

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

BARBARA C. LAWRENCE

Debtor

CASE NO. 97-11258

Chapter 11

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Hon. Stephen D. Gerling, U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

Under consideration by the Court is a motion (“Motion”) filed on October 18, 2002, on behalf of Barbara C. Lawrence, Lawrence Group, Inc. (“LGI”), Lawrence United Corp. Insurance Agency of Southern California, Inc., A.W. Lawrence and Company, Lawrence Agency Corp., Lawrence United Corporation, Lawrence Health Care Administrative Services, Inc. (the “Debtors”), Global Insurance Company (“Global”) and Senate Insurance Company (“Senate”) (collectively referred to as the “Movants”), pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure (“Fed.R.Civ.P.”), as incorporated by Rule 9024 of the Federal Rules of Bankruptcy Procedure (“Fed.R.Bankr.P.”).<sup>1</sup> According to the Motion, Movants seek (1) an award in the amount by which the value of 820,909 shares of stock (the “MTI Shares”) in Mechanical Technology, Inc. (“MTI”) sold to a number of the Respondents<sup>2</sup> pursuant to an Order of this Court, dated September 10, 1997

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<sup>1</sup> The Movants originally opted to file separate motions in each of the Debtors’ cases pursuant to Fed.R.Civ.P. 60(b)(3), rather than treating certain adversary complaints as Rule 60(b)(3) motions. On April 4, 2003, this Court entered an Order dismissing Fed.R.Civ.P. 60(b)(3) motions filed in all but one of the Debtors’ cases and deemed them filed only in the Barbara C. Lawrence case (Case No. 97-11258) in compliance with the Decision and Order of U.S. District Court Judge David Hurd, dated September 20, 2002.

<sup>2</sup> Respondents are comprised of certain individuals, as well as the corporate entities of MTI and First Albany Companies, Inc. (“First Albany”), currently known as Broadpoint Securities Group, Inc.

(“Sale Order”), exceeded the price at which the sale was consummated, and to recover costs, attorneys’ fees or expenses incurred in recovering such amount; (2) an award of punitive damages; (3) the costs and disbursements of the Motion, or (4) in the alternative rescission of the Sale Order pursuant to § 363(n) of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”). *See* Motion, filed October 18, 2002, at 2 (Dkt. No. 944). However, according to the Movants’ Reply on Motion for Relief pursuant to Fed.R.Bankr.P. 9024 and Fed.R.Civ.P. 60(b)(3), filed March 28, 2003 (“Movants’ Reply”) at 2 (Dkt. No. 904), the Movants are simply seeking an order rescinding the Sale Order and the return of the MTI Shares “or other equitable remedies.” *Id.* at 3.

After “limited discovery” pursuant to an Order of this Court dated September 19, 2003, an evidentiary hearing (the “Hearing”)<sup>3</sup> was conducted on October 15-17, 2008, December 3-5, 2008, December 29-30, 2008 and January 7-9, 2009. The matter was submitted for decision on February 13, 2009.

## **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(1), (b)(2)(A), (N) and (O).

## **FACTS**

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<sup>3</sup> Pursuant to the Court’s Scheduling Order, dated June 12, 2008, the Court indicated that it would conduct a separate hearing on the issue of damages, if it were necessary, following resolution of the Motion.

For purposes of this decision, the Court will assume familiarity with the procedural background concerning this matter as set forth by the U.S. Court of Appeals for the Second Circuit in *Lawrence v. Wink (In re Lawrence)*, 293 F.3d 615, 618-620 (2d Cir. 2002), vacating 262 B.R. 26 (N.D.N.Y. 2000).<sup>4</sup> Of particular import to the matter under consideration by this Court is the observation made by the Second Circuit, in examining the proceeding held on July 10, 1997 before U.S. Bankruptcy Judge John J. Connelly which ultimately resulted in the Sale Order, that

the Bankruptcy Court focused almost exclusively on the issue relating to segregation of the sale proceeds pending resolution of the various disputes among the plaintiffs.<sup>5</sup> The discussion of fairness of price during the Bankruptcy Court proceedings was limited to representations by the parties (i) that \$2.25/share had been the most recent trading price of MTI stock, and (ii) that no better offer for the plaintiffs' block of stock had been received, even though the plaintiffs had widely publicized the fact that they wished to sell the Shares. No party contested the fairness of the price during the Sale Order proceedings, nor did any discussion of MTI's fuel-cell research or operations arise during those proceedings.

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Further, the complaint and record contain circumstantial indications that the alleged fraud of the defendants prevented the issue of fairness from being fully explored during the Sale Order Proceedings. . . . In the instant case, the purchasers of the Shares elected to remain anonymous, and no meaningful explanation for their

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<sup>4</sup> The Court will also assume familiarity with its decisions issued since the matter was remanded to this Court by the U.S. District Court for the Northern District of New York on September 20, 2002.

<sup>5</sup> The Movants originally filed seven adversary proceedings in this Court against the Respondents on September 9, 1998, asserting that the defendants'/Respondents' "alleged concealments constituted fraud and misrepresentation under Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), and Rule 10b-5 promulgated there under, insider trading under Sections 20 and 20A of the 1934 Act, New York common law fraud, and violations of 11 U.S.C. § 363(n). In addition, all nine plaintiffs on September 9, 1998, filed a fraud action against the defendants in the United States District Court stating the same claims raised in the adversary proceedings." *Id.* at 619.

anonymity was given in response to a question from the Bankruptcy Court during the Sale Order proceedings. The purchasing group turned out to consist of various insiders, many of whom would likely have had access to any material information about the company's operations. While the defendants allege that they possessed no material information that was not already in the public domain, the announcement of MTI's fuel-cell advances less than a month after the closing of the sale casts some doubt on that assertion. In view of the fact that the stock price more than quadrupled upon MTI's October 20, 1997 announcement, we are skeptical of the defendants' assertions that the marketplace was already aware of the pace of MTI's progress in developing its technology. Because the complaint sets forth these particular allegations of fraud which could not have been uncovered by the plaintiffs during the original proceedings, and because the Bankruptcy Court which had entered the Sale Order seemed eager to give the plaintiffs their day in court, we believe that the District Court should have recharacterized the plaintiffs' claim as Rule 60(b)(3) motions.

*Id.* at 625-26.

It is on the basis of those “circumstantial indications” that the Motion was remanded to this Court for an evidentiary hearing. During the Hearing, which lasted eleven days, the Court heard testimony from thirteen witnesses, including three identified as experts, and approximately 300 exhibits, mostly by stipulation. On the basis of that testimony and those exhibits, the Court sets forth the following facts:

1. Sometime in 1995 First Albany began exploring the possibility of acquiring the interests in MTI held by Albert Lawrence and his affiliated companies, including some of the Movants herein. (George McNamee (“McNamee”) Dec. 30 Tr. at 102, 112)
2. In February 1996 First Albany offered to purchase 1,730,000 shares of MTI stock from United Community Insurance Company (“UCIC”), a subsidiary of LGI and a Texas insurance entity, United Republic Insurance Company (“URIC”),<sup>6</sup> for \$1.50 per share. (*Id.* at 131-133).
3. On May 7, 1996, First Albany purchased 909,091 shares of MTI formerly owned by UCIC at \$1.50 per share. (Movants’ Exh. 18 at 80). However, it was unsuccessful in purchasing the shares from URIC. Instead, the Debtors’ affiliates bought the

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<sup>6</sup> URIC is the parent company of Global Insurance Company, one of the Movants herein.

shares for \$.90 per share. (Alan Goldberg (“Goldberg”) Dec. 4 Tr. at 188).

4. In May 1996 First Albany won a proxy contest for control of MTI with ownership of 1,036,698 shares or approximately 29% of the outstanding shares. (Movants’ Exh. 18 at 80; McNamee Dec. 29 Tr. at 28-29). Lawrence was removed from MTI’s Board of Directors and McNamee and Goldberg replaced him and another director, with McNamee being named Chairman of the Board of MTI. (Movants’ Exh. 18 at 81; McNamee Dec. 29 Tr. at 23-24, 26-28).
5. In July 1996 representatives of LGI contacted First Albany about selling the 820,909 shares of MTI that ultimately were the subject of the Sale Order. (Respondents’ Exh. 7, McNamee Dec. 30 Tr. at 159).
6. Also in July 1996, MTI, through First Albany, sold 1,333,333 shares in a private placement to purchasers, some of whom ultimately were the same purchases as in the MTI Shares Sale, which is the subject of this Motion. (Movants’ Exh. 18 and Movants’ Exh. 4 and Respondents’ Exh. 6).
7. In the latter part of 1996, First Albany also obtained an additional million shares of MTI stock in consideration for cancellation of certain MTI indebtedness. (Movants’ Exh. 41). MTI issued a press release, dated January 3, 1997, and submitted a Form 8-K indicating its increased ownership of MTI.<sup>7</sup> (Movants’ Exh. 173 and 172, respectively).
8. In mid-September 1996 LGI made an offer to sell the MTI Shares to First Albany for \$2.68 per share. (Respondents’ Exh. 8 & 9; Wink Oct. 16 Tr. at 130; McNamee Dec. 30 Tr. at 164).
9. Discussions continued into January 1997 as evidenced by an offer by LGI’s counsel, Randal J. Ezick (“Ezick”), dated January 2, 1997, to sell 820,909 shares of MTI stock for \$3,100,000. (Respondents’ Exh. 11).
10. On February 24, 1997, McNamee traveled to the office of Arthur D. Little (“A.D. Little” or “ADL”) in Cambridge, Massachusetts to persuade ADL to partner with MTI exclusively in connection with a proposal being submitted to the Department of Energy (Movants’ Exh. 24 and Dec. Tr. at 85 and 94).

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<sup>7</sup> There was testimony from Stephen Wink (“Wink”) as First Albany’s in-house counsel during the relevant time period in 1997 that an 8-K is a report that is to be filed with the SEC concerning material developments (Wink Oct. 16 Tr. at 36). He also explained that public companies are also required to make quarterly filings with the Securities and Exchange Commission (Form 10-Qs) and an annual report (Form 10-K). (Wink Oct. 16 Tr. at 30).  
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11. On February 28, 1997, the Debtors filed chapter 11 petitions.
12. On March 10, 1997 McNamee met with representatives from Edison Development Corporation (“EDC” or “Detroit Edison”), a subsidiary of DTE Energy Co., and Detroit Center Tool (“DCT”) to discuss the possibility of a joint venture. (Movants’ Exh. 29 at Bates stamped number 500041). In a letter, dated March 19, 1997, reference is made to an “attempt to describe the framework of a relationship between MTI, DCT, and EDC to develop fuel cell technologies and products.”
13. Sometime in the spring of 1997, Robert Rock, Esq. (“Rock”), bankruptcy counsel for LGI contacted First Albany to reopen discussions for the sale of the MTI Shares. (Wink Oct. 16 Tr. at 65, 130).
14. On March 13, 1997, MTI submitted a proposal to the Department of Energy (“DOE”) (Movants’ Exh. 21) pursuant to a Program Research and Development Announcement (“PRDA”) for Integrated Fuel Cell Systems. (Movants’ Exh. 21).
15. On April 16, 1997, a meeting of the Board of Directors of MTI was held and attended by McNamee. One of the presentations made at the meeting included a section on Proton Exchange Membrane (“PEM”) Fuel Cells for Stationary Utility and Transportation Applications and included a joint venture description. (Movants’ Exh. 36 at Bates stamped numbers 00107-00112). Also mentioned was the fact that the DOE had released a PRDA for “Integrated Fuel Cell Systems and Components for Transportation and Buildings.” (*Id.* at Bates stamped number 00118).
16. McNamee testified that he later went to meet with Detroit Edison on May 7, 1997, to discuss forming a partnership. (McNamee Dec. 29 Tr. at 120). Also in May 1997 a presentation was made to the DTE Energy Board of Directions concerning a “Fuel Cell R&D Opportunity.” (Movants’ Exh. 28). It identified companies involved in fuel stack design, including Energy Partners, MTI, Analytic Power, H-Power and Ballard (*Id.* at 13, 29). It also indicates that the DOE had funded over \$100 million of fuel cell research “over the last decade.” (*Id.* at 19).
17. On May 29, 1997, MTI executed a Letter of Intent with EDC regarding entering into a joint venture. (Movants’ Exh. 174).
18. By letter dated June 7, 1997, Patricia Arciero-Craig (“Craig”), First Albany’s general counsel, confirmed that First Albany was interested in purchasing the shares belonging to Barbara Lawrence, totaling 471,841, at a price of \$2.00 per share based on “a large block discount and the fact that the shares bear a restrictive legend.” (Movants’ Exh. 12).
19. On June 9, 1997, Rock sent a letter to Craig, offering to sell the MTI Shares held by

LGI, Global and Barbara Lawrence, at least some of which had been purchased the year before in May of 1996 for \$.90, to First Albany for \$2.25 per share. (Respondents' Exh. 18).

20. On June 11, 1997, First Albany accepted the offer to purchase 820,909, on its own behalf and that of other "Purchasers" at an agreed price of \$2.25, the mid-point of the then-trading range for publicly traded MTI common stock, subject to Court approval. (Movants' Exh. 15, Wink Oct. 16 Tr. at 67).
21. On June 12, 1997, Wood prepared a form letter trying "to gauge your interest in a possible secondary private placement of Common Stock of Mechanical Technology, Inc. It further stated, "Because of your current investment in MTI, we wanted to provide you with the first opportunity to participate. The stock is anticipated to be offered at \$2.25 per share . . . ." (Movants' Exh. 35; David B. Wood, III ("Wood") Dec. 5 Tr. at 26).
22. On June 23, 1997, LGI and Barbara Lawrence filed a motion ("Sale Motion") for authorization to sell the MTI Shares pursuant to 11 U.S.C. § 363. (Dkt. No. 48).
23. In the interim, on June 16, 1997, MTI received notification from the DOE that it had been selected for an award "dependent upon satisfactory completion of negotiations, pre-award clearances and availability of funds." (Movants' Exh. 22; Dr. William Ernst ("Dr. Ernst") Oct. 17 Tr. at 148).
24. The award totaled \$15 million, of which \$8 million was to be spent by MTI on a cost sharing basis<sup>8</sup> whereby the DOE would reimburse MTI between \$4 million and \$6 million in actual expenses and \$7 million was to be spent by ADL on the same cost sharing basis. (McNamee Jan. 7 Tr. at 10-11).
25. The selection of the companies, including MTI, was the subject of an article that appeared in the *Energy Daily* on June 24, 1997. (Respondents' Exh. 24; Dr. Ernst Oct. 17 Tr. at 178).
26. On June 26, 1997 a special meeting of the Board of Directors of MTI was held (Movants' Exh. 183; McNamee Dec. 30 Tr. at 9) at which McNamee voted for the formation of Plug Power, LLC ("Plug Power"), a joint venture w/Detroit Edison (*Id.* at 10). The joint venture agreement included a provision whereby MTI agreed to "contribute assets, employees' assets, intellectual property, patents, contracts, etc. The corporation's membership interests are subject to reduction if, as of October 1,

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<sup>8</sup> McNamee testified that under a cost shared contract, all the costs for the research program are added up. The government agrees to pay some and the contractor pays some of the rest of the costs. (McNamee Dec. 30 Tr. at 173-175; *see also* Dr. Ernst. Oct. 17 Tr. at 159).

1999, the net awarded funds from contract proposals contributed to the corporation is less than eight million . . . .” (*Id.* at 10-11; *see also* Movants Exh. 40 , Form 10-Q filed with the SEC by MTI for the second quarter ending June 27, 1997).

27. By letter, dated July 9, 1997 McNamee wrote to Senator Alfonse D’Amato, stating that “We care because, with your help, Plug Power LLC just won the largest award the Department of Energy has made under this program, \$15 million over 30 months.” (Movants’ Exh. 37).
28. The Sale Hearing was held on July 10, 1997. It was represented to the Court that approximately 500 people received notice of the sale and were given the opportunity to submit competing bids. None were submitted. (Movants’ Exh. 7).
29. Rock, LGI’s counsel, represented to the Court that the motion was a joint motion by LGI and Barbara Lawrence. In addition, he stated that the stock was “extremely lightly traded” (*Id.* at 6). Craig told the Court that “it’s important to note that we’re dealing with a large block of the shares . . . and it’s customary when dealing with such a large block to apply a discount to the price per share . . .” *Id.* at 9.
30. Question from Judge Connolly:

The motion recites that First Albany is acting as an agent for purchasers - provision for a down payment which would serve as a penalty in the event this thing collapsed. Any reason why these purchasers cannot be identified, and do they understand that they’re bound to go through with this purchase if I approve it?

