged in paragraph 2 (or, in Lehman Brothers' case, paragraph 1) of each such Complaint. In providing this information, the SEC wishes to emphasize the following points:

---

[1] The SEC is not providing a list of companies referenced in the Merrill Lynch Complaint because there is no Distribution Fund in the *Merrill Lynch* action and, accordingly, there are no qualifying securities vis-à-vis Merrill Lynch. In addition, as to the Complaints against Citigroup Global Markets and Credit Suisse First Boston, the SEC is not listing the companies mentioned solely in connection with allegations that the firm engaged in unlawful "spinning" relating to Initial Public Offerings ("IPOs"). Consistent with the general thrust of these actions, the Distribution Funds are designed to provide payments to investors who suffered losses in connection with defendants' research-related activities. *See* Final Judgments § V.D.2 (as a threshold matter, an Eligible Distribution Fund Recipient under the Distribution Fund Plans must have purchased the equity securities of the company in question after the defendant's publication or the investor's receipt of research regarding that company). References and citations herein to the "Final Judgments" shall, unless otherwise indicated, be to the proposed Final Judgments against the defendant investment firms other than Merrill Lynch.

(1) The term "equity securities of companies referenced in the Complaint" appears in the Final Judgments solely as a guideline to assist the Distribution Fund Administrator in the formulation of the Distribution Fund Plans. In particular, under Section V.B of the Final Judgments, the Distribution Fund Administrator shall formulate Distribution Fund Plans "that, to the extent practicable, allocate[] funds to persons who purchased the equity securities of companies referenced in the Complaint" against the defendant in question.

Read literally, the term "companies referenced in the Complaint" could encompass any company mentioned by name in any manner or in any context in one of the Complaints. Out of an abundance of caution, the SEC is accordingly providing a list of each company mentioned in the Complaints (subject to the two qualifications discussed *supra* at n.1). The SEC wishes to clarify, however, that the parties intended the "referenced in" language to be a limiting factor in the formulation of the Distribution Fund Plans. Specifically, the parties intended this language to establish the outer bounds of the Distribution Fund Administrator's inquiry, so that, to the extent practicable, the Distribution Fund Administrator would not go beyond investors in the equity securities of companies referenced in the Complaints to determine the identities of Eligible Distribution Fund Recipients.

The parties did *not* intend that the "referenced in" language would be used expansively to provide payments to all investors who purchased the equity securities of any company mentioned in any of the Complaints at any time during the broad relevant time periods set forth in the Complaints. Thus, Section V.B of the Final Judgments expressly states that the Distribution Fund Administrator "need not provide that funds be allocated (i) with respect to purchases of equity securities of *each* company identified in the Complaint or (ii) to *all* purchasers of equity

securities of a company identified in the Complaint." (Emphasis in original). Section V.B further states that the Distribution Fund Administrator

> may recognize that purchasers of equity securities of companies referenced in connection with one kind (or some kinds) of conduct by Defendant should receive all of the Distribution Fund available for distribution to Eligible Distribution Fund Recipients or a greater proportion than should purchasers of equity securities of companies referenced in connection with another kind (or other kinds) of conduct by Defendant.

Accordingly, simply because a company is mentioned by name in one of the Complaints does not mean that investors in that company's equity securities during the relevant time period will be included in a Distribution Fund Plan.

(2) In view of the foregoing, the SEC believes that, after reviewing the record and conducting the inquiry contemplated by the Final Judgments, the Distribution Fund Administrator could quite rationally conclude that the Distribution Fund Plans should not include investors who purchased the equity securities of certain companies – e.g., those that are not directly linked to defendants' wrongdoing – in favor of investors who purchased the equity securities of other referenced companies.[2] For the reasons stated in Plaintiff Securities and Exchange Commission's Memorandum in Response to June 2, 2003 Order ("Response to June 2 Order"), the Commission believes that it is appropriate for the Distribution Fund Administrator to make these cuts in the first instance, subject to the Commission's review and the Court's approval. Having said that, we believe that the Distribution Fund Administrator could well conclude that the most suitable candidates for receipt of payments from the Distribution Funds are investors who invested in the equity securities of companies referenced in connection with

[2] For example, there are some companies mentioned in the Complaints as to which the defendant firm in question did not published research during the relevant time period. Under § V.D.2 of the Final Judgments, "as a threshold matter," an Eligible Distribution Fund Recipient under the Distribution Fund Plans must have purchased equity securities "after the publication or receipt of ... research" regarding the company in question. Final Judgments § V.D.2.

allegations that the pertinent defendant engaged in fraudulent conduct and/or conduct that violated the rules of the self-regulatory organizations ("SROs") regarding advertising and communications with the public (the "advertising rules"). Accordingly, while providing a list of all companies mentioned in the Complaints, the Commission is also indicating, within that broad list, those companies referenced in connection with allegations that the company published fraudulent research or research that violated the SRO advertising rules.

(3) The relevant time periods identified in the Complaints cover 2-3 year periods, while the alleged violative conduct with respect to any particular issuer of securities generally occurred over a shorter time period. Accordingly, Section V.D.1 of the Final Judgments states that, in formulating each Distribution Fund Plan, the Distribution Fund Administrator may consider "the proximity in time between the person's purchase of a company's equity securities and Defendant's publication of the research in question regarding the company" and that, "as a threshold matter ... the purchase must have been made after the publication or receipt of such research." Given that the overall relevant time period is broader than the time period of the alleged wrongful conduct with respect to any particular equity security, the information requested in the Order concerning the dollar volume of shares of all referenced companies' equity securities purchased throughout the relevant time period should not be regarded as an estimate of or proxy for the actual market loss or defendants' profits resulting from alleged wrongdoing.[3]

(4) There may be some companies "referenced" in the Complaints as that term is used in Section V.B of the Final Judgments that are not mentioned by name in the Complaints.

