UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

BARBARA C. LAWRENCE	CASE NO. 97-11258
Debtor	Chapter 11

APPEARANCES:

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

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

The Court has under consideration the motion filed on November 5, 2007, on behalf of Barbara C. Lawrence, Lawrence Group, Inc., 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. ("Debtors"), Global Insurance Company ("Global") and Senate Insurance Company ("Senate") (collectively referred to as the "Movants"[1]), pursuant to Rule 37 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated by Rule 7037 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") and made applicable to contested matters pursuant to Fed.R.Bank.P. 9014. The motion seeks sanctions against First Albany Companies, Inc. ("First Albany"), Mechanical Technology, Inc. ("MTI"), George C. McNamee ("McNamee"), and Alan P. Goldberg ("Goldberg") (collectively the "Respondents") and/or compelling the Respondents[2] to produce what the Movants maintain are responsive documents withheld from production. An amended motion was filed on November 6, 2007, by the Movants. On November 21, 2007, opposition was filed on behalf of the Respondents. On December 3, 2007, the Movants filed a reply to said opposition. The motion was submitted for decision on December 3, 2007, without oral argument.

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[1] The motion is filed by John W. Bailey, Esq. ("Bailey"), who identifies himself as "Attorneys for Movants." In its prior Memorandum-Decision, Findings of Fact, Conclusions of Law and Order, signed July 10, 2006 ("July 2006 Decision"), the Court cautioned Bailey, as Debtors' counsel, about dual representation of both the Debtors and the Texas Commissioner of Insurance as Receiver of United Republic Insurance Company.

[2] The "Respondents" identified in the motion presently under consideration are only four of several individuals/entities identified by the Movants in connection with the contested matter in this case.

JURISDICTIONAL STATEMENT

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

FACTS

The Court will assume familiarity with its prior rulings in this case, specifically, the Court's Memorandum-Decision, Findings of Fact, Conclusions of Law and Order, dated September 19, 2003 ("September 2003 Decision"), as well as the July 2006 Decision and a Decision issued on March 5, 2007 ("March 2007 Decision"). In addition, the Court will assume familiarity with the facts as set forth by the United States Court of Appeals for the Second Circuit in *Lawrence v. Wink (In re Lawrence)*, 293 F.3d 615 (2d Cir. 2002). Of relevance to the motion now before the Court, and by way of some background information, it notes the following:

On June 23, 1997, the Debtors filed a motion pursuant to § 363 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Code"), in effect at that time,[3] seeking Court approval of the sale of 820,909 shares of stock in MTI for the price of $2.25 per share. On August 5, 1997, United States Bankruptcy Judge John J. Connelly signed an Order approving the sale of the stock under the terms of a Stock Purchase Agreement, executed on July 25, 1997. On September 9, 1998, the Debtors commenced seven adversary proceedings against the Respondents, alleging that they had

[3] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), was signed into law on April 20, 2005, and made applicable to cases filed after October 16, 2005.

fraudulently concealed certain information that should have been disclosed during the sale negotiations. The Respondents filed a motion seeking dismissal of the adversary proceedings, which was denied by Judge Connelly on April 1, 1999. On appeal by the Movants,[4] United States District Court Judge David Hurd reversed Judge Connelly's ruling and dismissed the adversary proceedings. The Second Circuit Court of Appeals, on appeal by the Movants, found that Judge Hurd had abused his discretion by declining to[5] recharacterize the claims set forth in the adversary proceedings as motions pursuant to Fed.R.Civ.P. 60(b). Ultimately, the Second Circuit vacated the judgment of the District Court and remanded the matter back to it for consideration of the Movants' allegations of fraud pursuant to Fed.R.Civ.P. 60(b)(3). By decision, dated September 20, 2002, Judge Hurd remanded the matter back to this Court and directed that the seven adversary proceedings, which had previously been dismissed by him, be construed as Rule 60(b)(3) motions for relief from the Code § 363 sale order. Judge Hurd's decision also indicated that the Rule 60(b)(3) motions be deemed filed as of September 9, 1998, and that Global and Senate be allowed to participate in the Rule 60(b)(3) proceedings.