To which Craig, on behalf of First Albany responded:

Yes, Your Honor. The purchasers consist of private individuals who of course will be disclosed, and they do understand that the time is of the essence with respect to those - that the offer is binding. They’ve made representations in the agreement itself that they are bound to close by a certain date under specific terms.

*Id.* at 17.

31. On July 25, 1997, the parties executed the Stock Purchase Agreement (“SPA”). The SPA provided that First Albany was acting as a placement agent for “Purchasers” and was executing the Agreement “on behalf of Purchasers pursuant to powers of attorney duly executed by each of the Purchasers in favor of [First Albany].” (Respondents’ Exh. 29). The SPA stated that a complete Schedule “A” identifying the “Purchasers” would be provided on or before the closing.
32. On September 10, 1997, the Court entered the Sale Order. (Respondents’ Exh. 31).

33. On or about September 25, 1997, potential purchasers were notified of their right to rescind their agreement to purchase the MTI shares because of the fact that the shares were restricted and that the restricted legend would not be removed prior to the closing. (Respondents' Exh. 33).<sup>9</sup>
34. On September 26, 1997, the MTI Shares Sale closed and a list of the Purchasers was provided to representatives of LGI, Barbara Lawrence and Global. Those Purchasers included McNamee and Goldberg, as well as other insiders of First Albany. (Movants' Exh. 49).
35. MTI common stock closed at \$3.375 per share on September 26, 1997. (Movants' Exh. 52 and Respondents' Exh. 54).
36. On or about October 10, 1997, a Form 4 was filed on behalf of Edward Dohring and Dale W. Church, both newly elected directors of MTI in April 1997 (*see* Movants Exh. 176), indicating the purchase of 5,000 and 40,000 of the MTI Shares, respectively, on September 26, 1997. (Movants' Exh. 42 and 43). Form 4 were also filed on October 10, 1997, by Martin Mastroianni, a Director and Officer of MTI (20,000 shares); Dennis O'Connor, a Director of MTI (40,000 shares); Goldberg (58,409 shares); McNamee (100,000 and 10,000 shares by his wife); and Beno Sternlicht, a Director of MTI (100,000 shares). (Movants' Exh. 87-91).
37. On October 20, 1997, MTI common stock closed at \$5.75 per share. (Movants' Exh. 52 and Respondents' Exh. 54).
38. On October 21, 1997, the DOE held a press conference and issued a press release concerning the successful test of an Arthur D. Little Company fuel processor using two kilowatt fuel cell stacks manufactured by Plug Power. (Respondents' Exh. 36; Movants' Exh. 61-67; Dr. Ernst Oct. 17 Tr. at 164).
39. A number of news wires carried the story, which included reference to Arthur D. Little and Plug Power working together under a \$15 million cost-sharing contract "recently awarded by the Department of Energy to further develop this technology." (Movants' Exh. 121).

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<sup>9</sup> According to Respondents' Exhibit 33, a letter from Wood, Vice President of First Albany, dated September 25, 1997, "[t]he practical effect of your purchasing restricted securities is that you will not be able to transfer the Shares unless such transfer is made pursuant to Rule 144 or otherwise Exempt. Rule 144 generally provides that a purchaser may transfer restricted securities subject to certain volume limitations after holding them for a period of one year. In the case of MTI stock, this would limit sales to not more than approximately 60,000 shares in any three month period. After a two year holding period, the Shares will be freely tradeable without restriction."

40. On October 21, 1997, the volume of shares of MTI stock traded was approximately 223,100 with a closing price of \$6.3750 per share. (Movants' Exh. 52 and Respondents' Exh. 54).

## TESTIMONY

### Patricia Arciero-Craig

Craig testified that she joined First Albany on February 17, 1997 as in-house counsel. She represented First Albany at the Sale Hearing on July 10, 1997, before Judge Connelly. On direct examination by Movants' counsel, she acknowledged that in responding to Judge Connelly's question about the identity of the purchasers, she had indicated that their identities would be provided at the closing. She testified that she had not become aware of the identity of the purchasers until at or around the time of the closing in September 1997. (Oct. 15 Tr. at 87, 89).

At the hearing, she was also asked to read from her deposition, dated November 29, 2006, in which she stated that she "did not know definitively who the ultimate purchasers would be, but essentially, I was making the representation to the Court that the transaction would go through in a sense, regardless of who subscribed in the way of private or other entities. Essentially because something of a firm commitment underwriting . . . if there was only one other purchaser, that the rest of the shares would be purchased by First Albany, if need be." (Oct. 15 Tr. at 96).

### Stephen P. Wink

Wink joined First Albany in May 1996 as in-house counsel. In response to questions from Movants' counsel regarding the identity of the ultimate purchasers, Wink testified that "what I understood was is that in these deals purchasers weren't contacted until the closing is imminent,

and as far as I understood when the transaction finally got to the end, that's what happened." (Oct. 16 Tr. at 58). With regard to conversations that he had had with LGI's counsel, Rock, prior to the sale hearing, he testified that

we discussed that First Albany would be the purchaser, and that's when they approached me. That was what they were thinking and that's what I was thinking. And then sometime in that time period the company determined that it ha[d] purchased - you know - it had a big enough position in MTI as it was and that it would like to see other purchasers for the shares - these shares. As I said before, it was important to no matter what, get these shares out of Al Lawrence's hands. So the idea was either First Albany or other purchasers would purchase them, and I made that very clear to Bob Rock.

(Oct. 16 Tr. at 65-66); Movants' Exh. 15 (in which reference is made to "certain other purchasers"))).

Wink explained further that there had been a determination that First Albany would purchase shares if necessary in order to make sure the entire block of shares was purchased (Oct. 16 Tr. at 69). He further testified that one did not contact prospective purchasers until the closing was imminent "because we didn't know if the deal was going to happen or not. So there was no effort whatsoever made on my part, or as far as I knew, anybody else's part, to contact purchasers until we knew that this was going to happen." (Oct. 16 Tr. at 71; Oct. 16 Tr. at 128 (stating that "until you know you have a deal you just - just generally, you never go out and solicit purchasers for a whole host of reasons, but - because deals frequently fall apart)).

When presented with a Certificate of Secretary, signed by him, containing a list of purchasers in both 1996 and in 1997, he identified them as board members of First Albany and individuals affiliated with First Albany, as well as members of the board of MTI. (Movants' Exh. 49 and Oct. 16 Tr. at 107.

Wink testified that he was present in the courtroom on July 10, 1997, and heard Craig's

response to Judge Connelly's questions regarding the identify of the purchasers. Wink testified on cross-examination that it was his view that she had accurately responded to the judge's questions in that he felt Judge Connelly was concerned with closing the deal and getting assets into the estate. (Oct. 16 Tr. at 123).

Norma Petrosewicz ("Petrosewicz")

Petrosewicz, by way of background, testified that she had a B.B.A. in accounting and graduated from law school in 1985. In June 2002 she was appointed as receiver for URIC. (Oct. 17 Tr. at 9). She explained that URIC was an insurance company supervised by the Texas Department of Insurance and that it had gone into receivership when its liabilities exceeded its assets. (Oct. 17 Tr. at 10). In connection with the receivership, she testified that it was her responsibility to gather assets, determine liabilities and manage any litigation on behalf of the Texas Department of Insurance. (*Id.*). It was her testimony that as receiver she was given possession of the files, records of the receivership, and account statements of URIC. (Oct. 17 Tr. at 11). According to Petrosewicz, Global, one of the Movants herein, was a subsidiary of URIC.

On direct, Petrosewicz was asked whether in the review of the records of URIC, had she found any materials concerning the DOE award to MTI in June 1997 prior to October 20, 1997. The same question was asked concerning information about MTI's progress in fuel cell development. To both questions, she responded, "No." (Oct. 17 Tr. at 14). On cross-examination, she acknowledged that she had no firsthand knowledge concerning the negotiations in connection with the MTI Share Sale in 1997. (Oct. 17 Tr. At 19). Nor had she had any conversations with any of the Respondents in 1996 or 1997. (*Id.*). By way of explanation, she pointed out that she "was not on the scene, so to speak, until June 2002." (*Id.*). She also admitted

on cross-examination that she had no way of knowing if there was anything missing from the files she had been given in 2002. (Oct. 17 Tr. at 22-23).

Petrosewicz was shown Respondents' Exhibit 3 and asked whether in reviewing the files she had seen the letter dated March 14, 1996, from Michael Whiteman, Esq. and addressed to the Hon. Elton Bomer, Commissioner, Att: Neil Rockhold, Deputy Commissioner, both of the Texas Insurance Department, concerning "United Republic Insurance Company - Mechanical Technology, Incorporated." (Respondents' Exh. 3). She responded that she did not recall seeing the letter. (Oct. 17 Tr. at 29). She was asked to read from the document:

As you are aware, First Albany Companies has over a period of several months made several specific proposals to acquire the shares of common stock of Mechanical Technology Incorporated, MTI, owned by United Community Insurance Company, UCIC, a New York insurer, now controlled by the Superintendent of Insurance of the State of New York, URIC and URIC's subsidiaries, Global Insurance Company and Cendant Insurance Company.

(Respondents' Exh. 3, Oct. 17 Tr. at 30).

Petrosewicz testified that she was not aware of the offer for the URIC shares in 1996 based on her review of the files. (Oct. 17 Tr. at 30). She was also asked to read from Respondents' Exh. 3 the statement "Notwithstanding that exclusion, First Albany remains interested in acquiring URIC's, Global's and Cendant's holdings of MTI stock at a price of 1.50 per share subject to the terms and conditions set forth in the proposal. You are also aware, I am confident, that 1.50 per share considerably exceeds the recent publicly quoted bid and ask prices for the MTI stock." (Respondents' Exh. 3; Oct. 17 Tr. at 31). She acknowledged that the letter was over a year and a half prior to MTI's "alleged DOE award and over a year-and-a-half before the test . . . of A.D. Little's fuel report." (Oct. 17 Tr. at 31-32).

Petrosewicz was asked whether she had ever seen Respondents' Exhibit 91, a letter dated

February 13, 1996, from Michael Whiteman and addressed to Andrew Alberti, President of Cross River International, Inc. and allegedly UCIC's liquidator, in her review of the receivership records. (Oct. 17 Tr. at 32-33). She testified that she had not seen it. (*Id.*). She was then asked to read excerpts from the letter in which it was indicated that First Albany was interested in acquiring the shares of the common stock of MTI held by UCIC and URIC at a purchase price of \$1.50 per share. (*Id.*). Finally, she was asked to read a statement from the same letter in which it was stated that First Albany sought "through the proposed investment and such other measures, including the infusion of additional capital, as may be necessary, appropriate and desirable, to support the continued operation and the growth of MTI as an economic force in this community." (Respondents' Exh. 91 and Oct. 17 Tr. at 36-37). Petrosewicz was then shown the letter, dated June 9, 1997, from Rock to Craig confirming the offer by First Albany to purchase the shares of MTI stock owned by LGI or its subsidiary, Global Insurance Company, at a sale price of \$2.25 per share. (Respondents' Exh. 18, Oct. 17 Tr. at 39-40).

Dr. William Ernst

Dr. Ernst testified that he had a Bachelor of Engineering degree from Tufts University and a Master's degree from Massachusetts Institute of Technology and a Ph.D. from Rensselaer Polytechnic Institute in aeronautical engineering (Oct. 17 Tr. at 114-115). He joined MTI in 1979 and began work on fuel cells in 1989. (Oct. 17 Tr. at 115). In July 1, 1997, he became employed by Plug Power until September 2008. (Oct. 17 Tr. at 115-116). It was his testimony that he was involved with fuel cell related activity the entire time that he was employed by Plug Power. (October 17 Tr. at 121).

Dr. Ernst was asked by Movants' counsel to identify certain responses made by Dr. Ernst

in completing the application to the DOE in response to the PRDA, which was submitted on behalf of MTI in March 1997 (Movants' Exh. 21): Item 11 listed \$14,937,486 as the "Amount Requested from DOE for Entire Project Period." Item 12 identified the "Duration of Entire Project Period as May 1, 1997 to October 31, 1999. Item 13 listed Requested Award Start Date as May 1, 1997. The submission at Item 15 identified Dr. Ernst as the Principal Investigator/Program Director. Dr. Ernst explained that it was a cost sharing contract which would require that MTI "come up with some money" but it also had the potential to allow for MTI, and eventually Plug Power, to hire some people to perform technology development work. (Oct. 17 Tr. at 149). Dr. Ernst also testified that the actual award would only come following negotiations with the DOE. (Oct. 17 Tr. at 150, 158). He further testified on cross-examination by Respondents' counsel that "[t]o me the award would be the issuance - the signing of the final contract" which occurred in October 1997 (Oct. 17 Tr. at 159). He also identified a June 1997 DOE news release and an article appearing in the *Energy Daily* on June 24, 1997, announcing the selection of 17 companies by the DOE whose applications had received favorable consideration by the DOE. (Respondents' Exh. 21 (97) and 24). He testified that in his view, the article paralleled the information in the DOE release. (Oct. 17 Tr. at 160-161).

Dr. Ernst was asked whether in June 1997 he believed that MTI's fuel cell stack would run in connection with the A.D. Little fuel processor. Dr. Ernst responded that "[m]y belief was that our stack would run with the fuel cell processor if the fuel processor would run." (Oct. 17 Tr. at 155). The basis for this belief was the fact that the "tests on the individual components had been performed and they had achieved their desired performance." (Oct. 17 Tr. at 156).

On cross-examination concerning the demonstration that took place in October 1997, he

described it as a “laboratory test” involving the hook up of the MTI fuel cell to an Arthur D. Little processor. (Oct. 17 Tr. at 162). He explained that MTI had only learned about the demonstration a few weeks before the actual test was performed on or about October 10, 1997. (Oct. 17 Tr. at 163). He testified that the purpose of performing the test was to get good publicity for the Department of Energy as it was entering into its budget allocation schedule. In his view, it was not important to the work MTI and A.D. Little were doing under the PRDA project “[b]ecause it was just a proof of concept. We knew that our stack work[ed] because we had run it with fuel that Arthur D. Little would have been able to provide.” (Oct. 17 Tr. at 164). He agreed on cross-examination that it was not a demonstration of a breakthrough of MTI’s technology. I would not even call it a demonstration . . . . You take what you have on the shelf and put them together and just see if you can get anything to show that they work together. It’s not an integrated system. It’s just a laboratory version of things that are connected together . . . .” (Oct. 17 Tr. at 164-165). He further explained that “[i]t was not technologically important. It was a good step as far as publicity was concerned, both for the Department of Energy and Arthur D. Little and MTI [Plug Power].” (Oct. 17 Tr. at 165)

### David B. Wood, III

Wood began working for First Albany in 1995 and viewed his position as that of assistant to the chairman of the board of directors, George McNamee. He testified that he became aware of a project involving the placement of the MTI Shares sometime in late June 1997. (Dec. 5 Tr. at 11). According to Wood, he was to be responsible for preparing an informational packet that would be given to potential purchasers, as well as a list of talking points for presentation to the

potential purchasers. (Dec. 5 Tr. at 14).

Wood was shown Movants' Exhibit 6, which he identified as "a memo ("Memorandum") that I prepared for a discussion on how we would proceed in identifying purchasers and getting to the point of selling the transaction, how we were going to do the deal." (Dec. 5 Tr. at 15). He explained that it was to be the first deal that he had been placed in charge of, and he wanted to make sure to do it perfectly. (Dec. 5 Tr. at 16). He testified that the actual "Schedule," which began with the period from July 1 - 18, 1997, would not have worked since the memo was not printed out until July 15, 1997. (Dec. 5 Tr. at 16). According to Wood, he had prepared the Memorandum containing "the deal overview, schedule, contact list and discussion points for the MTI placement" (Movants' Exh. 6) sometime in late June or early July, but "I didn't even get around to printing it out because I didn't have a meeting with them [McNamee and Goldberg] until at least July 15<sup>th</sup> . . . . (Dec. 5 Tr. at 18-19).