[3] For example, the relevant time periods are generally from mid-1999 to mid-2001. In many cases, however, the challenged conduct occurred in late 2000 or early 2001. Information as to the number of shares or dollar volume purchased before the challenged conduct occurred would not be relevant to amount of investor loss or defendants' profits resulting from the challenged conduct.

For example, Paragraph 51 of the Complaint against Morgan Stanley alleges that "[i]n at least twelve stock offerings in which it was selected as lead underwriter from 1999 through 2001, Morgan Stanley paid $2.7 million of the underwriting fees to approximately twenty-five investment banks." Paragraph 52 of that Complaint gives examples of three such offerings, mentioning the companies by name, but does not identify the other nine. In the SEC's view, those nine other stock offerings are "referenced" in the Complaint even though the companies are not mentioned by name therein.

B. The statement in *Massey Ferguson Div. of Varity Corp. v. Gurley*, 51 F.3d 102, 104 (7th Cir. 1995), that Fed. R. Civ. P. 58 mandates that a judgment be "self-contained" does not require the Final Judgments here expressly to identify the companies or the relevant time periods referenced in the Complaints. The "self-contained" language flows from Rule 58's general requirement that a judgment be set forth in a "separate document" containing the judgment's essential terms. In *Massey Ferguson*, the district court had issued an order simply stating that "defendants' motion for summary judgment is granted in part and denied in part, consistent with the decision and order of September 15, 1994." *Id.* The Seventh Circuit found that that order did not comply with Rule 58 because it did "not say who is entitled to what relief, an essential ingredient of a proper judgment"; rather it "refer[red] for essential terms to the opinion." *Id.*

Here, by contrast, the Final Judgments precisely identify the relief that the SEC will obtain from defendants, and all other essential ingredients are contained in the Final Judgments. The names of the companies and the relevant time periods referenced in the Complaints are not essential to the entry of judgment against defendants in these actions by the Commission. Under Section II.B of the Final Judgments, once defendants make the required Federal Payments, they "relinquish[] all legal and equitable right, title, and interest in such funds, and no part of the

funds shall be returned to Defendant[s]." The companies and time periods referenced in the Complaints are simply criteria to be applied by the Distribution Fund Administrator in formulating Distribution Fund Plans for the proposed allocation to investors of the Distribution Funds. Those Funds will contain fixed amounts (the Federal Payments) that will not be affected either by the number or identity of states accepting the State Settlement Offers or by the number or identity of the referenced companies in the Distribution Fund Plans. In this sense, the Final Judgments here are *more* specific than final judgments in other cases, cited in the SEC's Response to June 2 Order, involving distribution funds. In those other cases, the final judgments simply created distribution funds and called for the appointment of claims or distribution administrators to create distribution plans, but set forth no requirements, standards, or guidelines that the administrators were to use in formulating the plans. As in those other cases, all Distribution Fund Plans here will be submitted to the Court for its review and approval.

Even if the "separate document" requirement of Rule 58 otherwise mandated that the names of the companies and the relevant time periods referenced in the Complaints be included in the Final Judgments themselves – which it does not – defendants have effectively waived that requirement. The primary purpose of Rule 58, and the finality requirement generally, is to clarify when the time for appeal begins to run. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978) (*per curiam*); 11 Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2781, at 6-7 (1995 ed.) ("[m]ost important" consideration underlying Rule 58 "is the fact that the time for appeal runs from the entry of the judgment"). In *Bankers Trust*, the Supreme Court held that the "separate document" requirement of Rule 58 is not a "categorical imperative" and that the parties are therefore free to waive it. *Id.* Here, the defendants have waived any rights they may have to appeal from entry of the Final Judgments. Consent ¶ 13 (for firms other

than Merrill Lynch); Consent ¶ 12 (for Merrill Lynch). Since defendants have waived all appeal rights, they have in essence also waived Rule 58's separate document requirement. Under all circumstances, the basic concern of Rule 58 to establish a timeline for appeal is not present here.

Moreover, each defendant firm has also agreed in its Consent "not [to] oppose the enforcement of the Final Judgment on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon." Consent ¶ 15 (for firms other than Merrill Lynch); Consent ¶ 14 (for Merrill Lynch). Rule 65(d) states among other things that "[e]very order granting an injunction ... shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Thus, defendants have waived objections based on any purported lack of specific identification of companies or time periods in the Final Judgments.[4]

C. The Court directs each defendant investment firm to "submit for each equity security identified by the SEC, the total number of shares purchased by its clients during the relevant time period and the total volume of those purchases" and allows the parties leave to apply for "additional time to prepare their respective responses." Order at 5, 6. For the reasons stated above, this information should not be viewed as a measure of investor loss or defendants' profits from alleged wrongdoing. Further, defendants' application for an extension of time to compile this information, to which the Commission does not object, should not delay entry of the Final Judgments. As discussed above, this information is not essential for entry of the

[4] As a prudential matter, it is inappropriate to require a specific identification in the Final Judgments of the companies and time periods referenced in the Complaints. Doing so might not only delay the entry of the Final Judgments, but also create the misimpressions that the Distribution Fund Administrator is required to include in the Distribution Fund Plans all investors in the equity securities of all such companies and that such investors will receive payments from the Distribution Fund Plans. For the reasons stated in the SEC's Response to June 2 Order, the Distribution Fund Administrator should have the flexibility, after having conducted an appropriate inquiry that has not yet been conducted, to identify in the first instance those companies an investment in the equity securities of which should provide the basis for a payment from the Distribution Funds.

Judgments, but goes instead to how the Distribution Funds will be distributed. Under these circumstances, rather than wait for this information to be compiled, the Commission respectfully requests that the Court instead enter the Final Judgments so that the $399 million in Federal Payments will be earning interest for investors and defendants will be subject to the Final Judgments' injunctive relief provisions, including the prophylactic provisions of Addendum A to the Final Judgments regarding separation of research and investment banking, disclosure, and independent research, and this Court's contempt power.

