

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
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ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 1/15/2010

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THE PENSION COMMITTEE OF THE  
UNIVERSITY OF MONTREAL  
PENSION PLAN, *et al.*,

Plaintiffs,

- against -

BANC OF AMERICA SECURITIES,  
LLC, CITCO FUND SERVICES  
(CURACAO) N.V., THE CITCO GROUP  
LIMITED, INTERNATIONAL FUND  
SERVICES (IRELAND) LIMITED,  
PRICEWATERHOUSECOOPERS  
(NETHERLAND ANTILLES), JOHN W.  
BENDALL, JR., RICHARD GEIST,  
ANTHONY STOCKS, KIERAN  
CONROY, and DECLAN QUILLIGAN,

Defendants.  
----- X

ORDER

05 Civ. 9016 (SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

The Opinion and Order filed January 11, 2010 is hereby withdrawn and replaced with an Amended Opinion and Order filed January 15, 2010. The January 11 Opinion and Order is amended as follows:

At page 17, lines 8-11, replace <While placing any burden at all on the innocent party to demonstrate the relevance of information that it can never

review may seem unfair, the line has to be drawn somewhere lest litigation become a “gotcha” game rather than a full and fair opportunity to air the merits of a dispute.> with <If the spoliating party offers proof that there has been no prejudice, the innocent party, of course, may offer evidence to counter that proof. While requiring the innocent party to demonstrate the relevance of information that it can never review may seem unfair, the party seeking relief has some obligation to make a showing of relevance and eventually prejudice, lest litigation become a “gotcha” game rather than a full and fair opportunity to air the merits of a dispute.>.

At page 24, line 15, replace <or relate to key players.> with <or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.>.

At page 28, note 68, after the final period add <I note that not every employee will require hands-on supervision from an attorney. However, attorney oversight of the process, including the ability to review, sample, or spot-check the collection efforts is important. The adequacy of each search must be evaluated on a case by case basis.>.

At page 42, line 13, after <destroyed backup data potentially containing responsive documents of key players> add <that were not otherwise

available>.

At page 42, line 14, add a footnote at the end of the sentence ending <misleading or inaccurate declarations.> stating <A cautionary note with respect to backup tapes is warranted. I am not requiring that *all* backup tapes must be preserved. Rather, if such tapes are the *sole* source of relevant information (*e.g.*, the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes. *See* Fed. R. Civ. P. 26(b)(2)(B).>. The new footnote is footnote 99 in the Amended Opinion and Order.

At page 52, footnote 138, add <or explain why it is no longer possible to conduct such a search> before the final period.

At page 70, line 4, delete <for non-duplicative materials> and add <While routine searches of backup tapes are not required, they should be searched when it has been shown that relevant material existed but was not produced, or relevant material *should have* existed but was not produced. Because both conditions are met, Okabena is required to conduct this search or explain why it is unable to do so.>.

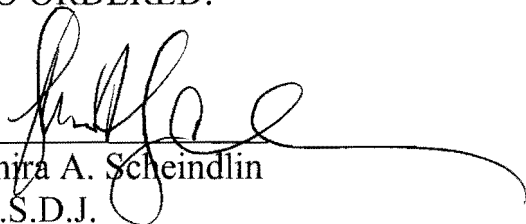
At page 70, footnote 202, delete <Because Okabena still has relevant

backup tapes and because a search of these tapes is now justified, particularly given the small number of emails and correspondence produced by Okabena, it is directed to search these tapes at its expense.>.

At page 82, lines 9-12, replace <*Second*, that 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation were grossly negligent in their failure to preserve the evidence.> with <*Second*, that if relevant evidence was destroyed after the duty to preserve arose, the loss of such evidence would have been favorable to the Citco Defendants.>.

At page 82, line 16, after the sentence ending <duty to preserve arose> add <This failure resulted from their gross negligence in performing their discovery obligations.>.

SO ORDERED:

  
Shira A. Scheindlin  
U.S.D.J.

Dated: New York, New York  
January 15, 2010

**- Appearances -**

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