In response to Judge Hurd's decision of September 20, 2002, remanding the matter to this Court, on October 18, 2002, the Movants filed a motion pursuant to Fed.R.Civ.P. 60(b)(3) and

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[4] A Settlement Agreement, dated October 1998, approved the assignment of what was identified as the "First Albany Claims" to Global or its parent corporation, United Republic Insurance Company. The Settlement Agreement was approved by the Court on February 22, 1999. *See* July 2006 Decision at 15-17. Thus, it was that Global and Senate became involved in the proceedings.

[5] In his decision of September 20, 2002, Judge Hurd again dismissed the adversary proceedings and provided that the complaints be filed as motions pursuant to Fed.R.Civ.P. 60(b)(3). As noted above, Movants filed a separate motion pursuant to Fed.R.Civ.P. 60(b)(3) on October 18, 2002.

requested that they be allowed discovery in connection with that motion. After hearing oral argument and allowing the parties an opportunity to file memoranda of law, the Court issued its September 2003 Decision in which it indicated that "[a] critical issue concerns what information any of the Respondents who were 'insiders' of MTI had that was not available to Movants and which they failed to disclose and whether any of that information was material to the price and subsequent increase in the trading of the stock, such that it should have been disclosed to the Movants before the Stock Purchase Agreement was executed [on July 25, 1997]." *See* September 2003 Decision at 16.

In issuing the September 2003 Decision, the Court made reference to an exhibit attached to the Movants' Supplemental Memorandum, filed April 25, 2003, entitled "General Areas of Inquiry Upon Discovery." *See* Exhibit E, attached to Declaration of Kylie Davidson, Esq., dated May 25, 2005 (Dkt. No. 975). The Court indicated that it would "allow discovery in connection with the second 'General Inquiry,' which focuses on how First Albany formed an opinion about the Stock up until the date that the Stock Purchase Agreement was executed." September 2003 Decision at 17.

The second "General Inquiry" included questions regarding whether there was a team in charge of assessing the value of MTI and who was involved in making the decision to invest in MTI. Specifically, there was a question regarding whether some entity had acted as a placement agent and organized the group of potential investors. Another question concerned whether there was a separate sales team in charge of contacting potential investors. In addition, there were questions concerning the role of each of the Respondents and who initiated the transaction and approved it. There was also a question about how First Albany had picked the investors to be

contacted.

The Court also allowed inquiry concerning the knowledge that McNamee had prior to the execution of the Stock Purchase Agreement in his role as Chairman of the Board of MTI and First Albany, regarding the development of the fuel cell technology and the tests that were being performed. Proposed questions included, "How did he acquire this knowledge? What information was he provided and by whom? When was he provided the information? Who kept him informed of developments in this area?"

The Court declined to allow inquiry about "[h]ow did sensitive information about the progress of the fuel cell project leak from the Plug Power group" ("First Inquiry") or about "[h]ow the purchasers made the decision to purchase," ("Third Inquiry"). The First Inquiry included requests for the identity of the engineers and scientists involved in the project or other employees or consultants. It also requested documentation concerning the flow of information, e.g. who reported to whom. Another area of that particular inquiry involved the process by which Plug Power reported back to MTI and Detroit Edison Energy and requested copies of correspondence or minutes of meetings relating to Plug Power or the fuel cell tests. Finally, there was a request for confidentiality policies and agreements in place for the engineers and scientists.

The Third Inquiry, which the Court also declined to allow, included questions about what information potential investors had about the company and who contacted them, as well as the identities of third parties, agents, consultants who took part in the decision whether or not to purchase. There was also a request for the production of documents relating to the creation of trusts and any investment policies and guidelines in existence. In addition, there was a question concerning what the investors knew about the research and development of the fuel cell project

and a request for transcripts of board meetings and a list of attendees. Finally, there was also a question concerning the proportion of each purchaser's investments in MTI stock before and after the purchase.