When questioned about the list of purchasers identified in the Memorandum, he explained that "any time you're going to do a second private placement, which this is, you're going to talk to - the first place you're going to start is the list of purchasers from the prior round." (Dec. 5 Tr. at 22). He further explained that "he [McNamee] gave me places to start and then I put together the list from that." (*Id.*). He testified that the list was then expanded. (Dec. 5 Tr. at 23-24). According to Wood, "[w]e didn't know who was going to purchase at that point. So, we were expanding the list to make sure that we could get enough people to purchase all the shares." (Dec. 5 Tr. at 24).

Wood was then shown a copy of his deposition testimony at which he was asked, "[w]hat made you decide to do that?" to which he replied, "Because that's who was - that's who I was

directed was going to get the shares who was going to be the purchasers of the new shares, was going to be the previous directors, the previous purchasers plus maybe a couple of additional people.” Wood then testified that he stood by his prior testimony. (Dec. 5 Tr. at 26-27).

He testified that he brought the Memorandum with him to the meeting with McNamee at which they had a discussion about the placement. (Dec. 5 Tr. at 30). With respect to discussion points, he acknowledged that no mention was made about the DOE award, pointing out that at the time there had been no actual award. (Dec. 5 Tr. at 45).

He was shown the letter from McNamee to Senator D’Amato (Movants’ Exh. 37) and was asked to interpret it. He testified that while he had not seen the letter before he was familiar with technology awards. He testified that he believed McNamee was “asking for help to make sure the money gets in the program. So, this sounds like this is an unfunded program. . . . [I]t’s an award without money.” (Dec. 5 Tr. at 49). He went on to explain that “a technology award does not mean - a department can award - there are lots of unfunded awards I’ve found. I’ve had lots of companies that have come to me and wanted investments that had an award, and then when you went a little further the award . . . the money hadn’t been appropriated yet.” (Dec. 5 Tr. at 49). He further testified that “if there was an unfunded award, I wouldn’t have wanted to talk about it because an unfunded award is saying, well, we sort of got this cool thing that might happen. And the whole point of this was not to talk about cool things that might happen. It was to talk about what we had done.” (Dec. 5 Tr. at 50).

#### Alan Goldberg

Goldberg testified that he had served as co-CEO with McNamee at First Albany between 1996 and 1997 and as director of MTI beginning in the spring of 1996 until 2003. Movants’

counsel questioned him on the importance of obtaining funding from the DOE for the fuel cell technology division of MTI. He testified that at the board meeting on February 13, 1997, there had been some discussion about the PRDA, stating his belief that MTI was looking at every available source of funding to help underwrite its fuel cell activities. (Dec. 4 Tr. at 178). Movants' counsel asked him "[w]ould it be fair to say that MTI was desperate to acquire fuel cell funding?" Goldberg responded "No. MTI was focusing on finding a partner so that it didn't have to continue to fund fuel cell development." (Dec. 4 Tr. at 180).

Regarding the purchase of the MTI Shares in 1997, Goldberg testified that "[i]t had to do with our original objective to take the Lawrence interest out of MTI and we had been pursuing that off and on throughout that whole period of time. . . . First Albany had a significant position in MTI and what we had hoped to do was if the shares were available we hoped to place them in a private placement." (Dec. 4 Tr. at 187-188).

When asked for clarification as to whether it was First Albany's goal to acquire the shares or act as a placement agent on behalf of other purchasers, Goldberg stated that by 1997:

First Albany had accumulated through the purchase and the swap a significant position. But our original objective was to take Lawrence out of the MTI equation. And we continued to pursue the sale of the purchase of those Lawrence shares so that MTI could move ahead in this reengineered company without any Lawrence cloud or overhang. And in 1997 what we hoped to do is come to an agreement about the purchase and place that stock in a private placement of investors.

Dec. 4 Tr. at 190.

In response to the question of whether or not from the inception it was Goldberg and McNamee's intention to purchase the shares themselves, Goldberg explained:

Our original intent in 1996 was to buy all of the Lawrence shares to clear the air about Lawrence involvement in MTI and for the firm to take a position. That changed over time. We were able to do the swap so that First Albany's position

went from 900,000 shares to a million nine, I believe at the time. We raised capital for MTI in a private placement in 1996 and brought in outside investors, and we had come a great distance in cleaning up the balance sheet in trying to rebuild some momentum for MTI. And I think that we all felt that we should continue to take - to pursue the opportunity to take Lawrence out to clear the air for MTI but that First Albany by this time had a very significant position and that it would be appropriate . . . .

Dec. 4 Tr. at 192-193.

When asked by Movants' counsel, "[a]re you telling us that you did not identify any people by name prior to bankruptcy court approval?", Goldberg replied: "No, I just told you a few minutes ago we hoped, of course, the people who invested in our 1996 placement would want to participate again. But we didn't talk to anyone, to my knowledge, about participating in the 1997 private placement until the bankruptcy court had approved the sale and the price." (Dec. 4 Tr. at 195).

When shown the Memorandum prepared by David Wood (Movants' Exh. 6), Goldberg testified that he had not seen it in 1997. However, he acknowledged his understanding that Wood was putting something together. However, the schedule set forth in the Memorandum was not implemented at the time because they had not received approval from the bankruptcy court to purchase the shares. (Dec. 4 Tr. at 197).

#### George McNamee

Asked by Respondents' counsel about the source of MTI's revenues, McNamee testified that MTI derived approximately 75% of its revenues from the test and measurement division of the company and 25% of its revenues from the technology division between 1995 and 1997 and that the fuel cell technology represented a bit over 5% of the total revenues for the company. (Dec. 30 Tr. at 96 and Movants' Exh. 41). McNamee acknowledged receiving updates on MTI

activities at its various board meetings (Dec. 29 Tr. at 57, 91). He attended an MTI board meeting on February 13, 1997 at which the PRDA from the DOE was discussed. In reviewing various entries on his calendar (Movants' Exh. 24 and 26, he testified that he met with Wayne Diesel, the CEO of MTI, in 1997 to discuss MTI business. These meetings included one on February 18, 1997 and one on March 13, 1997 (Dec. 29 Tr. at 62, 91). McNamee testified that he could remember having made only one trip to Arthur D. Little's facility in Cambridge, Massachusetts, that being on February 24, 1997. (Dec. 29 Tr. at 62-63, 95; Jan. 7 Tr. at 6-7). It was McNamee's testimony that the purpose of the trip had been to persuade A.D. Little to partner exclusively with MTI in connection with the PRDA. (Dec. 29 Tr. at 94, 115). He had had a luncheon meeting with Doug McCauley, the COO of Detroit Edison and a Mr. Henderson, the CEO of DCT to discuss a three-way joint venture concerning fuel cells on February 26, 1997 (Movants' Exh. 24) and he received a letter dated March 19, 1997, concerning a proposed partnership. (Dec. 29 Tr. at 120; Jan. 7 Tr. at 8-10). According to McNamee, the agreement discussed in the letter of March 19, 1997, was never finalized with DCT as it was unable to raise the necessary capital. (Jan. 7 Tr. at 10). Instead, it was Detroit Edison and MTI that continued the joint venture discussions. (Jan. 7 Tr. at 10). In this regard, McNamee testified that he had attended several meetings concerning the formation of Plug Power with representatives from Detroit Edison, including making the trip to Detroit in May 1997 (Dec. 29 Tr. at 93, 96-97). McNamee testified that at the time of his trip to visit Detroit Edison in May 1997, the negotiations for the joint venture were largely completed. (Dec. 30 Tr. at 8-9). He also acknowledged having voted in favor of the joint venture at the board of directors meeting in June 1997. It was also at that time that he joined Plug Power's board of directors. (Dec. 30 Tr. at 8-9).

When questioned by Movants' counsel about MTI's response to the DOE's PRDA, McNamee testified that MTI wanted to win an award; however, more important was the need to find a strategic partner with financial strengths as MTI really couldn't afford to win a contract with the DOE. (Dec. 29 Tr. at 108). It was his testimony that MTI's board wanted the focus to be on finding a fuel cell partner "[b]ecause the cost of developing fuel cells was going to be far beyond the capacity of MTI to support." (Dec. 30 Tr. At 146). He continued to explain that "[i]n a cost shared world if they won enough government contracts they would put themselves out of business. They needed to have a corporate partner who would put a significant amount of equity into a fuel cell effort and that was much more important to them than winning government contracts." (Dec. 30 Tr. at 146). He explained that the negotiations with Detroit Edison were not "solely contingent on whether they [MTI] won this or not as far as I know. . . . I think the negotiations contemplated that they might or might not win it and if they did not win it, they would be, you know, they'd have to win other things. . . . The most important thing to MTI was to get rid of the fuel cell mixer altogether, to get a partner with deep pockets and get rid of it before it put the company out of business." (Dec. 29 Tr. at 109). He further testified that "[i]t was important because MTI could not finance the amount of work necessary to bring fuel cells to commercialization . . . It needed a partner with deep pockets." (Jan. 7 Tr. at 101-102).

McNamee testified that he knew that MTI had submitted a proposal to the DOE and that \$15 million had been requested. (Dec. 29 Tr. at 111, 114; Dec. 30 Tr. at 168). He also identified the letter he had written requesting support from Senator D'Amato. McNamee testified that he had written Senator D'Amato in response to MTI's request for his assistance on July 9, 1997 (Movants' Exh. 37). Upon questioning by Respondents' counsel, McNamee explained that in

1997 Congress was very antagonistic about providing federal support for research in what he called “green technologies.” (Jan. 7 Tr. at 21). An industry lobbyist had requested that MTI write a letter to Senator D’Amato because of concerns that the House Appropriation Committee had significantly reduced the amount of money available for fuel cell research. (Respondents’ Exh. 25<sup>10</sup> and Jan. Tr. at 22). McNamee testified that he had written Senator D’Amato asking him to intervene with the head of the Senate Appropriations Committee. (Jan. 7 Tr. at 22).

Movants’ counsel referred him to a statement in the letter to Senator D’Amato in which he referred to the fact that Plug Power (MTI) had “just won the largest award the Department of Energy has made under this program \$15 million over 30 months.” McNamee acknowledged that the letter said nothing about the award being dependent on contract negotiations with the DOE. (Dec. 30 Tr. at 15). However, he testified that as of July 9, 1997 when he wrote the letter to Senator D’Amato, he understood that MTI was still in negotiations with the DOE and would only be able to get funding if the monies were approved by Congress. (Jan. 7 Tr. at 28). He also testified that the contract with the DOE ultimately was not executed by Plug Power until October 1997. (Jan. 7 Tr. at 28).

On questioning by Respondents’ counsel concerning the government contract process, McNamee, based on his experience at MTI with government contracts, testified that first there is a PRDA, then a submission in response to the PRDA, which is reviewed internally at DOE. Selected companies are invited to negotiate and their “award” is subject to successful negotiations on a range of issues, including what the cost share will be. This involves an audit by DOE to

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<sup>10</sup> Respondents Exhibit 25 was admitted for the content of the document and the fact that McNamee acted on it, rather than for its truth. (Jan. 7 Tr. at 25).

assure itself that the contractor will be able to perform and has the available funds to support cost sharing. (Dec. 30 Tr. at 174-175). He also testified that usually the final contract is signed months later and is still subject to the availability of funds, which in turn is dependent on Congressional approval. (Dec. 30 Tr. at 175).

Respondents' counsel requested that McNamee review Movants' Exhibit 21, the submission to the DOE in response to the PRDA, particularly with respect to the \$14,937,486 listed at Item 11 and described as "Amount requested from DOE for Entire Project Period."<sup>11</sup> McNamee stated that "[t]hat represents the total amount of money to be spent by all of the participants in the program, some of which would then be subsequently reimbursed by the DOE. But it's the total amount to be spent by all, not the total amount requested of the DOE." (Jan. 7 Tr. at 10). He went on to explain that \$8 million was to be spent by MTI and \$7 million was to be spent by ADL. They were to share the cost and if MTI spent \$8 million, DOE would reimburse it for between \$4 and \$6 million. (Jan. 7. Tr. at 12).

McNamee acknowledged that there had been no press release by MTI and no filing of an 8-K in connection with the submission of the proposal to the DOE in March 1997. He stated that, "I have no reason to think that it would include it," referring to MTI's Form 10-Q for the quarter ending March 28, 1997, filed with the SEC. (Movants' Exh. 39 and Dec. 29 Tr. at 116).

McNamee acknowledged having made a presentation at MTI's board meeting on April 16, 1997 at which they discussed fuel cell technology, the efforts to form a partnership and the DOE proposal that had been submitted. (Movants' Exh. 36 and Dec. 29 Tr. at 121). McNamee testified

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<sup>11</sup> Item 12 identifies the "Duration of Entire Project Period" to be from May 1, 1997 to October 31, 1999. Item 13 lists a Requested Award Start Date as May 1, 1997.

that he understood that under the proposal MTI would be working with A.D. Little and that was the reason he had traveled to Cambridge to meet with A.D. Little in the hopes of it working exclusively with MTI. (Dec. 30 Tr. at 7-8). As for the submission to the DOE pursuant to the PRDA, McNamee testified that he had been asked to discuss the various divisions of MTI and that the discussion concerning the DOE submission was some 52 pages into the power point presentation. (Dec. 30 Tr. at 144).

On April 26, 1997, First Albany held a board meeting at which McNamee presented a brief update on its investment in MTI (Movants' Exh. 184 and Dec. 29 Tr. at 124). McNamee emphasized that he would not have discussed the proposal submitted to the DOE by MTI at the First Albany board meeting as that was nonpublic information at the time. (Dec. 29 Tr. at 125).

McNamee was shown Movants' Exhibit 174, a Form 8-K dated May 29, 1997, identifying an "Event," namely the execution of a Letter of Intent with Edison Development Corp. in connection with the formation of a joint venture to further develop PEM fuel cells. The 8-K states that EDC would be making a cash contribution to the joint venture and MTI would be contributing certain assets held by the fuel cell research and development section of its technology division.

McNamee was shown Movants' Exhibit 34 (also attached to Movants' Exhibit 174),<sup>12</sup> which appears to be a new release, dated May 29, 1997, with the caption reading "DTE Energy Subsidiary, MTI sign Letter of Intent, with respect to the formation of a joint venture. In it he was quoted as stating that "Plug Power also intends to build on MTI's successes in automotive

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<sup>12</sup> The article identifies Edison Development Corp as a subsidiary of DTE Energy Co, whose principal subsidiary is Detroit Edison. It further describes MTI as a company that "develops, manufactures and markets a range of measurement and test systems widely used in the industry." (Movants' Exh. 34).

applications of fuel cells. Fuel cell technology could be the breakthrough development in zero emission electricity generation. . . . This could lead the way to bringing about a viable electric vehicle which uses gasoline as a fuel.” McNamee assumed that the quote had been cleared with him. He also admitted that no mention had been made in the article about the proposal submitted to DOE. (Dec. 29 Tr. at 132). McNamee explained that as part of the deal with Detroit Edison, MTI had committed to eight million dollars of research funding being made available to the joint venture.<sup>13</sup> (Dec. 29 Tr. at 135). When asked whether that was the funding requested in MTI’s application to the DOE (Movants’ Exh. 21), McNamee testified “Or some other research. Obviously, a lot of it had to come from other sources anyway because Movants’ 21 wouldn’t have added up to \$8 million, and particularly not over the two-year period of time. But, the - so they would have had to win that piece of the PRDA and other things or they would have had to win other things. But in any case, they would have to win some of it.” (Dec. 29 Tr. at 135). He also admitted that the proposal submitted to the DOE represented a significant potential source for complying with the provision in the agreement with Detroit Edison. (Dec. 29 Tr. at 136).