II. Finality of the Final Judgments Under Fed. R. Civ. P. 58

The Court next asks whether, in view of Rule 58, it can "approve a settlement where the precise amount of the penalty and disgorgement is not fixed, and no time line has been set for that determination," and whether any court has approved "a 'final' judgment" or the SEC has "ever issued a 'final' decision, where the penalty and disgorgement amounts or other sanctions were not fixed at the time the judgment or decision was entered." Order at 6. The Court also requests the identity of "the states that have accepted the State Settlement Offers and the terms and allocations as to each defendant of penalty and disgorgement with respect to each such state." *Id.*

A. As an initial matter, it is important to bear in mind that the precise amount of the *sum* of the penalty and disgorgement to be paid into the Distribution Funds in these actions – i.e., the Federal Payments – is in fact fixed. *See* Final Judgments § II.C ("Defendant's obligation to make the Federal Payment is not contingent or dependent in any way or part on Defendant's payments to state securities regulators pursuant to the State Settlement Offer."). Also fixed is the allocation between penalty and disgorgement of defendants' overall payments pursuant to the Federal Payments and the State Settlement Offers: "at all times" the total amount of penalties

shall equal the total amount of disgorgement paid in the Federal Payments and pursuant to the States Settlement Offers. *Id.* What is not fixed at this time is the allocation of the Federal Payments between (as distinguished from the total amount of) penalty and disgorgement.

B. Rule 58 does not present an obstacle to immediate entry of the Final Judgments even though that latter allocation has not yet been fixed. Even if defendants had not waived their rights (*see supra* at 6-7), Rule 58 would not preclude immediate entry of the Final Judgments. "Rule 58 states how a judgment is entered. It does not speak to whether a judgment ... is a 'final judgment' for purposes of appeal." 11 Wright, Miller & Kane, *supra*, § 2785, at 25. "The whole thrust of the rule [is] to have judgments entered promptly." *Id.* at 27.

Rule 58 was completely rewritten in 2002. Under current Rule 58(a)(1), the judgment must generally be set forth in a separate document, as has been done here. Under Rule 58(a)(2), the clerk must, without awaiting further direction of the court, enter a judgment for a sum certain and, when it grants other relief, the court must "promptly" approve the form of the judgment, which the clerk must equally promptly enter. Rule 58(b) states that, when judgment is required to be entered on a separate document, the judgment is considered entered on the earlier of when it is set forth in a separate document or 150 days have run from entry in the civil docket under Fed. R. Civ. P. 79(a). Rule 58(c)(1) states that "[e]ntry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees ...."

Rule 58 nowhere specifies when a judgment is considered "final" for purposes of appeal or otherwise. Indeed, "the new rule completely abandons the approach of defining the time when a judgment becomes 'effective'" so that court and attorneys will "[n]o longer ... need to grapple with questions regarding whether certain actions should be deemed to make a judgment

effective, particularly for purposes of appeal." 11 Wright, Miller & Kane, *supra*, § 2785 (2003 pocket part).[5]

As discussed in our Response to June 2 Order and as we understand will be discussed more extensively in a joint submission that defendants informed us they will make in response to the July 3 Order, a judgment is final if it ends the litigation on the merits. Under this test, the judgment need not set forth the exact amount of the damages; it is sufficient that the judgment "specify the means for determining" the amount of damages. *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 233-34 (1958). According to the Second Circuit, a judgment that fixes liability without a calculation of damages is final and appealable so long as the computation of damages is "merely ministerial in nature," and a judgment imposing permanent injunctive relief but reserving decision on damages is also appealable. *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1175 (2d Cir. 1995). In particular, if determining the amount of damages simply involves "plugging information into [a] formula," the judgment is final. *Production and Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1400 (7th Cir. 1992).

Here, while the allocation of the Federal Payments between disgorgement and penalties is not yet known (though the total amount of the Federal Payments *is* known), that allocation will be easily determined through the mechanical application of the formula set forth in Section II.C of the Final Judgments. Under these circumstances, the Final Judgments are indeed final.

C. There is ample precedent in SEC cases for entering judgment at this time even though the relative amounts of penalties and disgorgement in the Federal Payment have not been

[5] The former version of Rule 58 stated the following regarding entry of judgment: "(1) ... upon a decision by the court that a party shall recover only a sum certain ... the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, ... the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it."

precisely determined. (As discussed above, the total amount of the Federal Payment has been determined, as has the ratio of penalties to disgorgement *in toto*.) As will be seen, the courts in those cases went further than this Court would have to here in entering judgments, including those styled "Final" judgments or orders.

Most recently, in *SEC v. Worldcom, Inc.*, 2002 WL 31748604 (S.D.N.Y. 2002), Judge Rakoff entered a "Judgment of Permanent Injunction" against Worldcom while leaving to a future date the determinations whether to assess a civil penalty against the company and, if so, in what amount.[6] The *Worldcom* judgment contained a number of injunctive relief provisions and provisions regarding future tasks to be performed by the company, its court-appointed corporate monitor, and an independent consultant. As to penalty, Section VI of the *Worldcom* judgment stated that, "upon motion of the Commission or at the instance of the Court, the amount of the civil penalty, if any, to be paid by defendant WorldCom ... shall be determined by the Court in light of all the relevant facts and circumstances, following a hearing." Section X of the *Worldcom* judgment expressly authorized the Commission "to engage in continued discovery regarding any unresolved issue in the case with respect to WorldCom, which shall include, but is not limited to, discovery for the purposes of determining the appropriate civil penalty that should be imposed against defendant WorldCom." Despite the uncertainties whether any penalty would be imposed and the amount of any penalty to be imposed, the court, finding "no just reason for delay," ordered the clerk to enter the judgment. *Worldcom* Judgment § XIV.[7]

---

[6] The absence of the word "final" from the *Worldcom* judgment did not render it non-final. *See Bankers Trust Co.*, 435 U.S. at 384 n.4 (1978) ("a 'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that term is used in 28 U.S.C. § 1291").