The main focus of inquiry obviously was to be on what was known by the parties at the time they negotiated the purchase price for the stock. The Court specifically limited the Movants' inquiry to what non-public information the Respondents, involved in the negotiation process for the sale of the stock at $2.25 per share, had that should have been disclosed to Movants during the process. In its July 2006 Decision, the Court addressed concerns about information MTI might have had in connection with the development of the fuel-cell technology. In the July 2006 Decision, the Court limited Movants' discovery to documents that MTI provided to First Albany and/or the individual respondents prior to July 25, 1997. By letter, dated October 4, 2006, the Court clarified that its July 2006 Decision did not direct the production of all documents in the possession of MTI prior to July 25, 1997, relating to the fuel-cell technology.

ARGUMENTS

Arguments of the Movants

The Movants contend that the Court should grant their Motion to Compel Respondents to Comply with the Discovery Order or preclude Respondents from Offering Evidence. The Movants maintain that they are entitled to responsive documents held by Plug Power. Movants argue that it is improper for Respondents not to produce relevant Plug Power documents, which Movants assert were in the possession, custody or control of MTI when this proceeding was

commenced in 1998. They point out that at the time it was formed in June 1997, Plug Power was a 50%-owned subsidiary of MTI.[6] They argue that Plug Power was "in all practicalities, a subsidiary of MTI whose activities were critical to MTI's value because MTI reported its proportionate share of the gains/losses of Plug Power in its financial statements and Plug Power held all of 333MTI's fuel cell assets, including the assignment of the Department of Energy award." Movants' Memorandum of Law, attached to Movants' Motion ("Movants' Memorandum")(Dkt. No. 1035) at 5. According to the Movants, "[i]t is MTI's control of and access to the Plug Power documents that is in issue and the apparent fact that MTI has improperly never sought nor preserved those documents." *See* Movants' Reply Memorandum, filed December 3, 2007 ("Movants' Reply Memorandum") (Dkt. No. 1041) at 3.

Movants contend that because MTI held a 50% ownership interest in Plug Power, "it had the ability to 'secure materials from the non-party corporation to meet its own business needs.'" *Id.* at 8, quoting Charles Alan Wright, Arthur R. Miller, Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2210 (2d ed. 2004). Movants take the position that MTI should be deemed to have had control over those documents because of its 50% interest in Plug Power, and that as the parent corporation, the Court may order MTI to produce documents of its subsidiary. Furthermore, they argue that MTI had a duty to retain documents pertinent to pending litigation and should not have permitted any documents to leave its control. The Movants contend that information discoverable from MTI for the one month period between June 27[7] - July 25, 1997

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[6] Apparently, McNamee also served as Chairman of Plug Power's Board of Directors when initially formed.

[7] According to the Movants, "the fuel cell portion of MTI was placed in Plug Power by MTI on June 27, 1997," based on a statement in MTI 10-Q for the Quarter ending in June 27,

"necessarily should include Plug Power information." See Movants' Memorandum at 6.

Second, the Movants argue that Respondents should be compelled to produce documents utilized in prior mediation in a securities fraud action commenced in the U.S. District Court for the Northern District of New York on September 9, 1998. By decision dated April 23, 2001. Judge Hurd dismissed the complaint in that matter based on *res judicata. See Lawrence Group, Inc. v. Barton*, 98-CV-1436 (N.D.N.Y. April 23, 2001). Movants contend that First Albany and MTI have no basis for not producing documents which were previously relied on in the mediation discussions. Movants describe the documents as containing material inside information pertaining to MTI's fuel cell work. They contend that "[t]he simple fact that these documents 'may' have been communicated meets the standard for production pursuant to the [July 2006 Order]." *Id.* at 9. For example, the Movants argue that the MTI Letter Agreement from 1996 between Arthur D. Little Laboratories and MTI should be produced, as well as the U.S. Department of Energy solicitation and MTI application. With respect to the Mediation Submission Agreement entered into in 1999, Movants argue that it allowed for the use of

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1997:

> On June 27, 1997, the Company and Edison Development Corp. ("EDC"), a subsidiary of DTE Energy Co.[,] entered into final agreements and closed on the previously announced transaction to form a joint venture to further develop certain of the Company's technology in connection with Proton Exchange Membrane Fuel Cell. In exchange for its contribution of contracts and intellectual property and certain other net assets that had comprised the fuel cell research and development business activity of the Technology Segment . . . , the Company received a 50% interest in the joint venture . . .