With respect to his relationship with Wood, McNamee testified that Wood had worked for him on some special projects. (Dec. 29 Tr. at 40). Movants’ counsel drew his attention to McNamee’s calendar (Movants’ Exh. 24) in which there were several notations of meetings with Wood, including June 4 and June 10, 1997, as well as June 24, July 1, and July 8, 1997 (Dec. 30 Tr. at 13). He could not recall the topic of those meetings although he pointed out that Wood had been working on a project involving IS Robotics at the time. He also testified that it was unlikely

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<sup>13</sup> McNamee testified that Plug Power had two years to win the \$8 million in research contacts and as it turns out, they actually won over \$20 million during the two year period. (Jan. 7 Tr. at 56).

that either of the earlier meetings dealt with the MTI Shares. (Dec. 29 Tr. at 127-138). He acknowledged that he did involve Wood in the process. (Dec. 29 Tr. at 142). When shown Movants' Exhibit 6, the Memorandum from Wood to McNamee and Goldberg, he testified that he had no recollection of any meeting but had no reason to dispute Wood's testimony. (Dec. 29 Tr. at 143). He also testified that he could not recall receiving the Memorandum and did not know of anyone who had used it, even after September of 1997, when the closing occurred. (Jan. 7 Tr. at 41-42). He did not remember seeing the list of names prepared by Wood and opined that Wood might have figured out who to place on the list by examining the early private placement in 1996. (Dec. 29 Tr. at 152). Movants' counsel then read Wood's deposition testimony to McNamee (Dec. 14, 2005 deposition at 122) in which Wood, in response to a question concerning what made him look at the list of purchasers, stated, "Because that's who was - that's who I was directed was going to get the shares, who was going to be the purchasers of the new shares. It was going to be previous directors, the previous purchasers, plus maybe a couple additional people." (Dec. 29 Tr. at 162). McNamee testified that he could not testify to the accuracy of Wood's testimony but that he could not remember any "serious conversations about how we were going to allocate the shares until a couple of weeks before we actually did the deal. So what he's referring to I don't know. He seems obviously a little vague about when that is supposed to have happened." (Dec. 29 Tr. at 162). On questioning by Respondents' counsel, McNamee testified that he had not contacted anyone with respect to being a potential purchaser of the Shares as of the Sale Hearing on July 10, 1997. (Jan. 7 Tr. at 40). It was his testimony that "I don't believe I had a clear intent [as to who was going to purchase the stock] before September. (Jan. 7 Tr. at 61). He further explained that "we felt an obligation to offer the stock to the MTI directors, to the First Albany directors. There

were also people who had invested in the - in the first offering, and there were officers of First Albany who had invested in the first offering and there were officers of First Albany who didn't invest in the first offering and wanted to invest in the second one. They were first contacted a couple of weeks before the closing.” (Jan. 7 Tr. at 42-43).

McNamee was shown the Stock Purchase Agreement (SPA), dated July 25, 1997. When asked if he had caused anyone to convey to the sellers listed in the SPA information concerning the fact that MTI had “just won the largest award the DOE had made . . .” (parroting the statement made by McNamee in his letter to Senator D’Amato), he responded, “No.” He also responded “No” with respect to causing anyone to convey that information to the Court on July 10, 1997. (Dec. 30 Tr. at 32-33). He further testified that he had not had any conversations with Rock, Lisa Tang, Esq., who represented Barbara Lawrence, or Mr. and Mrs. Lawrence concerning the purchase transaction. (Jan. 7 Tr. at 78-79).

McNamee was then asked to review Movants’ Exhibit 32, “Secondary Offering of Mechanical Technology Incorporated Common Stock Shares,” dated July 30, 1997. He was asked whether it contained any statement about MTI or Plug Power having won the largest award . . . (again parroting the language in the letter to Senator D’Amato), to which he responded that the exhibit contained the term sheet, the published financial statements of MTI and the press releases. (Dec. 30 Tr. at 40). McNamee acknowledged that there was no mention of Plug Power or A.D. Little. (Dec. 30 Tr. at 45). He testified that what he did tell potential investors about was the fact that they had gotten a partner for the fuel cell business and had sold a troubled division and “I think the most important thing I said to people was that this transaction will take Lawrence completely out of MTI.” (Jan. 7 Tr. at 43). McNamee testified that he had not mentioned

anything about the upcoming test at A.D. Little because at the time he had no knowledge of the test. Nor had he mentioned the award from the DOE since the contract had not been signed at the time. Also, it no longer belonged to MTI, but to Plug Power. (Jan. 7 Tr. at 44-45). McNamee admitted that he had not made any disclosures as to the identities of the purchasers prior to September 26, 1997 to either the Court or any of the sellers. (Dec. 30 Tr. at 48).

Joseph Jacob Romm (“Dr. Romm”) - Expert

Dr. Romm’s testimony was proffered by the Respondents as an expert in the areas of DOE contract procedures in 1997 and fuel cell technology. Dr. Romm received a Ph.D. in physics from the Massachusetts Institute of Technology in 1987 and in 2008 was elected a Fellow in the American Association for the Advancement of Science. He joined the U.S. Department of Energy in 1993, serving as special assistant to the Deputy Secretary of Energy from 1993 to 1995 with a focus on programs involving the development of clean energy technologies, including hydrogen technology and fuel cell technology. (Jan. 7 Tr. at 126). He served from May of 1997 to November 1997 as Acting Assistant Secretary of the Department of Energy in charge of a budget of approximately one billion dollars and a staff of approximately 550-600 individuals involved with government’s research and development contracts in the area of renewable energy and energy efficiency. (Jan. 7 Tr. at 126-127). After leaving the DOE in 1999, he wrote several books on the subject of hydrogen and fuel cell technology. (Jan. 7 Tr. at 127-129).

Movants take issue with Dr. Romm’s testimony as an expert and ask that it be stricken. They argue that there is no basis for him to either provide expert or lay testimony in this matter. In particular, they argue that a portion of his testimony was completely outside his purported expertise and concerned matters for which he had no personal knowledge, particularly regarding

a document purported to be a press release by the DOE (Respondents' Exh. 21). Movants argue that Dr. Romm's testimony regarding an article which appeared in the *Energy Daily* on June 24, 1997 (Respondents' Exh. 24) was merely speculation. In addition, Movants contend that his testimony was not relevant to the issues under consideration. In particular, the Movants take issue with Dr. Romm's testimony "regarding developments in fuel cell technology research many years subsequent to the sale hearing . . . ." See Movants' Post-Trial Memorandum of Law (Dkt. No. 1151) at 44.

Before setting out Dr. Romm's testimony, it is necessary for the Court to address the Movants' request that it be stricken.<sup>14</sup> Rule 702 of the Federal Rules of Evidence permits an individual to testify as an expert "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Before considering the testimony of an expert, the Court must ensure that it is both relevant and reliable. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). The testimony must be more than subjective belief or unsupported speculation. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90 (1993). To the extent that the testimony is neither scientific nor technical, the Court must consider whether the information is within the purview of the average lay person. See *Sparton Corp. v. U.S.*, 77 Fed.Cl. 1, 6 (Fed. Cl. 2007). In

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<sup>14</sup> Respondents' have suggested that Movants waived any objection they might have to Dr. Romm's testimony by having proffered portions of his deposition, taken on August 29, 2008, for admission pursuant to Fed.R.Evid. 804(a)(5). The Court finds this argument without merit, particularly since Movants withdrew that request in the course of the Hearing.

addition, the Court has broad discretion in any such determination. *See Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002).

In *Sparton* the plaintiff offered the testimony of what it represented was a government contract expert. The court found the subject of the testimony encompassed a specialized area of knowledge not within the purview of an average lay person. *Sparton*, 77 Fed.Cl. at 7. In addition, the court indicated that it would have to consider factors other than the *Daubert* factors given that the testimony was not on scientific or technical issues. *Id.* Ultimately, the court concluded that the expert, a Professor Emeritus of Law at George Washington University who consulted for government agencies, *inter alia*, on government contracts and was a widely-published author in government contracts, could testify on government contract matters. However, his experience in the Navy between 1953 to 1959, well before the contract in dispute, was insufficient to allow him to testify regarding Navy policies. *Id.* at 9.

In *U.S. v. Jubb*, Case No. 89-30025, 1990 WL 96522, \*4 (9<sup>th</sup> Cir. 1990), several witnesses were permitted to testify as experts concerning the proper procurement procedures and general contract interpretation. So too in *Harrison Corp. v. Ericsson, Inc.*, 194 F.Supp.2d 533 (N.D.Tex. 2002), the court considered an affidavit of an expert on the general practices and procedures relating to government contracts. *Id.* at 539. Most recently in *Bridgelux, Inc. v. Cree, Inc.*, Civil Action No. 9:06CV240, 2008 WL 5549448 (E.D. Tex. Aug. 20, 2008), the court allowed the testimony of an expert on the policies and procedures of the Small Business Innovation Research program of the U.S. Department of Defense. In particular, the court found her qualified to “testify as to how other companies and the Government typically handle disclosures.” *Id.* at \*3. However, she was not permitted to testify as to the adequacy of the disclosures. *Id.*

In *U.S. v. Leo*, 941 F.2d 181 (3d Cir. 1991), the appellant, Gerald Leo, was convicted on four counts of mail fraud and one count of making a false statement in connection with his preparation of updates on contract proposal cost estimates during the negotiation process following a contract award by the U.S. Army. *Id.* at 185-6. He was sentenced to ten months imprisonment on the mail fraud charges and fined \$15,000 on the false statement conviction. *Id.* Leo raised five issues on appeal, including an argument that “the district court had abused its discretion in allowing expert testimony concerning industry customs and practices in the field of defense contracting.” *Id.* at 188.

The court pointed out that it had previously allowed “expert testimony concerning business customs and practices.” *Id.* at 196. The court indicated that such testimony is allowed “so long as the expert did not give his opinions as to legal duties that arose under the law.” *Id.* It allowed the expert to testify about the customs and practices within the defense industry. *Id.* at 197.

Based on this case law and a review of Dr. Romm’s credentials and experience with the DOE, the Court concludes that Dr. Romm’s testimony, to the extent that it addresses the customs and practices of the DOE in the area of contracting in 1997 when he served as Acting Assistant Secretary of the Department of Energy, should be allowed as the testimony of an expert. The Court also concludes that Respondents have also established that he is an expert in the field of fuel cell technology, including that which existed in 1997. However, the Court is of the opinion that Respondents have not established that Dr. Romm is an expert in the process of disseminating news releases by the DOE. The Court also does not find him qualified to opine on the extent to which the *Energy Daily* was read by individuals in “the legal, the media, everybody who followed energy at the time” without any evidence to support that conclusion. (Jan. 7 Tr. at 141). The Court finds

that much of his testimony relating to Respondents' Exhibits 21 and 24 is based on speculation, rather than on any expertise on the part of Dr. Romm. Accordingly, the Court will not consider that testimony either.

*DOE PRDA Process*

Dr. Romm was asked to explain the DOE process for receiving a cost sharing research and development contract in 1997. (Jan. 7 Tr. At 143). He testified that the DOE would send out a request for proposals or a PRDA. Following submissions over a couple of months, an independent expert review board would evaluate the proposals and rank them. (Jan. 7 Tr. at 145). According to Dr. Romm,

[a] decision would be made by somebody in the fuel cell program in this case as to which proposals would be funded. After the decision was made there would be a contact, usually a phone call, and followed usually quickly by some sort of letter or fax saying that they had been selected. Then there would be a press release developed and released. And then there would be a multi-month process in which those who had been selected would enter into negotiations for the actual contractual development.

(Jan. 7 Tr. at 145).

Dr. Romm further testified that “[t]he contract negotiation would typically determine whether the companies that had put in the proposals could in fact - what they had said was accurate, are the principal investigator[s] still at the company, does the company have the money available for the cost sharing, does the Department of Energy have the money available to enter into this contract.” (Jan. 7 Tr. at 146). According to Dr. Romm, the process typically would take a few months. *Id.*

He further testified that in the case of a multi year contract, “we would spell out in the negotiations and in the contract that if, for whatever reason, Congress did not provide funds in the

future years, the contract would be altered and the funds could be reduced contingent on Congressional appropriations.” (Jan. 7 Tr. at 147).

*Development of Fuel Cell Technology*

According to Dr. Romm, the DOE had funded A.D. Little, beginning in the early 1990’s, in connection with the development of a fuel processor or fuel reformer that would convert gasoline into hydrogen with the hydrogen mixture being used to run a fuel cell “for the purpose of so-called onboard reforming.” (Jan. 7 Tr. at 147-48). When asked about A.D. Little’s progress in 1997, Dr. Romm testified that in January 1997 “Chrysler Corporation had announced their intention to use A.D. Little’s reformer to build a prototype car over the next few years that would, in fact, you know, take gasoline and turn it into hydrogen to run a fuel cell.” (Jan. 7 Tr. at 148).

Dr. Romm was asked whether the test that took place in October 1997 at A.D. Little’s facility represented an advance in fuel cell technology. He stated unequivocally that “[t]he test clearly did not show any advancement in fuel cells. I think there are two ways of knowing that. One of which is that MTI only used a two kilowatt fuel cell even though they had in theory developed a much larger one. Two kilowatts is about 25 times too small to run a car. And so there was clearly not a test of the most advanced type of fuel cell ” (Jan. 7 Tr. at 150). He went on to state that “the Department had determined you would need at least a 50 kilowatt fuel cell in order to run a car. It was also very clear from the test that the two kilowatt fuel cell was so heavy and bulky that unless the technology were vastly improved, a 50 kilowatt version would never fit in a car.” (Jan. 7 Tr. at 150).

With respect to the fuel cell furnished by MTI in connection with the demonstration, he testified that it represented a very old piece of technology. (Jan. 7 Tr. at 151). He also testified

that there was nothing special about the MTI fuel cell and that A.D. Little could have used any number of fuel cells that other companies had developed. (*Id.*) According to Dr. Romm, the fuel cell used in the demonstration was not part of the DOE contract involving both MTI and A.D. Little since the contract proposal called for a 10 kilowatt unit that could fit onboard a car as part of an integrated unit. Instead, it was his opinion that the demonstration involved “the end of the multi-year process that DOE had previously funded A.D. Little to do.” (Jan. 7 Tr. at 152).

*October 21, 1997 Press Conference*

Dr. Romm testified that he was present at a press conference held on the October 21, 1997. (Jan. 7 Tr. at 154). On cross-examination, he acknowledged that he did not have a specific memory of being there, but his presence was referenced in the transcript of the conference, and he also testified that “given my position I would have been at that press conference.” (Jan. 7 Tr. at 193). When asked what his understanding of the purpose for the conference was, he testified that “I believe the purpose was to recognize what A.D. Little had done and obviously to draw attention to what was viewed as successful Department of Energy R&D with the goal of making clear to Congress and the media and the public that the federal government’s spending on R&D was achieving results and was a useful thing.” (Jan. 7 Tr. at 155). He further testified that after reviewing the materials, he was of the opinion that “this press conference was held the day before President Clinton made a major announcement in regards of the United States’ position on greenhouse gas reductions for the upcoming negotiations, climate negotiations in Kyoto, Japan.” (Jan. 7 Tr. at 156).

Respondents’ counsel asked Dr. Romm his opinion concerning various publications after the October press conference (*see, e.g.*, Movants’ Exh. 119, 120, 122, 127, 133 134, 135) that had

called the A.D. Little test in October 1997 a “breakthrough.” It was his testimony that “I think the use of the word breakthrough is unfortunate. . . . this was an advance principally, almost exclusively on the A.D. Little side in that they had made their fuel processors smaller, small enough to fit on board a car. That was the only thing as I see it that was newsworthy and that . . . represents an advance.” (Jan. 7 Tr. at 159). He further acknowledged that “[t]he advance was on the fuel reformer side. It’s quite clear that there was no advance announced on the fuel cell side.” (*Id.*)

Dr. Romm was also asked to address certain allegations in Movants’ complaint, which served as a factual basis in support of the Motion pursuant to Fed.R.Civ.P. 60(b)(3). Specifically, he was asked to confirm the allegation at ¶ 163 of Respondents’ Exhibit 98, Movants’ amended complaint, dated December 17, 1998, that on October 21, 1997, it had been announced that the DOE, A.D. Little, Plug Power and the DOE’s Los Alamos National Laboratory had successfully demonstrated the first ever gasoline powered fuel cell electric engine for automobiles. Dr. Romm testified that, in his opinion, the statement was not true given his prior testimony that the two kilowatt fuel cell was too large to put inside a car and the fact was that one 25 times larger would have been required to power an automobile. (Jan. 7 Tr. at 162). He was also asked to give his opinion on allegations in ¶ 169 of the Complaint that the fuel cell technology had gone beyond the research and development stage to a workable gasoline powered fuel economy stage. He responded that he “wouldn’t even put it in the term of the development stage. It was still in the “basic research phase” and “there was no advancement.” (Jan. 7 Tr. at 163).