[7] On July 7, 2003, Judge Rakoff approved a penalty in the *Worldcom* action. In his written opinion, he relied on the cases cited in the SEC's Response to June 2 Order to hold that, in deciding whether to approve a consent judgment in an SEC enforcement action, the "Court reviews such a settlement proposal not on the basis of what it might itself determine is the appropriate penalty, but on the basis of whether the settlement is fair,

(continued ...)

Worldcom is not an isolated example. Identical or at least virtually identical provisions entering permanent injunctive and other relief but deferring a determination as to disgorgement and/or penalties are found in the following consent judgments (one of which was styled a "Final Judgment") or orders entered by courts in SEC enforcement actions: *SEC v. Koskella*, No. 1:01-CV-6227 (N.D. Ill. Jan. 15, 2002) ("Final Judgment and Order of Permanent Injunction"); *SEC v. Schluep*, No. C-02-4193 (N.D. Cal. Oct. 9, 2002) ("Judgment of Permanent Injunction and Other Legal and Equitable Relief"); *SEC v. Dowdell*, No. 3:01CV00116 (W.D. Va. June 4, 2002) ("Permanent Injunction Order"); *SEC v. Cammarano*, No. H 98-3707 (S.D. Tex. Jan. 19, 1999) ("Order of Permanent Injunction and Other Equitable Relief"). In all of these cases, the courts, finding no just reason for delay, instructed the clerks to enter the judgments.

In all of these cases, as in *Worldcom*, the courts entered judgments, including one styled a "Final Judgment," even though it was unclear (a) whether there would be any penalty and/or disgorgement; (b) if there was to be a penalty and/or disgorgement, how much those amounts would be; and (c) when those determinations would be made. The Final Judgments here are more definite in that the aggregate amount of penalty and disgorgement is already known.

In *SEC v. Prudential Securities Inc.*, No. 93-2164 (EGS) (D.D.C. Jan. 21, 1993), the court entered a consent "Final Order" pursuant to which Prudential paid $330 million into a claims administration fund designed to compensate investors harmed by its conduct. Under the terms of the Final Order, Prudential agreed to pay all claim settlements and all awards resulting from the agreed-upon claims process. It also specifically agreed that the aggregate dollar amount of such claim settlements and awards might exceed the amount of money in the claims fund and

---

(... continued)
reasonable, and adequate" and that, "where one of the settling parties is a public agency, its determinations as to why and to what degree the settlement advances the public interest are entitled to substantial deference." *SEC v. Worldcom, Inc.*, 2003 WL 21523992, at *5 (S.D.N.Y. 2003).

that it would pay any unpaid awards and settlements if the claims fund was to become exhausted. Ultimately, Prudential paid approximately $1 billion pursuant to the Final Order. *See SEC v. Prudential Securities Inc.*, 171 F.R.D. 1, 2 (D.D.C. 1997), *aff'd*, 136 F.3d 153 (D.C. Cir. 1998). The Final Order in *Prudential* went further than the Final Judgments here in that, in these cases, defendants' total penalty and disgorgement amounts are fixed, while Prudential's exposure under its Final Order was totally unbounded.

Similarly, in *SEC v. Gruntal & Co.*, No. 96 Civ. 2514 (S.D.N.Y. Apr. 19, 1996), Judge Mukasey entered a consent "Final Order" pursuant to which Gruntal was required to deposit $5.5 million in disgorgement into a CRIS account for ultimate distribution pursuant to a plan to be created by a fund administrator. The Final Order also called for Gruntal (a) to disgorge an additional, unspecified amount of up to $6.7 million if the fund administrator determined that Gruntal had not repaid, recredited, escheated, or properly segregated and scheduled for escheatment such an amount in connection with the challenged conduct; and (b) to pay to the parties to whom they belonged any monies determined, after research by Gruntal or the fund administrator, not to be escheatable.

D. In non-securities cases, even prior to the 2002 amendment of Rule 58, courts considered judgments "final" though the amount of penalty or damages had not been fixed. Some of these cases are discussed *supra* at 10. In addition, in *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964), the Second Circuit, per Judge Friendly, held that its earlier determination of defendant's liability was "final" for purposes of collateral estoppel effect even though plaintiff's damages had not then been determined. The Court of Appeals stated:

> "Finality" in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good

> reason for permitting it to be litigated again. We meant our previous ruling to be final on the hotly contested issue of liability under Glidden's contract with its employees .... The mere fact that the damages of the Zdanok plaintiffs have not yet been assessed should not deprive that ruling of any effect as collateral estoppel it would otherwise have.

Id. at 955.

In *Houben v. Telular Corp.*, 231 F.3d 1066 (7th Cir. 2000), the Seventh Circuit addressed the question whether it had appellate jurisdiction in light of the fact that penalties under the Illinois Wage Payment and Collection Act ("IWPCA") had not been fixed at the time judgment was entered, and therefore the judgment was purportedly not "final" for purposes of appeal. The court stated that there are circumstances, most notably attorney's fees and costs, "in which the existence of unresolved issues in the district court does not defeat the finality of the judgment." *Id.* at 1070-71. It concluded that penalties under the IWPCA were to be treated in the same manner as attorneys' fees and costs and were therefore not required to be set forth in the final judgment. Accordingly, it held, "the unresolved nature of the IWPCA question does not defeat our appellate jurisdiction." *Id.* at 1071.