See id. at 6, quoting MTI's SEC Form 10-Q.

documents if they were "otherwise discoverable." According to the Movants, the July 2006 Order required production of documents that represented insider information concerning MTI fuel cell technology.

Finally, it is the Movants' position that the Respondents have improperly withheld and redacted documents and have made improper claims of privilege. Specifically, the Movants argue that Respondents have provided only one document from MTI and two redacted minutes of board meetings and no documents from Plug Power. Movants argue that the Respondents had no authority to redact documents such as the MTI Board meeting minutes. They also contend that Goldberg and McNamee do not have a right to redact documents such as the MTI Board package and McNamee's calendar of activities. As to the latter, Movants take the position that only personal entries which are unrelated to McNamee's business should be redacted. Also, they contend that there is no basis for failing to produce the July 1997 offering plan and any other drafts. In addition, they argue that there is no basis for failing to produce the Certificate of Secretary, executed by Stephen Wink. Movants also contend that First Albany has no grounds for asserting privilege when they have failed to produce a privilege log. Finally, Movants contend that the list of purchasers together with any related documents should not have been willfully withheld from production. In summary, it is the Movants' position that the Plug Power documents, mediation documents and other dispositive documents should be ordered to be produced to achieve compliance with the July 2006 Decision. Specifically, they cite to page 12 of the July 2006 Decision which they point out allowed their discovery demands #33 and #36.[8]

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[8] Discovery Demand #33 requests "any and all documentation indicating what information may have caused First Albany Companies to buy shares of MTI." *See* Exhibit B, attached to Attorney Declaration, sworn to on November 5, 2007 ("Bailey Declaration" (Dkt. No.

Citing to Fed.R.Civ.P. 37(b)(2)(A), Movants argue that the Court has the discretion to make a finding of fraud and misrepresentation by Respondents in their dealings with the Court and grant the 60(b)(3) motion. In the alternative, Movants request that the Court preclude Respondents from offering evidence contradicting their knowledge of non-public material information prior to their purchase of the MTI stock pursuant to Fed.R.Civ.P. 37(b)(2)(B-D).

Response by the Respondents

With respect to the Plug Power documents, the Respondents point out that at the time the Court issued its first order in September 2003, MTI owned approximately 9.96% of Plug Power's outstanding shares. Respondents stress the fact that in its September 2003 Decision, the Court indicated that the Movants were only entitled to "very limited discovery concerning the Stock Sale process up until July 25, 1997 when the Stock Purchase Agreement was executed." Respondents point out the Court made it clear that it would not permit discovery about how sensitive information might have leaked from the Plug Power group or how the purchasers made the decision to purchase. Specifically, the Court limited discovery to "how First Albany formed an opinion about the [MTI] Stock up until the date that the Stock Purchase Agreement was executed."

The Court in its July 2006 Decision reaffirmed that "[t]he issue for discovery was a very narrow one, namely, what non-public information the Respondents who negotiated the price possessed prior to July 25, 1997, that should have been disclosed to Movants. The Court

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1035). Discovery Demand #36 requests "any and all documentation, records or memos indicating any knowledge that any member of First Albany Companies may have had regarding the research and development of the fuel cell project." *Id.*

specifically disallowed what Movants are still demanding, namely, "'any and all' correspondence between MTI and Arthur D. Little Laboratories; between MTI and the U.S. Department of Energy; [and] between MTI and Los Alamos National Laboratory." *See* July 2006 Decision at 10. The Respondents emphasize that the Court limited the Movants to copies of documents/correspondence actually provided by MTI to First Albany and/or the individual respondents prior to July 25, 1997, in connection with the development of the fuel cell technology.