On cross-examination, Dr. Romm was asked whether “MTI knew in July 1997 that it was going to be able to integrate its fuel cell with the reformer to generate electricity.” He replied that

“[t]hey never ultimately succeeded in integrating it in the sense that the Department of Energy would have used the word as a package unit that would fit inside a car. They did a test in which they connected a unit that could not have fit inside a car with a fuel processor that could fit inside a car.” (Jan. 7 Tr. at 179). On further questioning, Dr. Romm admitted that “[t]he test showed that the A.D. Little fuel processor could provide reformer that could run a small fuel cell stack by MTI. It did show that, yes.” (Jan. 7 Tr. at 180-181). He testified that “I don’t know if it was known for months. It was known for months that A.D. Little was going to succeed at this. I think the big issue that might have been unknown was whether, not whether you could build a fuel processor that could reformat, that could run a fuel cell, but whether you could build one that was small enough to fit onboard in an engine block of a car, let’s say.” (Jan. 7 Tr. at 181).

Asked for any “insight” he had gained by reading the transcript of Dr. Ernst, Dr. Romm testified that

MTI appears to have been sort of hastily brought in at the last minute to do this test. That the Department clearly wanted to do some sort of a PR event around that time, it was budget time, President Clinton was about to give a big speech. It was probably fishing around for whatever announcement it could make. A.D. Little seemed a likely choice. It appears based on Dr. Ernst’s testimony that they were fishing around for whatever fuel cell they could get nearby to do the test and that it was hastily arranged, done at the last minute.

(Jan. 7 Tr. at 183-184).

#### Lucy Allen (“Allen”) - Expert

Allen testified that she held a Bachelor’s degree from Stamford University (1981) and an MBA from Yale University (1986), a Master’s in economics from Yale (1989) and a Masters of philosophy from Yale (1990). She is currently a Senior Vice President for National Economics Research Associates (“NERA”), an economic consulting firm specializing in micro economics,

which deals with stock prices and markets. (Allen Dec. 16 Tr. at 8). On *voir dire* she acknowledged that she was not an expert in fuel cell technology or on how government research and development contracting process works (Dec. 16 Tr. at 15). She testified that she had been hired “[t]o assess materiality of certain allegedly withheld information and then calculate damages.”<sup>15</sup> (Dec. 16 Tr. at 21). It was her testimony on cross-examination that initially in preparing her 2003 report (Movants’ Exh. 52) she had been asked to determine “whether there was a basis for defendants’ claim that the ADL demonstration had a significant effect on the stock price.” (Dec. 4 Tr. at 98). She explained further that “[m]y assignment for my 2008 report (Movants’ Ex. 51) was to look at this allegedly withheld information which was defined to me as three components . . . .” (Dec. 4 Tr. at 98-99).

According to Allen, the three components consisted of

The first is that the purchasers of the stock were primarily insiders. The second was that there had been an award of a DOE, Department of Energy, award of approximately \$15 million and the third is that the technological progress had been made with regard to fuel cell.

(Dec. 3 Tr. at 22).

She testified that she had not been asked to determine whether the “original \$2.25 made any sense, but whether this additional information would have made a difference to the Court or the buyers and the sellers at the time.” She further explained that she had

gathered information, data and information, publicly available information. That was sort of the first step. Second, I looked at when this allegedly withheld information was revealed to the market. Third, I looked at how the market reacted when this allegedly withheld information was revealed. Fourth, I tested whether the market reaction was significant, and fifth, I looked at whether there were other

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<sup>15</sup> According to Allen, she was not offering an opinion concerning whether the information was withheld, however.

reasonable explanations for whatever conclusion I came up with.

(Dec. 3 Tr. at 26-27).

Ultimately, she concluded that the “allegedly withheld information was material.” (Dec. 3 Tr. at 30). In this regard, she stated “[w]hat I did conclude is that the price rise on October 21<sup>st</sup> is related to - is caused by the release of information including the \$15 million DOE award and the technological progress that was made.” (Dec. 4 Tr. at 95).

Allen testified that October 21, 1997, was the first public mention that they could find of the \$15 million DOE award that she had been able to locate. (Movants’ Exh. 114). She testified that she had not seen the *Energy Daily* article, dated June 24, 1997 (Respondents’ Exh. 24) until it was produced by the Respondents. Upon further research, she testified that it was a trade publication, which was not captured by the news compilation service used by NERA. (Dec. 4 Tr. at 57). It was her testimony that the price of MTI stock went up substantially on October 20, 1997, and October 21, 1997. Combined, she testified that it was statistically significant at the 99% level. (Dec. 3 Tr. at 36-37). She explained that on the 20<sup>th</sup> the stock price went up approximately 28% and on the 20<sup>th</sup> and 21<sup>st</sup> combined it went up approximately 42%. (Dec. 3 Tr. at 36).

Originally when she had prepared her 2003 report she looked at companies that Bloomberg, using its financial analysis system, had identified as peer companies to MTI for her controls in connection with an “event study.” (Dec. 3 Tr. at 51, 85). She explained that she had examined what the stock price reaction had been when the information was released on October 21, 1997, after controlling for how the stock price reacted typically. (Dec. 3 Tr. at 83). According to Allen, an event study is a method for predicting “how the stock would have reacted in the absence of that particular event and then compare the actual reaction to the predicted reaction.”

(*Id.*). Her event study was used to predict “MTI’s stock price reaction on the 20<sup>th</sup> and 21<sup>st</sup> controlling for what happened to the Bloomberg peer index on those days and given the historical relationship between the Bloomberg peer index and MTI.” (Dec. 3 Tr. at 96).

According to Allen, “[m]y conclusion was that the withheld information was material, meaning that it would be material to a reasonable investor and that conclusion was based on a number of findings, including that the stock price movement on October 20<sup>th</sup> and October 21<sup>st</sup>, so around that time that the withheld information was released to the market, that that stock price movement was statistically significant, and I found it to be statistically significant regardless of the controls that I used.”<sup>16</sup> (Dec. 3 Tr. at 43, Movants’ Demonstrative Exh. 1-1). She noted that looking at the Bloomberg peer index, the actual price movement on Oct. 20 and 21<sup>st</sup> was outside the bounds of the predicted movement. (Dec. 3 Tr. at 96 and Movants’ Demonstrative Exh. 1-3 and 2-1). She also testified that she had also looked at controlling for Ballard and ERC and still found the price movement statistically significant. (Dec. 3 Tr. at 97 and Movants’ Demonstrative Exh. 1-5 and 2-4, 2-5, 2-6).

She was asked whether the same information would have been material in July, 1997. She responded that

one of the pieces of withheld information, allegedly withheld information, is the DOE award. The financial situation of MTI had not changed much between July and October and the \$15 million DOE award for a company with, you know, \$32 million in revenue is - I think if it’s material in October, it’s going to be material in July. So I don’t see the financial condition of MTI as making a difference in

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<sup>16</sup> After reviewing the report of Respondents’ expert, James Malernee, Jr. (“Malernee”), she had also examined the NASDAQ index, as well as the performance of the stocks of Ballard Power Systems (“Ballard”) and Energy Research Corp. (“ERC”), both companies involved in fuel cell research. She testified that she had seen no similar movement in the stock of either on October 20<sup>th</sup> and October 21<sup>st</sup>. (Dec.3 Tr. at 138).

terms of the materiality of the withheld information. I don't see a difference in terms of the market for MTI's measurement and control business or the market for the fuel cell industry. This is a small company doing research and development in a field that has - you know, the potential is all in the future. It's not generating cash in fuel cells today, today, back in 1997. I don't see a difference between July and October in terms of here's a small company whose getting a large DOE award and this can put them on the map so to speak in this new and upcoming field.

Dec. 3 Tr. at 135-136.

On cross-examination, Allen acknowledged that if she had only considered the change in price on October 21, 1997, it would not have been significant at even the 95% level. (Dec. 4 Tr. at 13. She testified that she had not studied the issue of market efficiency of MTI stock. (Dec. 4 Tr. at 29). She also acknowledged that at the time she had written her reports, she was not aware that the MTI Shares were restricted. (Dec. 4 Tr. at 50).

In examining the price change of MTI stock on both October 20, 1997 and October 21, 1997, one of the explanations she gave was that she believed that there had been "leakage" of the information, which caused the rise in stock price on October 20, 1997. Her reasons for concluding that there had been leakage were: (1) price change; (2) volume of shares; (3) DOE's October 21<sup>st</sup> press release that had been marked as embargoed; (4) New York Times article that appeared on October 21<sup>st</sup> but was datelined October 20<sup>th</sup> and loaded into the system at 4:00 a.m. on the 21<sup>st</sup>; (5) other news articles that appeared after the 21<sup>st</sup> that had discussed the price movement that began on October 20<sup>th</sup> as being due to the DOE announcement on the 21<sup>st</sup>. (Dec. 4 Tr. at 63). She acknowledged that she had not found any published news stories on October 20<sup>th</sup>. (Dec. 4 Tr. at 66). She also admitted that there had been six days in 1997 where there had been higher volume of MTI shares traded than on October 21, 1997. (Dec. 4 Tr. at 64). She also acknowledged that there was a slight increase in Ballard stock on October 20<sup>th</sup>. (Dec. 4 Tr. at 68).

She admitted on cross-examination that she had not differentiated between the three components of the allegedly withheld information. She explained that she had been asked to examine them together and she felt they were interrelated. (Dec. 4 Tr. at 84-85). She acknowledged that she did not know whether the reason the insiders had wanted to purchase the stock was because of the \$15 million award from the DOE or the technological process that had been made. (Dec. 4 Tr. at 85). According to Allen, "I didn't make an attempt to separate the price reaction - how much of the price reaction was due to the \$15 million DOE award or technological progress. Now, of course part of the DOE award was, in fact, to conduct this kind of technological research and development. So I'm not even sure what it would mean to separate those two components." (Dec. 4 Tr. at 85-86).

James K. Malernee, Jr. - Expert

Malernee testified that he has a B.S. in Petroleum Engineering from the University of Texas (197), an MBA from Southern Methodist University (1972), and a Ph.D. in finance from the University of Texas (1977). He currently serves as President and Chairman of the Board of Cornerstone Research, an economic and financial consulting firm. According to Malernee, he had been involved in over 500 securities cases over the last two years with his biggest area of practice being litigation under § 10(b) the 1934 Act (15 U.S.C. § 77j(b) and Rule 10b-5 (17 CFR 240.10b-5) involving issues of fraud on the market. (Jan. 8 Tr. at 12). He explained that he had been asked to look at the materials and analysis provided by Allen and to provide an evaluation and critique of that analysis. (Jan. 8 Tr. at 15). He was also asked to examine the behavior of the MTI stock during the latter part of 1997. (Jan. 8 Tr. at 16).

Malernee examined the period from June 11, 1997, when the price of the MTI Shares was

set and July 25, 1997, the date of the SPA, and examined the trading of Ballard and ERC shares of stock over the same period. (Jan. 8 Tr. at 28-29). He concluded that there was not much price or volume variation in the stock of the three companies during that period. (Jan. 8 Tr. at 29 and Respondents' Exh. 3 1nd 13). He also found the same to be true between July 25, 1997 and September 10, 1997, the date the Court signed the Sale Order. (Jan. 8 Tr. at 29). He acknowledged an increase in volume around May 30, 1997 and the end of September 1997, finding that there were a lot of days in which the MTI stock did not trade at all, specifically between July 11, 1997 and October 21, 1997, there were 34 days on which the stock did not trade. Thus, he concluded that there was not a lot of depth in the stock. (Jan. 8 Tr. at 30).

Asked to critique Allen's analysis, he made the following findings: (1) "Miss Allen ignores market efficiency, which is fundamental to this kind of an analysis. Second of all, even if it were trading efficiently, MTI - and it's not - the model she uses is badly flawed. Third, there's no evidence in her analysis that supports her conclusion of leakage. And then finally and I think very importantly, there's no evidence that the information released on October 21<sup>st</sup> was material to MTI or to the market. (Jan. 8 Tr. at 40 and Respondents' Demonstrative 4).

While Allen had testified that performing an efficiency study of the price of MTI's stock was unnecessary for her to reach her conclusions on materiality, Malernee stressed the importance of such a determination because "[i]t's not possible to apply conventional techniques that are used in efficiently traded stocks to understand price movements [of an inefficiently traded stock]." (Jan. 8 Tr. at 54). He explained on cross-examination that "you can't do an event study without having market efficiency." (Jan. 8 Tr. at 143). He further noted that inefficiently traded stocks often have price movements when there is no news or release of information. (Jan. 8 Tr. at 72).

In particular, he testified that Allen should have looked at the factors identified in *Cammer v. Bloom*, 711 F.Supp. 1264, 1286-1287 (D.N.J. 1989) and made a determination whether the MTI stock traded efficiently (Jan. 8 Tr. at 57-58 and Respondents' Demonstrative 9). These include "(1) a large weekly trading volume; (2) a significant number of securities analysts following and reporting on a company's stock; (3) the presence of market makers who are able to react swiftly to company news and drive the stock price; (4) the eligibility of the company to file an S-3 Registration Statement for its public offerings; and (5) empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price." *In re SCOR Holding (Switzerland) AG Litigation*, 537 F.Supp.2d 556, 574 (S.D.N.Y. 2008).

Examining those factors, Malernee found that the average weekly trading volume for MTI was 0.5%; whereas the *Cammer* standard was 2% trading volume. (Jan. 8 Tr. at 59). There was also no analyst coverage. (*Id.*). Malernee asserted that *Cammer* requires at least 10 market makers; whereas, MTI had only 5. (Jan. 8 Tr. at 61). Nor was MTI eligible in 1997 to file an S-3 Registration Statement with the SEC. Malernee explained that large companies with at least \$150 million of stock in the hands of outsiders were allowed to file S-3's. (Jan. 8 Tr. at 64). Finally, with respect to the fifth factor, Malernee found that "MTI simply did not react to information provided to the market place." (Jan. 8 Tr. at 70). This finding was based on what he indicated was the most important information, namely reaction to earnings related announcements. (Jan. 8 Tr. at 64). He had looked at the quarterly and annual reports, of which there had been six between the end of 1996 and the end of 1997. (Respondents' Demonstrative 10). He noted that of the six dates, on four of them there had not been any trades of the shares. (Jan. 8 Tr. at 70). Nor had there been

any trading the day before those dates. (*Id.*).

Malernee also opined that there was no evidence to support Allen's conclusion of leakage as a basis for looking not only at October 21, 1997, but also October 20, 1997, in the event study she performed in determining that the allegedly withheld information was material. (*See* Respondents' Demonstrative Exh. 12). He felt Allen had simply assumed that it had happened. (Jan. 8 Tr. at 79). For instance, while she had found a price change on October 20, 1997, Malernee pointed out that there had been price change on other days without any news being released. He also pointed out that the volume on October 20<sup>th</sup> was not all that unusual, noting that there had been five other days in the preceding two months where there had been higher volume. (Jan. 8 Tr. at 81). Ultimately, he concluded that the release of the announcement of the DOE award on October 21, 1997 and mention of the demonstration earlier that month was not material. In support of this conclusion, he noted an article that appeared in the *Energy Daily* on October 23, 1997, which discussed the need for more work on the technology and that what had been accomplished in the demonstration was not a surprise to the engineers. (Jan. 8 Tr. at 102 and Respondents' Exh. 100). He also found no material change in the price of either Ballard or ERC stock on either the 20<sup>th</sup> or the 21<sup>st</sup>, from which he concluded that the DOE announcement was not material. (Jan. 8 Tr. at 105). He opined that if there been a breakthrough in fuel cell technology, as some had described, it would have been important to the entire industry and would have been reflected in the prices of the stock of such companies as Ballard and ERC. (Jan. 8 Tr. at 106). With respect to the DOE award, he pointed out that no one had stated that it would mean profitability for MTI and add value to the company, noting that the ultimate award was a cost sharing contract. (Jan. 8 Tr. at 108).