In *Falls Stamping & Welding Co. v. International Union, United Auto. Workers, Aerospace & Agr. Implement Workers of Am., Region II*, 744 F.2d 521 (6th Cir. 1984), the Sixth Circuit held that the entry of permanent injunctive relief that did not dispose of a damages claim was a final judgment precluding a subsequent damages claim based on the same conduct. According to the Sixth Circuit, "the absence of an express disposition of the damage claim does not destroy the finality of the order." *Id.* at 525. The Sixth Circuit reached the same result in *Bustop Shelters of Louisville, Inc. v. Classic Homes, Inc.*, 923 F.2d 854 (table), 1991 WL 4697 (6th Cir. 1991). There, Classic had placed garnishments relating to a damages award it had obtained in the district court against Bustop. The Sixth Circuit affirmed on liability but vacated

and remanded on the issue of damages. In subsequent proceedings, Bustop argued that the previously obtained garnishment was invalid in light of the Sixth Circuit decision "because no final judgment exists on which to issue the garnishments and no sum certain exists for a garnishment to enforce." 1991 WL 4697, at *2. Relying on the Second Circuit's decision in *Zdanok*, the Sixth Circuit tersely rejected this argument, stating: "Where damages are unsettled but liability determined, a final judgment exists." *Id.*

E. The Court seeks an identification of the states that have accepted the State Settlement Offer and a description of the terms and allocations as to each defendant of penalty and disgorgement for each such state. According to Christine A. Bruenn, President of the North American Securities Administrators Association ("NASAA") and Maine Securities Administrator, the following 12 states have reached final settlements with a defendant firm and, in some cases, have already accepted that defendant's State Settlement Offer: Alabama, Arizona, Connecticut, Hawaii, Illinois, Massachusetts, New Jersey, Oklahoma, Texas, Utah, Vermont, and Utah. The state of New York has reached a final settlement with and received its portion of the State Settlement Offer from two defendant firms. A chart setting forth the state, the name of the firm with which it has reached settlement, and the amount and the terms of the settlement payment is attached as Addendum 2. Of these 13 states, 11 have submitted settlement documents to a total of 7 or more of the remaining 9 firms (Merrill Lynch is not included because it reached settlement with the states last year). An additional 25 states and 2 jurisdictions have sent settlement documents to one or more of the defendant firms. (In fact, 21 have sent documents to 8 or all of the 9 firms entertaining settlement with the states.)

F. As to whether defendants have sought or intend to seek a federal income tax deduction or indemnification or reimbursement from any insurer or other entity of its Federal

Payment, the SEC notes that all defendants agreed in their Consents, which are incorporated by reference in and therefore a part of the Final Judgments, not to seek or accept any reimbursement or indemnification, including but not limited to any insurance payment, and not to claim, assert, or apply for any tax deduction or credit for any penalty amounts paid in the Federal Payments or to the states pursuant to the State Settlement Offers. Accordingly, there shall be no tax credit or deduction at any level, indemnification, or insurance for any penalty paid by any defendant pursuant to the global settlement.

As discussed in the SEC's Response to June 2 Order, the Consents and Final Judgments do not contain any provisions stipulating the tax, insurance, or indemnification treatment of disgorgement, independent research, or investor education payments. The treatment of payments other than penalties will presumably be in accordance with the laws of the pertinent jurisdiction. The SEC leaves it to each defendant to state whether it intends to seek a tax deduction or credit, insurance, or indemnification for its disgorgement payments.

As stated above and in our Response to June 2 Order, under Section II.C of the Final Judgments, for each defendant, *the total amount of penalties paid* in the Federal Payment and pursuant to the State Settlement Offer *shall at all times equal the total amount of disgorgement paid* in the Federal Payment and pursuant to the State Settlement Offer. Further, under Section II.C, insofar as any amount paid to state securities regulators pursuant to the State Settlement Offer is deemed a penalty, the amount of the Federal Payment that is deemed a penalty shall be adjusted so that, at all times, the total amount of penalties paid shall equal the total amount of disgorgement paid. In sum, therefore, on an overall basis, for each dollar that a defendant pays,

and as such dollar is paid, $0.50 is a non-deductible, non-insurable, and non-indemnifiable penalty.[8]

III. Application of Injunctive Relief and Other Provisions to Foreign Entities and Activities

The Court questions whether the proposed injunctive relief provisions and other prohibitions against conflicts between investment banking and research apply to defendants' foreign affiliates or subsidiaries and whether the proposed injunctive relief provisions apply to defendants' activities in non-U.S. markets. *Id.* at 6.

A. Addendum A to the Final Judgments imposes on a going forward basis certain requirements and restrictions on "the firm[s]" to eliminate and prevent impermissible conflicts between investment banking and research.[9] Those requirements and restrictions, which are designed to protect U.S. investors, are set forth in Section I of Addendum A, entitled "Separation of Research and Investment Banking." Under Section I.1.a of Addendum A, "the term 'firm' means the Defendant, Defendant's successors and assigns (which, for these purposes, shall include a successor or assign to Defendant's investment banking and research operations), *and their affiliates*, other than 'exempt investment banking adviser affiliates.'" (Emphasis added). Thus, the requirements and restrictions in Addendum A apply to defendants' foreign subsidiaries and affiliates. Under Section II.3 of Addendum A, the requirements and restrictions relating to Separation of Research and Investment Banking (Addendum, § I) apply – equally to defendants and their foreign subsidiaries and affiliates – to research reports furnished to U.S. investors, but

[8] Suppose, for example, that the entire $399 million in Federal Payments had been made before any payment to any state was made (a purely hypothetical example, since some states have already been paid). Under this scenario, $199.5 million of the Federal Payment would be a penalty and $199.5 million would be disgorgement.