Accordingly, the Respondents take the position that the Movants are not entitled to Plug Power documents. They argue that Plug Power is an independent, publicly held company, which has always had separate management from MTI. According to the Respondents, MTI currently owns approximately 2.5% of Plug Power's stock. Respondents indicate that at the most MTI could have asked that Plug Power consent to produce documents, which Respondents indicate MTI offered to do, but that offer was rejected by Movants. *See* Respondents' Memorandum in Opposition . . . at 15 (Dkt. No. 1038).

Respondents also contend that the mediation documents are neither relevant nor within the limited scope of discovery. The mediation occurred in the context of a securities fraud case. The documents were exchanged between the parties and provided to the mediator pursuant to a Mediation Submission Agreement in 1999. Respondents take issue with the Movants' position that the mediation documents "may" have been communicated to the individual Respondents at First Albany that negotiated the price. Respondents point out that McNamee stated under oath

that he was not familiar with either Exhibit Q or R.[9]

Respondents also contend that they have not improperly redacted or withheld documents. They note that the Movants did not object to the production of redacted calendar pages and used them during their depositions. Respondents indicate that they provided the MTI board minutes, redacting non-responsive information. As to the documents relating to the Offering to Purchasers, Respondents point out that it was dated July 25, 1997 and does not fall within the scope of discovery arguably because at that point the price had been determined. Respondents also point out that Movants actually have the Certificate of Secretary, executed by Stephen Wink, which they are now requesting. In addition, the Respondents point out that it was executed in September 1997. The Respondents make the argument that if Movants contend that the Offering to Purchasers and the Certificate of Secretary are relevant to this matter and should have been provided by the Respondents, then the Movants also should have provided copies of both documents to the Respondents in response to their discovery requests.

DISCUSSION

As this Court has noted previously, "'there is no question that the scope of discovery is

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[9] Exhibit Q, attached to Bailey Declaration, is a letter dated November 25, 1997, on the letterhead of the Lawrence Group, Inc. ("LGI"), purportedly written by Albert W. Lawrence, Chairman of LGI, to William C. McLucas ("McLucas"), Director of the Securities and Exchange Commission, in which he requests an investigation of the trading of the MTI stock, which was previously approved by this Court. The letter was copied to a number of individuals, including Albert Kilts, President of Global, one of the Movants herein. *See* sub-Exhibit Q, attached to the Bailey Declaration at Exhibit H. "Exhibit R" appears to be a letter in response from by Brian F. Mumford, Esq., on behalf of First Albany, dated December 23, 1997, and addressed to McLucas. *See* Exhibit R, attached to the Bailey Declaration.

always within the control and discretion of the trial court.'" July 2006 Decision at 7, quoting *In re Wyatt, Inc.*, 168 B.R. 520, 523 (Bankr. D. Conn. 1994). Indeed, Fed.R.Civ.P. 26(b) clearly authorizes a Court to limit the extent of discovery otherwise allowed by the rules.

In its September 2003 Decision, issued over four years ago, the Court agreed to allow the Movants limited discovery, which was not intended to be a "fishing expedition." The issue for discovery was a very narrow one, namely what non-public information was possessed by the Respondents, who negotiated the price of the stock, prior to July 25, 1997, that should have been disclosed to the Movants.