On cross examination, he was asked whether there was a “basis to conclude that the MTI share price on October 21<sup>st</sup> was not incorporating material information into the price on that date.” He responded that “On October 21<sup>st</sup> there is no evidence that that was the case. There was a lot of volume. I’ll give you that, but there was not a statistically significant price change, which is one of the features that you just described that there is a reaction to information - material information, and there wasn’t.” (Jan. 8 Tr. at 141). He also opined that looking at a two day effect, as Allen had done, was not a proper way to do an event study. (Jan. 8 Tr. at 142). Malernee reiterated that “you can’t do an event study without having market efficiency,” which Allen had not established with respect to the stock of MTI. (Jan. Tr. at 143). According to Malernee, “[s]he has incorrectly taken a two day price effect to look at - to offer an opinion that the two day effect is statistically significant when the one day effect dominates just about everything else and would make the two day effect in just about any instance significant.” (Jan. 8 Tr. at 181). He testified on redirect that “[a]bsent efficiency, which is common for a lot of the small, thinly traded stocks that have no following, there’s no information out there about them, then you can’t tie an information release to contemporaneous stock price movement. It’s the kind of thing where somebody could hear about that two days later.” (Jan. 9 Tr. at 54).

## **ARGUMENTS**

The arguments identified herein have been derived not only from the pre- and post-hearing briefs submitted by the parties, but also from previous documents filed with the Court in connection with the Motion.

According to the Movants,

Respondents defrauded the Movants and the Court by (a) misrepresenting at the MTI Shares Sale Hearing that the \$2.25 per share sale price was fair and reasonable and (b) omitting to state at the MTI Shares Sale Hearing the withheld material information, namely (i) that MTI had been awarded a \$15 million award (the “Award”) for fuel cell research and development by the Department of Energy (the “DOE”); (ii) MTI/Plug Power had substantially progressed fuel cell development by virtue of an ability to integrate an Arthur D. Little reformer operating on gasoline with MTI/Plug Power fuel cells to produce electricity - the key underpinning of any development of fuel cell energy efficient transportation systems - and something that never before occurred; and (iii) the purchasers of the MTI Shares were going to be exclusively the MTI Board members, the First Albany Board members and the senior executives of First Albany together with their friends, family and close business associates (collectively, the above is the “Withheld Information”).

Movants’ Post-Trial Memorandum of Law (Dkt. No. 1151) at 2.

It is the position of the Movants that the allegedly “Withheld Information” was “material to the fair and reasonable value of the MTI Shares on July 25, 1997.” *Id.* at 3. Citing to *In re W.A. Mallory Co.*, 214 B.R. 834 (E.D. Va. 1997), they argue that had the Court known that the purchasers were insiders the price would have been subjected to heightened scrutiny. It is Movants’ position that Respondents had an obligation to inform the Court that the purchasers were insiders and instead they chose to “duck” the Court’s inquiry.

With respect to disclosure of the Purchasers, Respondents assert that the Movants, having offered the shares to First Albany, an insider with ownership of a substantial number of shares in MTI, always knew the ultimate purchasers would be insiders. With respect to their specific identities, Respondents argue that it is quite common for the exact names not to be available until right up to the closing as investors are solicited and decisions made on whether to make the investment. Respondents also point out that the Movants never pressed for the names of the purchasers and “clearly did not consider the identity of the Purchasers to be significant” as they

executed the Stock Purchase Agreement in which expressly they agreed that the purchasers' identities would be disclosed at the closing. Respondents also contend that the Movants have failed to establish that the identity of the purchasers was material to the price of the MTI Shares in July 1997 by clear and convincing evidence.

With respect to the Movants' focus on what they describe as the Respondents' push for the sale on an expedited basis, Respondents point out that the efforts to purchase the stock had begun early in 1996 and there were concerns that some unexpected roadblock would somehow interfere with the ultimate sale. In addition, First Albany had some concerns because MTI's fiscal year ended in September and First Albany maintains a "blackout period" during which insiders are not permitted to trade stock for a period prior to the release of financial statements. Since earnings were released by MTI on December 22, 1997, the "black out period" allegedly began on September 30, 1997, four days after the closing on the MTI Shares.

Respondents then go on to discuss the fuel cell technology and its development with respect to the automotive program. They pointed out that Albert Lawrence controlled MTI when it first became involved in the development and that fuel cell technology was only in the development stages as of July 25, 1997. In this regard, they note a May 30, 1997, article in *The Times Union* which used words such as "aiming at advancing clean fuel-cell technology" and "goal is to mass produce fuel cells at an affordable price" and fuel-cell units would eventually be available in discussing the intent to form a joint venture with EDC. (Respondents' Exh. 16). Respondents acknowledge an announcement of the Secretary of Energy's October 21, 1997, press conference concerning a "breakthrough" by ADL and a demonstration by it of a method of producing hydrogen from gasoline but contend that ADL was not close to making it commercially

available at that time in automobiles. The fuel cell technology had been in existence at MTI and other laboratories and the test ADL conducted in October 1997 was no more than a first step in a long process.

With regards to the DOE award, Respondents point out that when MTI was notified in June 1997 that they had been selected in response to the application submitted to the DOE in March 1997, it was merely an offer to negotiate on a range of issues, including what the cost share would be, as well as the need for an audit by DOE to assure itself that MTI would be able perform and had the available funds to support cost sharing. There was also the issue of Congressional approval. Respondents point out that ultimately the contract was not signed until in October 1997 and that at the time it belonged to Plug Power, not MTI.

## **DISCUSSION**

Of concern to this Court in considering Movant's motion pursuant to Fed.R.Civ.P. 60(b)(3) is not only the importance to be given to the finality of its judgments and orders, particularly in the context of a sale pursuant to Code § 363 (*see In re Cable One CATV*, 169 B.R. 488, 497 (Bankr. D.N.H. 1994)), but also the underlying purpose of the rule that requires "fairness and integrity of the fact-finding process." *See Lonsdorf v. Seefeldt*, 47 F.3d 893, 898 (7<sup>th</sup> Cir. 1995); *Schultz v. Butcher*, 24 F.3d 626, 630 (4<sup>th</sup> Cir. 1994).

Following the completion of the Hearing, the Court requested that the parties address the issue of whether the Motion was alleging a fraud "on the Court," as well as on the Movants, because of various assertions by the Movants throughout these proceedings that the allegedly

withheld information constituted a fraud not only on them but also on the Court. Rule 60(b)(3) provides for relief from a final judgment, order or proceeding due to fraud, misrepresentation or misconduct by an “opposing party.” However, Rule 60(d)(3) expressly states that “[t]his rule does not limit a court’s power to set aside a judgment for fraud on the court.”

Respondents assert that the Movants have not alleged “fraud on the Court,” acknowledging that parties “sometimes loosely describe motions under Rule 60(b)(3) as dealing with ‘fraud on the court.’” Respondents’ Post-Hearing Memorandum of Law (Dkt. 1150) at 61. Respondents point out that the two bases for post-judgment relief are distinct, citing to *Zurich North America v. Matrix Serv., Inc.*, 426 F.3d 1281, 1291 (10<sup>th</sup> Cir. 2005). The court in *Zurich* noted out that “only the most egregious conduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.” *Id.*; *see also Stoecklin v. U.S.*, 285 Fed.Appx. 737, 738 (11<sup>th</sup> Cir. 2008) (noting that one must show “an unconscionable plan or scheme which is designed to improperly influence the court in its decision”).

Movants assert that they “do not need to allege or prove fraud on the Court to succeed on the instant Rule 60(b) motion. . . . relief from a judgment due to fraud on the court can be obtained through the savings clause of Rule 60(b) and is completely distinguishable from the standards to be applied with respect to fraud on a party available by way of Rule 60(b)(3).” Movants’ Post-

Trial Reply Memorandum of Law at 7, n.8.<sup>17</sup> They do acknowledge that fraud on the court requires a stringent standard; whereas, fraud on a party is more flexible. *Id.* Based on these assertions, as well as the Court's considerations of the specific allegations, it concludes that the relief sought is based on alleged fraud on the Movants, not the Court.

With that in mind, the Movants have the burden to establish their claim of fraud by clear and convincing evidence in order for them to obtain relief pursuant to Fed.R.Civ.P. 60(b)(3). *Entral Group Intern. LLC v. 7 Day Café & Bar*, 298 Fed.Appx. 43, 44 (2d Cir. 2008), citing *Fleming v. New York University*, 865 F.2d 478, 484 (2d Cir. 1989). The traditional elements of fraud include a false representation of a material fact, made with knowledge of its falsity, with intent to defraud, and on which action is taken in justifiable reliance on the representation. *Info-Hold, Inc. v. Sound Merchandising, Inc.*, 538 F.3d 448, 456 (6<sup>th</sup> Cir. 2008); *Filler v. Hanvit Bank*, 156 Fed. Appx. 413, 416 (2d Cir. 2005); *see also Travelers Cas. & Sur. Co. v. Crow & Sutton Assoc.*, 228 F.R.D. 125, 131 (N.D.N.Y. 2005), *aff'd*, 172 Fed.Appx. 382 (2d Cir. 2006) (stating that Rule 60(b)(3) is invoked where material information has been withheld in connection with the judgment or order which is the subject of the 60(b)(3) motion).

Allegations of fraud under the provisions of the Securities Exchange Act of 1934, specifically, § 10(b), which were originally asserted in the Movants' complaint, require proof of similar elements, including that the misstatements or omissions of material fact were made with scienter. *See Filler* at 415. However, the Court is of the opinion that the allegations based on the Securities Exchange Act of 1934 are not for it to consider in connection with this Motion given

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<sup>17</sup> The Court can find no where in their Post-Trial Memorandum of Law (Dkt. 1151) that the Movants discuss the issue of whether the Motion alleges fraud on the Court.

that it has no jurisdiction to address that Federal statute, except perhaps to the extent that the allegations are “related to” the bankruptcy case. In that case, any determination by the Court would have to be made as recommendations to the U.S. District Court for the N.D.N.Y., the same court that remanded these matters back to this Court. This would make no sense. The reference was withdrawn on those causes of action with the consent of the parties in June 1999 and this Court interprets the orders of both the Second Circuit Court of Appeals and the District Court as directing this Court to focus on Rule § 60(b)(3) and Movants’ allegations of fraud concerning the fairness and reasonableness of the price of the MTI Shares at the time of the Sale Hearing.

Movants’ assert that the Second Circuit “explicitly converted Movants’ securities fraud claims into a Rule 60(b)(3) Motion,” (*see* Footnote 8 of Movants’ Reply Post-Trial Memorandum, citing *Lawrence*, 293 F.3d at 627) and apparently take the position that those claims survived. It is on this basis that they contend that the standard of proof is the preponderance of the evidence standard for claims under § 10(b) of the 1934 Act and Rule 10b-5, citing *Herman & Maclean v. Huddleston*, 459 U.S. 375, 380 (1983). Movants’ Post-Trial Memorandum of Law at 24. The Court has reviewed the Second Circuit’s decision and believes that it was merely drawing an analogy between the typical Rule 60(b)(3) motion, which requires that it be brought within a reasonable time not to exceed one year, and a claim under Section 10(b) of the Securities and Exchange Act of 1934, which allows three years from the alleged fraud in which to assert a claim. Thus, the Second Circuit concluded that the Motion was timely. However, there is nothing in the decision to indicate that the securities fraud claims survived.

Before the Court can address the sufficiency of the proof submitted by the Movants concerning whether the facts or information they allege were withheld from them in connection

with their negotiations on the price of the stock were material to those negotiations and to the ultimate representations made at the Sale Hearing and withheld with fraudulent intent, the Court must consider the nature of those facts and whether such facts existed at the time and were actually withheld, before addressing the materiality of the information and the fraudulent intent.

#### Identity of the Purchasers

The Movants contend that the identity of the purchasers of the MTI Shares and the fact that they were insiders of MTI was known to the Respondents at the time of the Sale Hearing and not known to the Movants, such that Respondents should have revealed them. LGI's general counsel, Ezick, acknowledged in a letter dated July 29, 1996, the interest of First Albany, an insider of MTI as early as May 1996, in purchasing the MTI Shares. (Respondents' Exh. 7). In mid-September Ezick sent a letter to Wink, First Albany's counsel, offering to sell the MTI Shares to First Albany for \$2,200,000. (Respondents' Exh. 8). On January 2, 1997, Ezick, on behalf of LGI, offered to sell the MTI Shares for \$3,100,000. (Respondents' Exh. 11). However, the discussions were put on hold when the Debtors filed their bankruptcy petitions on February 28, 1997.

On June 9, 1997, Rock, who did not testify on behalf of the Movants, approached First Albany as counsel for LGI, offering to sell the MTI Shares to First Albany at \$2.25 per share. (Respondents' Exh. 18). Said offer was accepted by First Albany, on its own behalf and that of other "Purchasers" on June 11, 1997 (Movants' Exh. 15).

Wink testified that he had had conversations prior to the Sale Hearing to the effect that First Albany intended to be the purchaser when first approached by LGI in 1996. However, in May 1996 First Albany won a proxy contest for control of MTI and at that point owned 1,036,698 shares in MTI. Then in the latter part of 1996 it obtained an additional million shares

inconsideration for cancellation of certain MTI indebtedness. (Movants Exh. 18, 173 and 172). According to Wink, First Albany determined that its position with MTI as a shareholder was sufficiently large and that “it would like to see other purchasers for the shares.” (Wink Oct. 16 Tr. at 65-66; *see also* Goldberg Dec. 4 Tr. at 190).

Wink testified that it was First Albany’s practice not to contact prospective purchasers until the closing was imminent, particularly in light of early offers for the MTI Shares that had been unsuccessful. (Wink Oct. 16 Tr. at 71, 128). It was his testimony that to his knowledge, there had been no contact with any purchasers until they knew that the sale was to take place. (*Id.*). Both Goldberg and McNamee confirmed that there had been no contact with prospective purchasers until the sale had been approved by the Court on July 10, 1997. (Goldberg Dec. 4 Tr. at 195 and McNamee Jan. 7 Tr. at 40). In fact, McNamee testified that he recalled that they had first been contacted a couple of weeks prior to the closing. (McNamee Jan. 7 Tr. at 42-43).

Movants rely in part on representations made to the Court by Craig on July 10, 1997 at the Sale Hearing that “[t]he purchasers consist of private individuals . . .” (Movants’ Exh. 7 at 17) and the earlier letter from First Albany, dated June 11, 1997, indicating that First Albany was accepting LGI’s offer on its own behalf and that of other “Purchasers.” (Movants’ Exh. 15). In addition, the Movants direct the Court to the testimony of Wood and the Memorandum he had prepared for a meeting with McNamee and Goldberg. (Movants’ Exh. 6). He testified that although he had prepared it in late June or early July, he had not printed it out until July 15, 1997, and had not sent it to either Goldberg or McNamee. (Wood Dec. 5 Tr. at 18-19). Instead, he testified that he had brought it with him to the meeting. (Wood Dec. 5 Tr. at 30). When questioned about where he had gotten the names on the “Contact List” attached to the

Memorandum, Wood testified that he had started with a list of the individuals that had purchased shares of MTI stock in the initial private placement in 1996 (Wood Dec. 5 Tr. at 22, 23) and he had later expanded the list after discussions with McNamee and Goldberg. (*Id.* at 24). However, at his deposition he stated that in apparently formulating the contact list he had included the names of not only the previous purchasers but also the previous directors, as well as some additional people as he had been directed. (Wood Dec. 5 Tr. at 26). At the same time, he stated that they had not decided at the time of the meeting in July who were going to purchase the MTI Shares. (Wood Dec. 5 Tr. at 27).

On the basis of Wood's testimony, as well as the representations made to the Court by Craig at the Sale Hearing and the earlier letter from First Albany, dated June 11, 1997, Movants contend that they have established that the identities of the purchasers, including McNamee and Goldberg, and the fact that they were insiders, were known on July 10, 1997 and should have been revealed to the Movants, as well as the Court, for purposes of considering whether the \$2.25 stock price was fair and reasonable.