[9] Addendum A is incorporated by reference into the Final Judgments.

only if such research relates to either a U.S. company or a non-U.S. company for which a U.S. market is the principal equity trading market.

B. As to the application of the Final Judgments' injunctive relief provisions to defendants' subsidiaries and affiliates, Section I of the Final Judgments against all investment firm defendants applies to "Defendant, Defendant's officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise." Section XIV of the Final Judgments states that

> with respect to all injunctive relief and all future obligations, responsibilities, undertakings, commitments, limitations, restrictions, events, and conditions, the terms "Defendant" and "Defendant's" as used herein shall include Defendant's successors and assigns (which, for these purposes, shall include a successor or assign to Defendant's investment banking and research operations, and in the case of an affiliate of Defendant, a successor or assign to Defendant's investment banking *or* research operations).

(Emphasis in original).

The language in Section I of the Final Judgments tracks Fed. R. Civ. P. 65(d), which states that "[e]very order granting an injunction ... is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Under this standard, to the extent the activities of a defendant's foreign subsidiaries and affiliates fall within the subject matter jurisdiction of the federal securities laws (*see* below), and to the extent those subsidiaries and affiliates are in active concert or participation with the defendant, the injunctive relief provisions would bind such entities. *International Bus. Machs. Corp. v. Comdisco, Inc.*, 1993 WL 155511, at *4 n.2 (N.D. Ill. 1993) ("If defendant's foreign

subsidiaries are in active concert or participation with it, then Rule 65(d) permits the subsidiaries to be enjoined whether or not they are name[d] as parties.").[10]

C. Apart from the requirements of Rule 65(d), subject matter jurisdiction of the federal securities laws is required for application of the injunctive relief provisions to the activities of foreign subsidiaries or affiliates. Subject matter jurisdiction is also required with respect to defendants' activities in non-U.S. markets. The Second Circuit most recently considered the subject matter jurisdiction issue in *SEC v. Berger*, 322 F.3d 187 (2d Cir. 2003), where it affirmed the application of the federal securities law to certain foreign conduct. In so doing, the Court of Appeals stated that

> we have consistently looked at two factors: (1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens. See, e.g., *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London,* 147 F.3d 118, 125 (2d Cir.1998); *Itoba Ltd. v. Lep Group PLC,* 54 F.3d 118, 121-22 (2d Cir.1995); *Psimenos v. E.F. Hutton & Co., Inc.,* 722 F.2d 1041, 1045 (2d Cir.1983). In evaluating these two factors, we apply what are known respectively as the "conduct test" and the "effects test."
>
> In considering the conduct test, we have held that jurisdiction exists only when "substantial acts in furtherance of the fraud were committed within the United States," *Psimenos,* 722 F.2d at 1045 (citing *IIT v. Vencap, Ltd.,* 519 F.2d 1001, 1018 (2d Cir.1975)), and that the test is met whenever (1) "the defendant's activities in the United States were more than 'merely preparatory' to a securities fraud conducted elsewhere" and (2) the "activities or culpable failures to act within the United States 'directly caused' the claimed losses." *Itoba,* 54 F.3d at 122 (citations omitted).

Id. at 192-93. As to the effects test, in *Consolidated Gold Fields PLC v. Minorco, SA*, 871 F.2d 252, 261-62 (2d Cir.), *amended on other grounds*, 890 F.2d 569 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989), the Second Circuit held in a securities case that "[t]he anti-fraud laws of the

[10] Affiliates are expressly subject to the record retention and non-destruction requirements of Section X of the Final Judgments (Section XI of the Investor Education Final Judgments).

United States may be give extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States."

In the instant actions, the activities of any foreign subsidiaries or affiliates of defendants or defendants' future activities in non-U.S. markets will be subject to the Final Judgments' injunctive relief provisions only if they satisfy the conduct or effects tests, as the Supreme Court and Second Circuit have interpreted them.[11]

IV. Safeguards on the Investor Education Fund Administrator

As to investor education, the Court asks: "What audit procedures do the parties envision to ensure that expenditures by the Investor Education Fund Administrator and the grant administration program are appropriate. Does the SEC contemplate the posting of a bond for the Investor Education Fund Administrator?" *Id.*

Under Section IX.A of the Investor Education Final Judgments, the defendants making investor education payments shall make such payments in five equal annual installments. The initial annual payment will be to the court registry, and all subsequent annual installment payments will be made in accordance with the Investor Education Plan to be formulated by the Investor Education Fund Administrator (which Plan is subject to the Commission's review and the Court's ultimate approval) or by further order of the Court. Under Section IX.E.2 of the Investor Education Final Judgments, the "Investor Education Plan shall establish and describe a non-profit grant administration program to fund worthy and cost-efficient programs designed to equip investors with the knowledge and skills necessary to make informed investment

[11] In this regard, it bears mention that, under Section 15 of the Securities Exchange Act of 1934 [15 U.S.C. § 78o], broker-dealers cannot generally do business with U.S. investors unless they are registered with the Commission. Many foreign entities, including those that are subsidiaries or affiliates of defendants, choose not to register with the Commission, thus choosing not to do business in the U.S. Accordingly, to the extent defendants' foreign broker-dealer subsidiaries and affiliates are not registered with the Commission, they would not be engaged in the broad-based publication of research to investors in the United States.

decisions." In light of this goal, Section IX.E.2 also states that the Investor Education Plan "may" – but need not necessarily – "authorize the transfer of the funds in the CRIS Investor Education Fund accounts ... to one or more interest-bearing accounts opened and maintained by the Investor Education Fund Administrator."