In connection with the motion presently before the Court, the Movants contend that page 12 of the July 2006 Decision Order "was crystal clear in upholding [Movants'] Requests 33 and 36." *See* Movants' Reply Memorandum at 5. However, the extent to which the Court allowed the discovery requested in #33 and #36 must not be considered in a vacuum. The Court made it "crystal clear" on the prior page of the July 2006 Decision that the "Movants [were] entitled to receive copies of those documents/correspondence <u>provided</u> by MTI to First Albany and/or the individual respondents prior to July 25, 1997, in connection with its development of the fuel cell technology." July 2006 Decision at 11. The Court reiterated in its letter of October 4, 2006, to Bailey that the July 2006 Decision "did not direct the production of all documents in the possession of MTI prior to July 25, 1997, relating to the development of fuel-cell technology." The Court in that same letter went on to explain that there was only to be limited discovery. In its March 2007 Decision it again reiterated that it would "no longer tolerate efforts to obtain discovery beyond the parameters it has set. . . . [I]n the context of a Rule 60(b)(3) motion, the Court does not believe it appropriate to allow Movants to continue turning over stones in hopes

that something may turn up . . . ." March 2007 Decision at 10. The "parameters" were set by the Court in its September 2003 Decision and further clarified in its July 2006 Decision at page 11. As it noted with some frustration in its March 2007 Decision, the Movants should be quite familiar with those limitations, yet they continue in their efforts to step beyond the boundaries set by the Court. Having said that, the Court will consider each of the requests by the Movants currently under consideration:

Plug Power Documents

With respect to the Plug Power documents, the Court notes that in its September 2003 Decision, it expressly prohibited the Movants from seeking the production "of all internal documents related to the financial and technical performance of Plug Power, including copies of all internal correspondence or minutes of meetings partly or wholly related to Plug Power or the fuel cell tests." *See* Inquiry 1 of the "General Areas of Inquiry Upon Discovery" (Dkt. No. 907). The Court also indicated in its September 2003 Decision that it would not allow, *inter alia*, the production of "any documentation as to the flow of information" from the engineers and scientists involved in the project, including MTI, Plug Power, Detroit Edison Energy Company. *Id.*

Plug Power is a separate legal entity. The Movants now appear to be seeking the same information/documentation they were previously denied by requesting it from MTI based on their argument that MTI's interest in Plug Power gave it control of and access to that information. In the Court's view, whether the documents were to come directly from Plug Power or indirectly from MTI, the Movants' request in this regard is simply an end run around the Court's prior

refusal to allow them access to those internal documents. Accordingly, the Court will deny Movants' request that MTI/Plug Power be required to produce such documents.

Mediation Documents

With respect to certain documents produced in 1999 in connection with prior mediation, the Movants base their request on the argument that the documents "may" have been communicated to those negotiating the sale price of the stock in 1997. As discussed above, however, the standard for the production of nonpublic information in this case is not to be based on what "may" have existed at the time the price of the stock was negotiated. Rather, the standard for the production of documents is based on what nonpublic information concerning the status of the fuel cell technology those involved in the negotiations actually had at the time of the discussions.

With that standard in mind, the Court is also cognizant that "[m]ediation materials have a special significance in the mediation process which requires heightened protection to preserve the value of the mediation process." *Bradley v. Fontaine Trailer Co., Inc.*, Case No. 3:06CV62, 2007 WL 2028115, at *5 (D. Conn. July 10, 2007). Nevertheless, documents which are otherwise discoverable are not excluded simply because they were provided during the course of mediation. *See* Comment to the 2006 Amendment of Fed.R.Evid. 408, applicable to compromise and offers of compromise in which it is stated that "the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations" and *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1107 (5th Cir. 1981), citing S.Rep.No. 1277, 93rd Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad. News 7051, 7057

(1974).

At issue herein is not the discovery of any settlement agreement negotiated by one of the parties and a third party. In addition, the Court is somewhat at a loss to understand why the Movants are now seeking copies of documents which are already in their possession. The admissibility of such documents is certainly not at issue at this time. The Court sees no reason to compel the production of the documents by the Respondents when they are already in the possession of the Movants and apparently have been for some time. Indeed, some of them were allegedly utilized in conjunction with previous depositions. Accordingly, the Court will not order their production under those circumstances by the Respondents.