The Court concludes that the Movants have not met their burden by clear and convincing evidence as regards the lack of disclosure of the identities of the purchasers of the MTI Shares. To begin with, there appears to be no dispute that those negotiating for the sale of the shares on behalf of Movants, none of whom testified at the Hearing, approached First Albany knowing it was an insider of MTI, beginning in 1996. The history of events leading up to the ultimate sale of the MTI Shares makes it clear that First Albany's efforts were directed at removing control of MTI from Albert Lawrence in order to provide MTI with a new direction. It is clear that those negotiating the sale on behalf of the Movants were well aware of First Albany's insider status and

certainly knew that the initial private placement for the shares of MTI had gone to various insiders. There was no reason to think that the 1997 transfers of shares would be any different. According to the record, notice was given to over 500 individuals/entities of the availability of the over 800,000 shares and there were no other bidders. This Court finds the testimony that the identities of the purchasers were not finalized until shortly before the closing on September 26, 1997 quite credible and done without fraudulent intent. Until the SPA had been finalized on July 25, 1997, and the Sale Order signed on September 10, 1997, the possibility for the sale to fall through existed, particularly given the earlier efforts to purchase the same shares. Just the day before the closing, the prospective purchasers were given the opportunity to rescind the purchase based on the restrictive nature of the shares. The parties knew at least First Albany, an insider, was going to be a purchaser and the fact that other insiders were identified on September 26, 1997 as purchasers should not have come as a surprise to anyone. Accordingly, the Court concludes that the identity of the purchasers as insiders does not constitute withheld information sufficient, under a standard of clear and convincing evidence, to consider whether the Respondents had committed fraud in connection with the MTI Shares Sale.

#### DOE Award

The Movants take the position that the Respondents should have revealed that MTI had submitted a proposal in response to the PRDA in March 1997 and should have revealed the notification received on June 16, 1997, concerning MTI's selection by the DOE of an award. (Movants' Exhibit 22 and Respondents Exh. 69). The Movants point out that MTI was a fairly small company and the possibility of \$15 million in funding should have been highly significant to it. Movants place great emphasis on McNamee's letter to Senator D'Amato dated July 9, 1997

(Movants Exh. 37), in which he described the award as the “largest award the Department of Energy has made under this program, \$15 million over 30 months.” Despite that description, Movants allege fraud on the part of McNamee and point out that the filing of the proposal was not included in the 8-K submitted by MTI on or about May 29, 1997 (Movants’ Exh. 174). In addition, the Movants note that its receipt was not mentioned in the “Secondary Offering of Mechanical Technology Incorporated Common Stock Shares,” dated July 30, 1997. (Movants Exh. 32). Movants contend that the information was withheld from those negotiating the price of the stock, as well as the Court, with the intent to keep the price of the MTI Shares down artificially in order to assert that \$2.25 was fair and reasonable.

Respondents emphasized that while MTI’s proposal in response to the PRDA received favorable approval by the DOE, that “approval” had to be placed in perspective. To begin with, the contract with the DOE was allegedly not signed until October 1997 (Dr. Ernst Oct. 17 Tr. at 159) and, at that time, any funding or reimbursement of expenses on a cost-sharing basis was to be made to Plug Power, not MTI. It was explained that the notice by the DOE in June 1997 was only the first of a number of steps. Respondents point out that an actual contract was “dependent upon satisfactory completion of negotiations, pre-award clearances and availability of funds.” Romm and McNamee, as well as Ernst, all testified that the actual award would not come until negotiations had been completed and then monies would only be available if approved ultimately by Congress (Ernst. Oct. 17 Tr. at 150, 158; McNamee Dec. 30 Tr. at 174-175; Romm Jan. 7 Tr. at 146-147). It was with the latter in mind that McNamee agreed to write the letter to Senator D’Amato in the hopes of there being funding for the award.

In response to questioning by Movants’ counsel, Wood admitted that there had been no

mention of the DOE award among the suggested talking points in the “Secondary Offering of Mechanical Technology Incorporated Common Stock Shares,” (Wood Dec. 5 Tr. at 45). He explained that in his view it was an award without money, and that it would not have been appropriate to discuss an unfunded award. (Wood Dec. 5 Tr. at 49). “[T]he whole point of this was not to talk about cool things that might happen. It was to talk about what we had done.” (Wood Dec. 5 Tr. at 50). McNamee too indicated that he had not felt it appropriate to mention the award from the DOE since the contract with the DOE had not been signed at the time and it also no longer belonged to MTI, but to Plug Power. (McNamee Jan. 7 Tr. at 44-45). McNamee stated, “I think the most important thing I said to people was that this transaction will take Lawrence completely out of MTI.” (McNamee Jan. 7 Tr. at 43).

Respondents also point out that between 1995 and 1997 when all these negotiations and discussions were taking place, MTI derived approximately 75% of its revenues from the test and measurement division of the company and 25% of its revenues from the technology division and that the fuel cell technology represented a bit over 5% of the total revenues for the company. (McNamee Dec. 30 Tr. at 96 and Movants’ Exh. 41). McNamee did not appear to dispute that government funding for research and development was essential to MTI’s activities in the field of fuel cell technology. However, he emphasized the fact that often such contracts could represent a drain on a company from a financial perspective, particularly with regards to a cost-sharing contract. He explained that even though it was announced that MTI had won a \$15 million award, in actuality that \$15 million was shared with A.D. Little with approximately \$8 million allocated to MTI and \$7 million to A.D. Little. McNamee explained that under a cost-sharing contract if MTI spent \$8 million on the project, it could expect to receive reimbursement from the DOE of

between \$4 and \$6 million since MTI was responsible for 25% of the expenses and could expect reimbursement of approximately 75% from the DOE. (McNamee Jan. 7. Tr. at 12). Thus, the actual cost to MTI/Plug Power was upwards of \$2 million. McNamee testified that at the time that the proposal had been submitted to the DOE in March 1997, the most critical issue for MTI in connection with its fuel cell technology division was to enter into a partnership or joint venture with a company that was willing to make a substantial investment; otherwise, it [the fuel cell technology division] could “put the company out of business.” (McNamee Dec. 29 Tr. at 101-102, 109). Movants offered no testimony to support their contention that the mere submission of the proposal to the DOE was of any material significance to MTI warranting a press release or mention to any of the individuals negotiating the price of the MTI Shares. In addition, the Movants have offered no testimony to contradict that of McNamee, Ernst, Romm and Wood that even the notification of an award by the DOE in June 1997 was not an “event” of any significance for the company, other than providing the possibility that ultimately it would allow Plug Power, with the financial backing of Detroit Edison, to move forward with research in the area of fuel cells and allow for additional personnel to be hired to work on the contract in cooperation with A.D. Little. At the time of the Sale Hearing in July 1997, it appears that negotiations and due diligence on the part of the DOE were underway, but there is no evidence that Congress had approved the funding as evidenced by McNamee’s letter to D’Amato. Indeed, no contract was signed until sometime in October 1997, and that contract was signed not by MTI, but by Plug Power.<sup>18</sup>

Again, the Court must conclude that the Movants have failed to establish by clear and convincing evidence that information concerning the DOE submission and notification of an award

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<sup>18</sup> Admittedly, MTI held a 50% interest in Plug Power.

at the time of the Sale Hearing would have been material to the negotiations on the price of the MTI Shares ultimately represented to the Court as being fair and reasonable. As recognized by Wood, there are lots of unfunded technology awards. The Court is not convinced, based on the exhibits and testimony presented at the Hearing, that MTI's submission of a proposal and its subsequent notification by the DOE of the possibility of funding in June 1997 was in any way significantly material to the negotiations of the price of the stock. Not only was the funding proposed under a cost-sharing contract with the DOE, there is also the fact that it was subject to budgetary approval by Congress and that any rights in the eventual contract belonged not to MTI, but to Plug Power. The Court concludes that the reasons given for not informing the Movants, in connection with the negotiations of the sale price, or the Court were reasonable and certainly not done with any fraudulent intent.

Movants' reliance on the language in McNamee's letter of July 9, 1997, to Senator D'Amato does not persuade the Court otherwise. The letter speaks for itself. It clearly states that "Plug Power just won the largest award the Department of Energy has made under this program, \$15 million over 30 months." McNamee testified that the intent of the letter was to gain Senator D'Amato's additional support for Congressional funding. By referring to the \$15 million, the letter makes it clear that substantial monies needed to be approved in the Senate if the award was going to have any practical substance. However, the testimony from McNamee, as well as from Ernst and Romm, make it clear that even if approved by Congress, MTI was not going to be handed \$15 million. In fact, it was not even going to be handed \$8 million. It was going to have to spend \$8 million and then seek reimbursement for up to 75% of those expenditures. More importantly, it was not going to be MTI receiving those monies, it was Plug Power.

### Status of MTI's Fuel Cell Technology

In its decision of May 22, 2002, the Second Circuit, in remanding the matter for consideration of the Movants' allegations of fraud pursuant to Fed.R.Civ.P. 60(b)(3), expressed particular concerns about the fact that there had been no discussion of MTI's fuel-cell research or operations during the Bankruptcy Court sale proceedings, noting that they had been limited to "representations by the parties (i) that \$2.25/share had been the most recent trading price of MTI stock, and (ii) that no better offer for the [movants'] block of stock had been received, even though the [movants] had widely publicized the fact that they wished to sell the Shares." *Lawrence*, 293 F.3d at 625. It is Movants' position that at the time of the Sale Hearing,

MTI/Plug Power had substantially progressed fuel cell development by virtue of an ability to integrate an Arthur D. Little reformer operating on gasoline with MTI/Plug Power fuel cells to produce electricity - the key underpinning of any development of fuel cell energy efficient transportation systems - and something that had never before occurred . . .

Movants' Post-Trial Memorandum of Law at 2.

Movants emphasize that "[i]t was not the 'demonstration' or the press conference that was the withheld information - it was the technological progress that had occurred by July 1997, namely the ability to integrate the fuel cell with the reformer . . . along with the disclosure of the Award and the insiders purchasing" that was material to the price reaction on October 20-21, 1997. Movants' Post-Trial Reply Memorandum of Law at 3. According to the Movants, "the material issue that drove the stock price was that never before had anyone been identified as having achieved the ability to INTEGRATE a gasoline operated reformer with a fuel cell stack to generate electricity. So BOTH the reformer and the fuel cell were by definition involved in the INTEGRATION. Specifically, the reformer had to output hydrogen and the fuel cell stack had to

be able to accept the hydrogen and generate electricity.” *Id.* at 6. Movants argue that at the time of the Sale Hearing the Respondents were well aware of MTI’s progress with its fuel cell stack, citing to a statement by Allen Bucknam (“Bucknam”) of Plug Power to the effect that the test that occurred at the A.D. Little facility in Cambridge a week and a half prior to the press conference conducted on October 21, 1997, was

something we’ve been working and planning on for a few months. . . . We didn’t want to rush it because it’s too important for that. And we made sure we took the right steps to get it done and, you know, we didn’t want to bring everything over to Arthur D. Little and hook everything up and have it not work. So we put the time and effort into getting it done right. And we’ve proved now that we can get electricity from gasoline and that’s a significant accomplishment. Now we need to scale up, work on more output, work on reducing the weight and the volume of the unit, and we’re making good progress with that.”

(Movants’ Exh. 65).

With respect to the press conference held on October 21, 1997, Bucknam, speaking on behalf of Plug Power, admitted that he was not an engineer and at one point in response to a question from a reporter asking him what size internal combustion engine would be needed in comparison with the 50-watt fuel cell system that they were aiming for “in the very near future,” he indicated that they were “getting out of my scientific expertise.” *Id.*

Movants argue that the state of MTI’s progress in the area of fuel cell technology was known by McNamee based on what they describe as his “close involvement with the key aspects of the fuel cell work,” including his meeting with Dr. Ernst and A.D. Little in Cambridge, Mass., his review of the MTI Board of Directors Presentation on April 16, 1997 about the details of the fuel cell work in February and April 1997 . . . and his meeting and negotiations with Detroit

Edison.<sup>19</sup> Movants' Post-Trial Reply Memorandum of Law at 5. It is the Movants' position that McNamee should have made the information known in connection with the negotiations of the sale price of the MTI Shares and the ultimate representations made by LGI's counsel and First Albany's counsel to the Court at the Sale Hearing. However, Movants presented no direct testimony from any witness with expertise on the question of the state of fuel cell technology in 1997 other than Dr. Ernst, who they sought to examine as a hostile witness,<sup>20</sup> as well as news articles that appeared following the press conference on October 21, 1997 (Movants' Exh. 121, 132, 133, 147). In particular, Movants reference a statement made by Dr. Ernst in response to the question regarding "whether they [MTI's fuel cell stacks] would be able to be integrated with an A.D. Little fuel processor at that time [June 1997]?" (Dr. Ernst Oct. 17 Tr. at 154-155). Dr. Ernst responded that "[o]ur PEM fuel cell technology as a fuel cell stack was in good shape, although it wasn't all the way there, for sure. The fuel processor technology was not as far along as our fuel cell technology. The fuel cell - the fuel process technology, the various components, had been proven, but not in an

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<sup>19</sup> Movants assert that "the evidence is that Respondents knew of the status of the fuel cell work - it was the key to the deal that McNamee personally negotiated with Detroit Edison." Movants' Post-Trial Reply Memorandum at 19, n.14 (emphasis supplied). However, a review of the transcript cited by Movants in making that assertion, specifically McNamee's Dec. 30 Tr. at 12-13, provides no support for Movants' assertion. McNamee responded affirmatively to Movants' counsel's statement, "you engaged in negotiations with Detroit Edison to set up a joint venture which would progress this fuel cell technology of MTI, correct?" (McNamee's Dec. 30 Tr. at 12). The remainder of the testimony at pages 12-13 of the transcript discusses whether the possibility of funding from the DOE was part of the deal. No where in that testimony is there a discussion of the state of fuel cell technology at MTI at the time as being the "key to the deal" with Detroit Edison as Movants state.

<sup>20</sup> At the hearing on October 17, 2008, the Court found that Dr. Ernst was not a necessarily a hostile witness, despite his having been subpoenaed by the Movants. (Oct. 17 Tr. at 119).

integrated way. Our stack was in pretty good shape at that time.” (Dr. Ernst Oct. 17 Tr. at 155). On further questioning concerning whether he had a view as to whether, in the June 1997 time frame, MTI’s fuel cell stack would run in connection with the A.D. Little fuel processor, he replied, “[m]y belief was that our stack would run with the fuel processor if the fuel processor would run.” (*Id.*). Dr. Ernst concluded that the fuel processor would run, given that “tests on the individual components had been performed and they had achieved their desired performance.” (Dr. Ernst Oct. 17 Tr. at 156).

On cross-examination, Dr. Ernst took issue with the importance of the test at A.D. Little’s facility on or about October 10, 1997. He took issue with the labeling of it as a “breakthrough of MTI’s technology.” (Ernst Oct. 17 Tr. at 164-165). “You take what you have on the shelf and put them together and just see if you can get anything to show that they work together. It’s not an integrated system. It’s just a laboratory version of things that are connected together . . . .” (*Id.*). This view was also expressed in an article appearing in the *Energy Daily* on October 23, 1997, captioned “More Work Needed to Make Fuel Cell ‘Breakthrough’ A Reality.” (Respondents Exh. 100).

Dr. Romm testified that the fuel cell furnished by MTI in connection with the demonstration at A.D. Little’s facility “represented a very old piece of technology.” (Dr. Romm Jan. 7 Tr. at 151). He testified that the use of the word “breakthrough” at the press conference held on October 21, 1997, “was unfortunate . . . . this was an advance principally, almost exclusively on the A.D. Little side in that they had made their fuel cell processors smaller, small enough to fit on board a car. . . . The advance was on the fuel reformer side. It’s quite clear that there was no advance announced on the fuel cell side.” (Dr. Romm Jan. 7 Tr. at 159). In fact, he opined that the fuel cell could have

been provided by any number of companies. (Dr. Romm Jan. Tr. at 151).

In addition, Dr. Romm was asked to confirm allegations made by the Movants in their amended complaint, dated December 17, 1988, which serves as the basis for the Motion herein. Specifically, he was asked to comment on the statement found at ¶ 169 of the amended complaint that there was inside information that had not been provided to the Movants indicating that fuel cell technology at MTI had gone beyond the research and development stage to a workable gasoline powered fuel economy stage. He responded that it was still in the “basic research phase” and “there was no advancement” at the relevant time in June or July 1997. (Dr. Romm’s Jan. 7 Tr. at 163).