Under these circumstances, the Commission agrees with the Court that audit procedures with regard to the Investor Education Funds are appropriate. The posting of a bond for the Investor Education Fund Administrator may also be appropriate depending on the audit procedures that are adopted, who would post the bond and in what amount, the source of funds used for posting the bond, and similar considerations. (For example, the Commission does not believe it would be appropriate to draw from the Investor Education Funds themselves to post a bond.) The Commission believes that the nature of the audit procedures and, if appropriate, a bond and its amount (a) will depend heavily on the nature of the grant administration program that the Investor Education Fund Administrator proposes; and (b) should be determined in consultation with the Investor Education Fund Administrator after (s)he is selected. Accordingly, the Commission recommends that the details concerning audit procedures and a possible bond be set forth in the Investor Education Fund Administrator's proposed Investor Education Plan.

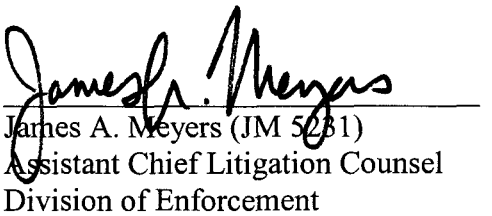
The Commission notes that, under the Final Judgments, all of the Investor Education Funds will remain in the court registry at least until the Court approves the Investor Education Plan; as mentioned above, the Investor Education Plan may, but need not necessarily, authorize the transfer of the Investor Education Funds out of the court registry. Further, under Section IX.D.1.e of the Investor Education Final Judgments, the Court is required to approve all payments of the Investor Education Fund Administrator's fees and expenses. Any conduct by

the Investor Education Fund Administrator inconsistent with that requirement would subject him or her to this Court's contempt power.

V. Time for Submission of Candidates for Distribution Fund Administrator and Investor Education Fund Administrator

Finally, the Court invites the SEC to propose dates by which it will nominate candidates for Distribution Fund Administrator and Investor Education Fund Administrator. The Commission requests leave to submit its proposals regarding the Distribution Fund Administrator by July 25, 2003. As to the position of Investor Education Fund Administrator, the Commission requests leave to respond by August 29, 2003. In deference to the candidates, particularly those whom the Court does not select, the Commission will not publicly release the names of its recommendations for Distribution or Investor Education Fund Administrator unless the Court directs otherwise.

Respectfully submitted,



James A. Meyers (JM 5231)
Assistant Chief Litigation Counsel
Division of Enforcement
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0911
Telephone: 202-942-4712
Fax: 202-942-9581

Attorneys for Plaintiff

Of Counsel:
Stephen M. Cutler, Director
Antonia Chion, Associate Director
Yuri B. Zelinsky, Assistant Director
Division of Enforcement
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0801
Telephone: 202-942-4567 (Chion)

Date: July 18, 2003

ADDENDUM 1

LIST OF COMPANIES AND RELEVANT TIME PERIODS IN SEC COMPLAINTS

Firm	Companies Mentioned by Name in Complaint[1]	Rel. Time Period[2]
Bear Stearns	Storage Networking Ancor Communications JNI Corp. Vixel Corp. iAppliances Agilent Technologies CacheFlow Go.com Pets.com Packeteer ***SonicWall*** ***Micromuse*** Internet Security Systems ***CAIS Internet, Inc.*** ***Digital River*** Andrx Corp.	July 1, 1999 – June 30, 2001
Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.)	***Focal Communications Corp.*** ***Metromedia Fiber Networks, Inc.*** ***Level 3 Communications Inc.*** ***Williams Communications Group Inc.*** ***XO Communications Inc.*** ***Adelphia Business Solutions Inc.*** ***RCN Corp.*** ***AT&T Corp.*** AT&T Wireless Services, Inc. Worldcom, Inc. Global Crossing Ltd. Qwest Communications International Rhythms NetConnections Inc. Nippon Telegraph KPN Qwest Winstar Communications, Inc. McLeod USA, Inc.	Jan. 1, 1999 – Dec. 31, 2001

[1] Companies are listed in the order in which they appear in the Complaint. Companies as to which the pertinent Complaint alleges that the firm published fraudulent research or research that violated the SRO advertising rules are indicated in bold/italics.

[2] The Relevant Time Period identified in this Addendum is the relevant time period alleged in ¶ 2 (or, in Lehman Brothers' case, ¶ 1) of the Complaint against the defendant in question.

Firm	Companies Mentioned by Name in Complaint	Rel. Time Period
Credit Suisse First Boston	***Digital Impact, Inc.*** ***Synopsys, Inc.*** ***Numerical Technologies, Inc.*** ***Agilent Technologies, Inc.*** ***Winstar Communications, Inc.*** ***NewPower Holdings, Inc.*** Gemstar-TV Guide International, Inc. Allaire Corp. Aether Systems, Inc. Razorfish, Inc.	July 1, 1998 – Dec. 31, 2001
Goldman Sachs	Storage Networks Inc. Loudcloud Inc. Ventro Corp. Crown Castle International Corp. Willis Group Holdings, Ltd. Crosswave Communications Inc. GeneProt WebEx Inc. ***Exodus Communications, Inc.*** ***Global Crossing Ltd.*** ***AT&T Corp.*** ***WorldCom, Inc.*** ***360Networks Inc.*** Winstar Communications, Inc.	July 1, 1999 – June 30, 2001
J.P. Morgan[3]	KV Pharma King Pharmaceuticals KPMG International Rectifier IFX CCC Information Services Epicor Software Corporation WFI AppNet Vicinity Intertrust Mypoints Concord EFS Accenture	July 1, 1999 – June 30, 2001

[3] Two companies mentioned in the Complaint against J.P. Morgan are not included in this list because neither company (Technology Partners International and Participate.com) ever was a publicly traded company.