However, the Court does take exception to the Respondents' position that the July 30, 2007 offering memorandum, attached to Exhibit H of Bailey's Declaration as sub-Exhibit U, does not fall within the scope of discovery allowed by the Court in that it is dated after July 25, 1997. As the Court stated in its July 2006 Decision in connection with the deposition of David Wood, "if you [the Movants] develop a basis for a showing in your line of questioning that it relates to events that occurred prior to the July date, though the conversation was had thereafter, then I think it's a permissible question." *See* July 2006 Decision at 6-7. The same approach should hold not only to questions but also to document production. In this regard, the Court notes that the Stock Purchase Agreement was executed on July 25, 1997, a Friday. The offering memorandum requires that in order to purchase shares in MTI, funds had to be available in a First Albany Account on or prior to July 28, 1997, a Monday. July 30, 1997, a Wednesday, was set as the "proposed closing date" for the secondary offering of the shares. Therefore, it is reasonable to believe that any information contained in the offering memorandum was available

to the Respondents when the Stock Purchase Agreement was executed the prior week and should be available to the Movants in connection with their discovery request. As noted above, it is the Court's understanding, however, that the Movants have the offering memorandum, having participated in the 1999 mediation.

Board of Directors Minutes

Upon review of the papers, reference has been made to both the Board Minutes of First Albany and also of MTI.[10] According to the Movants, Goldberg, as a member of MTI's Board, testified at his deposition that he had been provided with a package of materials from MTI which Movants contend contained relevant non-public information. Respondents provided a redacted version of the minutes of the Board meeting held on February 13, 1997. *See* Exhibit "I," attached to Bailey's Declaration. They also provided a copy of the Certificate of Secretary with respect to a meeting of MTI's Board of Directors on June 26, 1997, authorizing MIT to enter into a Letter of Intent with respect to a joint venture with Edison Development Corporation. *See id.* Movants object to the redaction of two pages from the MTI Board minutes of February 13, 1997, and request that they be provided with the unredacted minutes. With the exception of personal entries, they also object to the redaction of McNamee's calendar for the months beginning January 20, 1997 and ending December 21, 1997. *Id.*

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[10] Respondents indicate that they have reviewed First Albany's Board minutes for the relevant time period and concluded that they do not contain any responsive information. However, the Respondents have indicated that "[s]hould the Court wish to review these minutes *in camera* to satisfy itself that they were not responsive, First Albany would have no objection." *See* Respondents' Memorandum in Opposition, filed November 21, 2007, at 26, n.86 (Dkt. No. 1038).

With respect to the Board minutes of First Albany, the Court will agree to review them *in camera* as the Respondents have offered. The Court will also require the Respondents to provide it with a copy of the unredacted MTI Board minutes for February 13, 1997, as well as the MTI Board of Directors' Book, dated April 16, 1997, for *in camera* review to determine whether there is any nonpublic information on the fuel cell technology that was made available to any of the Respondents in their capacity as members of the MTI Board of Directors prior to execution of the Stock Purchase Agreement.

McNamee's Calendar

With respect to McNamee's calendar, the Movants apparently raised no objections to its use during their deposition of McNamee. However, the Court believes it appropriate to require the Respondents to provide the calendar in unredacted form, with the exception of personal entries, to the Court for *in camera* review.

Based on the above discussion, the Court will deny Movants' request for sanctions against the Respondents pursuant to Fed.R.Civ.P. 37(b)(2). The Court will require the submission by the Respondents of the MTI Board minutes for February 13, 1997, as well as the MTI Board of Directors' Book, dated April 16, 1997, and McNamee's calendar, with the exception of personal matters from January 20, 1997 to December 21, 1997, to the Court for *in camera* review by March 3, 2008. In addition, and by the same date, the Court will require the submission by the Respondents of the First Albany Board minutes for the relevant time period for *in camera*

review.[11]

IT IS SO ORDERED.

Dated at Utica, New York

this 20th day of February 2008

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[11] The Court has been unable to locate any indication of the dates of any of those Board meetings in either the Movants' or the Respondents' papers. *See, e.g.*, Respondents' Memorandum in Opposition at 26, n.86 (Dkt. No. 1038).