On cross-examination, Dr. Romm acknowledged that the test “showed that the A.D. Little fuel processor could provide reformer that would run a small fuel cell stack by MTI. It did show that, yes.” (Dr. Romm Jan. 7 Tr. at 180-181). However, he did not know whether it was known for months. “I think the big issue that might have been unknown was whether, not whether you could build a fuel processor that could reformat, that could run a fuel cell, but whether you could build one that was small enough to fit on board in an engine block of a car . . . .” (Dr. Romm Jan. 7 Tr. at 181).

The reality of the state of fuel cell technology with respect to the automotive industry in October 1997 was a description found in the *Energy Daily* October 23<sup>rd</sup> article, in which the author describes the press conference, stating “[j]ust hours before the hastily arranged press conference convened, DOE officials called Plug Power and asked company officials to bring the fuel cell unit to Washington. Measuring approximately 10 inches by 10 inches by 8 inches, the lab model weighs 140 pounds - and it took two men to haul [it] onto the stage for [Energy Secretary Federico] Pena to showcase.” (Respondents Exh. 100). The extent to which the statement is accurate is not

for the Court to determine. However, it does lend credence to the testimony of both Dr. Ernst and Dr. Romm that the description of it being a “breakthrough,” particularly for A.D. Little, was nothing more than “political hype.”

The Court must again conclude that there was no reason for McNamee or any of the others negotiating the price of the MTI Shares to reveal information on the progress of fuel cell technology by MTI. Fuel cell technology was only a small division of MTI at the time, generating less than 5% of its revenues. In addition, the testimony indicates that further research on fuel cell technology and development was going to take an investment of capital if the research was to continue. This was quite evident from the discussions with Detroit Edison that began in March 1997. Ultimately, MTI divested itself of its technology and patents, as well as its research contracts, including any award that eventually was made by the DOE following negotiations and cost sharing arrangements, in forming Plug Power in June 1997. Notice of the execution of a Letter of Intent by MTI and EDC was made publicly known when it filed a Form 8-K with the SEC on or about May 29, 1997. Thus, at the time of the Sale Motion dated June 23, 1997, and of the Sale Hearing on July 10, 1997, the fuel technology division of MTI, as well as any funding from the DOE that might materialize following negotiations, no longer belonged to MTI.

#### Additional Discussion

The Court has concluded that none of the information allegedly withheld constituted a fraud on either the Court or the Movants in connection with the sale of the MTI Shares. “[A]n insider is not required to “confer upon outside investors the benefit of his superior financial or other expert analysis by disclosing his educated guesses or predictions.’ . . . In short, the law mandates disclosure only of existing material facts. It does not require an insider to volunteer any economic

forecast.”” *Harkavy v. Apparel Indus., Inc.*, 571 F.2d 737, 741 (2d Cir. 1978) (citation omitted). At the time of the Share Sale, the individuals negotiating the price knew that the shares were being offered to insiders; the DOE “award” was simply an offer to negotiate and was dependent on certain due diligence, as well as approval of the funding by Congress; and the progress in fuel cell technology was ongoing and the ultimate demonstration on October 10, 1997, was not a true breakthrough for the automotive industry and other entities involved with similar research efforts. In addition, at the time of the Sale Hearing it belonged to Plug Power. Thus, there was nothing to disclose to Court or to those negotiating the price.

Nonetheless, the Court does believe, given the lengthy procedural circumstances that have existed for almost twelve years since the sale of the MTI Shares was approved, it is appropriate for it to address Allen’s testimony, as well as that of Malernee’s, and the issue of materiality in the event that on subsequent appeal it is determined that one or more of those items of information should have been disclosed in connection with the negotiations and ultimately the sale of the MTI Shares is found to be material. In this regard, the Court observes that the arguments and the basis for Movants’ allegations concerning the fairness of the sales price have become somewhat of a moving target since the issue of fraud in connection with the Sale Hearing was first addressed by the Second Circuit . Initially, the concerns raised by the Movants involved the ADL demonstration on October 10, 1997. That argument evolved into the suggestion that the allegedly withheld information was more than the demonstration, it was what it represented, namely, the state of fuel cell technology at MTI at the time of the MTI Share Sale. There was also the assertion made to the Second Circuit that at the time of the Sale Hearing, the Respondents, in particular, McNamee, knew that the ultimate purchasers would be insiders. This was the focus of Allen’s 2003 Report.

Subsequent to that report, she testified that she was then asked to include consideration of the award announcement of the DOE in June 1997, the amount of which was disclosed on October 21, 1997. Accordingly, since she made it clear that she had not segregated any of the three items of information, it would appear, based on her testimony, that her finding of materiality is an “all or none” process. How that will play out should the Court’s earlier conclusions as regards any one of those items be reversed is not for this Court to decide.

“Material facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company’s securities. \* \* \* whether facts are material . . . when the facts relate to a particular event and are undisclosed by those persons who are knowledgeable thereof will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.” *Harkavy*, 571 F.2d at 741.

In this case, Allen made it clear that she was not asked to determine whether the information had been withheld from the Movants and/or the Court. She was simply asked to determine “whether this additional information would have made a difference to the Court or the buyers and the sellers at the time” in connection with the negotiation of the sale price and the representation to the Court that the price of \$2.25 per share was reasonable. To this end, she conducted an event study and determined that the price rise on October 21<sup>st</sup> was caused by the release of information about the \$15 million DOE award and the technological progress that MTI had made. In addition, she opined that the fact that the ultimate purchasers were insiders of MTI, if known in July 1997 would have justified a higher price for the shares. In connection with her analysis, she admitted that she had not

known that the MTI Shares were restricted but she testified that she did not believe that would alter her conclusions. In addition, there was no testimony by her about the fact that the shares were being sold in a block of 820,909. Her testimony, and the event study she conducted, focused for the most part on the price and volume of the MTI shares sold on October 20, 1997 and October 21, 1997. On October 20, 1997, the volume of shares traded was 23,100 with a closing price of \$5.75 per share. (Movants' Exh. 52). On October 21, 1997, the volume of shares traded was 223,100 with a closing price of \$6.375. (*Id.*). She also emphasized that her conclusions were based not only on the event study but also on her review of various documents, including news releases, published financial disclosures of MTI, and the pleadings and deposition testimony in the case.

Malерnee, in his discussion of Allen's expert reports and analysis, argues that it was improper for her to have relied on an event study without first determining whether the MTI shares were traded efficiently.<sup>21</sup> He also argues that it was improper for her to have included both October

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<sup>21</sup> In submitting their Post-Trial Memorandum of Law, dated January 30, 2009, Movants attached as "Exhibit 1" two declarations of Malерnee filed apparently in *Bovee v. Coopers & Lybrand*, 216 F.R.D. 586 (S.D.Ohio 2003). Respondents, in a letter dated February 4, 2009, object to its consideration by the Court, arguing that the "Movants have fundamentally misrepresented what the Declarations say . . . ." Movants responded in a letter, dated February 5, 2009, that they were simply asking the Court to take judicial notice that Malерnee had filed a sworn document in *Bovee* in which "he performed an event study in connection with a stock that he claimed was not trading efficiently." Movants submitted Malерnee's declaration because of what they contend was Malерnee's failure at the Hearing (Jan. 8 Tr. at 148-149) to answer whether he had ever performed an event study on an inefficiently traded stock. After a review of *Bovee*, the Court must agree with Respondents that in *Bovee* Malерnee did not perform an event study for the purpose of determining materiality of information on the price of stock at issue. Instead, as the court in *Bovee* pointed out, "he performed an "event study" in which he examined the price of MAW stock to determine if it was influenced by disclosures made by MAW and the release of other information on the public." *Id.* at 605. Relying on the event study, as well as certain other factors, Malерnee concluded that the stock of MAW did not trade efficiently. *Id.* Thus, Movants, in submitting the declarations, have failed to rebut Malерnee's position that you cannot determine materiality using an event study without first finding that the stock trades efficiently.

20 and 21<sup>st</sup> in her analysis based on his finding that she had not established that there was any leakage. In addition, he contends that any analysis of the impact of any of the information forthcoming on October 20's and on October 21's MTI's stock price cannot be applied retroactively to the July 10, 1997 Sale Hearing.

### *Event Study*

In a prior Letter Decision and Order, signed November 18, 2008 ("November Letter Decision") (Dkt. No. 1130), this Court addressed the use of an event study<sup>22</sup> by Allen in connection with her analysis of the materiality of the allegedly withheld information. As noted above, it was the Respondents' contention that a stock must trade efficiently if an event study is to be used.

As noted in its November Letter Decision, a party asserting fraud in connection with the sale or purchase of securities must establish the element of reliance. In connection with class action litigation, plaintiffs are able to rely on a presumption that the market price of a security reflects its value in the case of a security/stock that trades efficiently in the market. *Id.* at 5. However, there is also the assertion that the use of event studies may also be employed "to argue that . . . an alleged misrepresentation was or was not material." William O. Fisher, *Does the Efficient Market Theory*

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<sup>22</sup> "An event study is a statistical regression analysis that examines the effect of an event on a dependent variable, such as a corporation's stock price. This approach assumes that the price and value of the security move together except during days when disclosures of company-specific information influence the price of the stock. The analyst then looks at the days when the stock moves differently than anticipated solely based upon market and industry factors-so-called days of "abnormal returns." The analyst then determines whether those abnormal returns are due to fraud or non-fraud related factors.... [E]vent study methodology has been used by financial economists as a tool to measure the effect on market prices from all types of new information relevant to a company's equity valuation." *In re Enron Corp. Securities*, 529 F.Supp2d 644, 720 (S.D.Tex. 2006), *citing* Jay W. Eisenhoffer, Geoffrey C. Jarvis, and James R. Banko, *Securities Fraud, Stock Price Valuation, and Loss Causation: Toward A Corporate Finance-Based Theory of Loss Causation*, 59 BUS. LAW. 1419, 1425-26 (August 2004).

*Help Us Do Justice in a Time of Madness?* 54 EMORY L.J. 843, 871 (2005) (emphasis supplied). Another author postulates that the calculations, at least with respect to damage analysis, made in connection with an event study “should be based not on whether the market was efficient or inefficient, but rather on whether the fraud was sufficiently material to have a statistically significant impact on the market price, given the degree of market efficiency.” Jon Koslow, *Estimating Aggregate Damages in Class-Action Litigation under Rule 10b-5 for Purposes of Settlement*, 59 FORDHAM L. REV. 811, 816 (1991).

The Court must acknowledge a limited expertise with respect to the appropriate use of an event study, which is based on its research and the divergent views expressed by the two experts, Allen and Malernee. In this case, Movants are not seeking to rely on any presumption of reliance in the context of a class action. The Court believes the appropriate approach is to consider Allen’s analysis and conclusion that the information was material and then give consideration to the degree of market efficiency that MTI’s shares displayed, as argued by Malernee, for purposes of the weight to be given to Allen’s testimony.

For example, Allen concluded that the identification of the purchasers of the MTI Shares was material to the price of the stock on October 20, 1997. However, the identify of the purchasers was revealed on September 26, 1997, at the closing and only 4, 000 shares traded on that day and only 100 the day before, at the same closing price of \$3.375. On September 29, 1997, only 500 shares were traded and the price closed at \$3.00 per share. (Movants’ Exh. 52). Furthermore, on October 10, 1997, the date that two of the insider purchasers filed their Form 4s with the SEC, there was no trading whatsoever of MTI stock. On October 13, 1997, the next trading date, there were 5,800 shares traded at a closing price of \$4.125, the same closing price as on October 9, 1997. Under her

analysis, there should have been some increased volume and significant price change on one of those two dates if the identity of the purchasers as insiders was material. Certainly, this is cause to question the amount of weight to be given her conclusion, at least with regards to the disclosure of the purchasers as insiders of MTI.

There is also the fact that Allen found it necessary to examine the activity of the MTI stock on not only October 21, 1997, when the announcements and news articles appeared concerning the demonstration on October 10, 1997, but also on October 20, 1997, in order to find that the disclosure had had a significant effect on the price, as well as the volume, of trading of the MTI stock. This was based on a theory of leakage, which she supported with reference to (1) price change; (2) volume of shares; (3) DOE's October 21<sup>st</sup> press release that had been marked as embargoed (Movants' Exh. 61); (4) New York Times article that appeared on October 21<sup>st</sup> but was datelined October 20<sup>th</sup> and loaded into the system at 4:00 a.m. on the 21<sup>st</sup> (Movants' Exh. 45 and 132); (5) other news articles that appeared after the 21<sup>st</sup> that had discussed the price movement that began on October 20<sup>th</sup> as being due to the DOE announcement on the 21<sup>st</sup>. (Dec. 4 Tr. at 63).

The change in price on October 21, 1997, was not statistically significant under her analysis, despite the heavy volume in trading. Thus, in order for it to be statistically significant, she had to include the change in the price of the MTI stock on October 20, 1997. It would seem that the appropriate approach was to first prove that there had been leakage and then examine the price of the stock on the two days. The fact that the DOE press release was marked as "embargoed" and that in certain other instances articles had appeared prematurely despite being labeled as "embargoed" is also not particularly strong evidence of leakage. Nor does the fact that the New York times article (Movants' Exhibit 45) was datelined October 20, 1997, lend much credence to her leakage theory,

particularly since it was not loaded into the system until October 21, 1997, and printed that day. That other news articles make reference to price movement that “began” October 20, 1997, simply makes the article more interesting for the reader to consider. It does not mean that there was leakage.

The Court also has concerns about the weight to be given Allen’s finding of materiality based on having calculated that the movement in price over the two day period was statistically significant at the 99 percentile level. Allen acknowledged that even at the lower 95% level and based on the 200 trading days prior to October 21, 1997, one would expect there to be 10 days (5% of 200) on which the price movement should be significant. (Dec. 4 Tr. at 16). However, according to the Respondents, there were actually 52 days, which she did not dispute. She also acknowledged that there did not need be any news release to the market for there to be a significant price movement for the stock. (Dec. 4 Tr. at 19). This comports with Malernee’s view, in arguing that the MTI stock did not trade efficiently, that the price of MTI stock regularly failed to react to information provided to the market place. (Jan. 8 Tr. at 70).

Finally, there is Allen’s testimony that, based on what she viewed as a lack of change in MTI’s revenues between July and October, the announcement of the award of \$15 million from the DOE would have been just as material in July as she found it to be in October. (Dec. 3 Tr. at 135-136). The Court is uncomfortable with that conclusion. To begin with, as of June 27, 1997, the fuel cell technology belonged to Plug Power, not MTI. Any interest MTI might have in Plug Power was as a holder of a 50% interest in the company. Also, the DOE award was only in the negotiation stage in July 1997. As evidenced by McNamee’s letter to Senator D’Amato, there would have been no funding unless it received Congressional approval. In addition, ultimately the recipient, whether

MTI or, ultimately, Plug Power, was allocated only \$8 million of the \$15 million and under a cost sharing contract actually would have been reimbursed by the DOE for up to 75% of its expenditures. Thus, it was required to spend \$8 million in order to be reimbursed \$6 million. Accordingly, under the ultimate contract with the DOE, MTI/Plug Power was obligating itself to spending approximately \$2 million of its own monies in order to participate in the program with A.D. Little under the contract. As McNamee testified, the contract actually represented a drain on MTI's revenues as attempts were being made to move forward with its other divisions. According to McNamee, that was one reason that the joint venture agreement with Detroit Edison and the infusion of capital by Detroit Edison was so critical.

For the reasons discussed above, the Court concludes that Allen has failed to establish that the allegedly withheld information was material to the price movement on October 21, 1998, and would not have been material to the price of \$2.25 represented as a fair and reasonable price at the Sale Hearing.

Based on the foregoing, it is hereby

ORDERED that the Motion pursuant to Fed.R.Civ.P. 60(b)(3) is denied; and it is further

ORDERED that a hearing on the issue of the relief sought by the Movants, whether in the form of rescission of the Sale Order or an award of damages, is rendered moot.

Dated at Utica, New York  
this 27<sup>th</sup> day of February 2009

/s/ Hon. Stephen D. Gerling  
STEPHEN D. GERLING  
U.S. Bankruptcy Judge