Firm	Companies Mentioned by Name in Complaint	Rel. Time Period
Lehman Brothers	***Razorfish, Inc.*** ***RSL Communications, Inc.*** ***DDi Corporation*** ***RealNetworks, Inc.*** ***Broadwing, Inc.*** Worlstor Compaq Zymogenetics, Inc. Dyax Corp. Yadayada Texas Instruments Inc. Curagen Corp. Delta Three Communications, Inc. Triton Alamosa Micron Technology Intel Global Crossing Ltd. Pacific Gateway Exchange Inc.	July 1, 1999 – June 30, 2001
Morgan Stanley	Loudcloud, Inc. iBeam Broadcasting Corp. Transmeta Corp. AT&T Latin America Convergys Corp. Veritas Software Corp. Pilgrim's Pride Corp. Sabre Group Holdings Inc. Concord/EFS, Inc. eBay, Inc. America Online, Inc. Compaq Computer Corp. Hearst Sotheby's Holdings, Inc. Agile Software Corp. Atmel Corp. Chemdex (Ventro) Drugstore.com, Inc. Priceline.com Inc. Ask Jeeves, Inc. Marimba, Inc. Homestore.com, Inc. Vignette Corp. VeriSign, Inc. Akamai Technologies, Inc. Women.com Networks, Inc. CNET Networks, Inc. Inktomi Corp. FreeMarkets, Inc.	July 1, 1999 – Dec. 31, 2001

Firm	Companies Mentioned by Name in Complaint	Rel. Time Period
U.S. Bancorp Piper Jaffray	E-Machines TheraSense, Inc. Genta, Inc. Metromedia Fiber Networks, Inc. Qwest Natural Microsystems, Inc. ***Esperion Therapeutics, Inc.*** ***Triton Network Systems*** Emisphere Technologies, Inc. Just for Feet JDS Uniphase Corp. Comverse Technology Inc. Onyx Pharmaceuticals Buca, Inc.	June 1, 1999 – Dec. 31, 2001
UBS Warburg	JDS Uniphase Avant Immunotherapeutics, Inc. ***Triangle Pharmaceuticals*** ***Interspeed*** Flextronics International Ltd Atmel, Inc. Netopia, Inc. Espeed, Inc.	July 1, 1999 – Dec. 31, 2001

ADDENDUM 2

States That Have Signed Agreements As Of July 17, 2003

Firm	*States*	*Payment Amt*	*Description*	*Payment Received*
Bear Stearns	Hawaii	$ 250,000	Civil monetary penalty	Yes
	New Jersey	$ 648,335	Civil monetary penalty	Yes
	Vermont	$ 250,000	Civil monetary penalty	No
CSFB	Massachusetts	$1,467,615	Fine	Yes
Goldman	Utah	$ 250,000	Civil monetary penalty	No
JP Morgan	Texas	$1,606,657	Administrative fine	Yes
Lehman	Alabama	$ 275,000 $ 27,654 $ 30,000 $ 10,000 $ 342,654	Administrative penalty Costs / Secs. Comm. Costs / Att. Gen. Investor protection trust[1]	No
Morgan Stanley	New York	$1,462,158	Penalty	Yes
Piper Jaffray	Washington	$ 200,000 $ 27,074 $ 227,074	Administrative fine Costs / Secs. Div.	Yes
Citigroup Capital Markets (SSB)	New York	$8,772,946	Penalty	Yes
UBS Warburg	Arizona	$ 395,321	Administrative penalty	Yes
	Connecticut	$ 150,000 $ 112,402 $ 262,402	Fine Costs	Yes
	Illinois	$ 956,921	Civil monetary penalty	Yes
	Oklahoma	$ 265,877	Civil monetary penalty	Yes

[1] To be used for investor education.

CERTIFICATE OF SERVICE

I hereby certify that, on July 18, 2003, I caused Plaintiff Securities and Exchange Commission's Memorandum in Response to July 3, 2003 Order to be served on the following by electronic mail transmission (signed copy in .pdf format) pursuant to agreement between the parties:

Dennis J. Block, Esquire
Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, New York 10038
Attorneys for Bear, Stearns & Co. Inc.

Mark G. Cunha, Esquire
Simpson Thacher & Bartlett
425 Lexington Ave.
New York, New York 10017-3954
Attorneys for J.P. Morgan Securities Inc.

Samuel J. Winer, Esquire
Marc Dorfman, Esquire
Foley & Lardner
3000 K Street, NW, Suite 500
Washington, D.C. 20007-5143
Attorneys for Henry McKelvey Blodget

Mark F. Pomerantz, Esquire
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019-6064
Attorneys for Lehman Brothers Inc.

Robert B. McCaw, Esquire
Wilmer, Cutler & Pickering
399 Park Avenue
New York, New York 10022
Attorneys for Citigroup Global Markets Inc.

Dixie L. Johnson, Esquire
Fried Frank Harris Shriver & Jacobson
1001 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20004
Attorneys for Merrill Lynch, Pierce, Fenner & Smith Incorporated

Carey R. Dunne, Esquire
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017
Attorneys for Credit Suisse First Boston LLC

Alexander Dimitrief, Esquire
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601-6636
Attorneys for Morgan Stanley & Co. Incorporated

Stephanie Wheeler, Esquire
Sullivan & Cromwell
125 Broad Street
New York, New York 10004-2498
Attorneys for Goldman, Sachs & Co.

Mitchell A. Lowenthal, Esquire
Cara A. Chambers, Esquire
Cleary, Gottlieb, Steen & Hamilton
One Liberty Plaza
New York, New York 10006
Attorneys for UBS Warburg LLC

Lee S. Richards, Esquire
Arthur S. Greenspan, Esquire
Richards Spears Kibbe & Orbe
One World Financial Center
New York, New York 10281-1003
Attorneys for Jack Benjamin Grubman

Dean Jeske, Esquire
Foley & Lardner
330 North Wabash Avenue, Suite 3300
Chicago, Illinois 60611-3608
Attorneys for U.S. Bancorp Piper Jaffray, Inc.

James A. Meyers

Date: July 18, 2003