FANE LOZMAN

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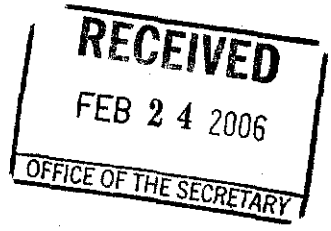
February 22, 2006



Chairman Christopher Cox
Securities and Exchange Commission
Station Place
100 F. Street
Washington, D.C. 20549-9303

Re: Response to comment on proposed NYSE Merger with Archipelago

Dear Chairman Cox:

The New York Stock Exchange merger with the Archipelago Stock Exchange would never have happened, if Mr. Gerald Putnam had not met me. The reason being is that the Terra Nova ECN, renamed[1] Archipelago on April 19, 1999, was programmed by Townsend Analytics. I met with Townsend Analytics in early 1994, and received a commitment from them that they would program my Scanshift software (U.S. patent 5,689,651 , www.scanshift.com) which they did. It was only in mid 1994, that I introduced Mr. Putnam to the Townsends, and we all went into business in Blue Water Partners, Inc. My partners greed led them to illegally force me out.

We had a trial in 2004, where the jury verdict was that Mr. Putnam committed constructive fraud by usurping the corporate opportunities of Blue Water Partners, Inc., the company he was President of. This verdict was on behalf of Blue Water Partners as a plaintiff. Thus, when Mr. Kevin O'Hara stated in his comment letter[2] of February 8, 2006, that the "jury and judge exonerated Mr. Putnam on all counts," he was wrong. As General Counsel of Archipelago and the Pacific Exchange one would think that Mr. O'Hara would be required to be honest in his correspondence with the SEC, and not make statements which are not true.

The attached verdict form[3] signed by all twelve members of the jury states that the jury did not exonerate Mr. Putnam. These twelve members of the jury signed the verdict form that reads as follows:

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[1] Nasdaq Trader Head Trader Alert, Terra Nova Trading ECN renamed Archipelago, April 19, 1999
[2] Letter from Mr. Kevin O'Hara of Archipelago and Pacific Exchange, February 8, 2006
[3] Verdict Form dated December 16, 2004

Verdict Form 1, As to plaintiffs Blue Water Partners' claim for usurpation of corporate opportunities brought against Jerry Putnam, Terra Nova Trading, and GDP, we, the jury, find for Blue Water Partners and against the following defendant or defendants: with Jerry Putnam and Terra Nova Trading being checked YES.

There is nothing confusing about that verdict form, or its impact on the integrity of Mr. Putnam. On February 7, 2006 we had our post trial motion hearing, and I am enclosing a copy of the transcript[4] for your review. A review of this transcript shows how significant the facts and conduct of Mr. Putnam were.

Mr. Putnam, or whatever his name is, in a story[5] in the February 19, 2006 issue of the New York Post they state that his real name is Mr. Put**man!** Apparently the new Mr. Put**nam** did not disclose this on his filings to be a broker with the NASD, even though he was required to.

Mr. Putnam does not have the honesty factor that is a requirement for a corporate leader in a time where Sarbanes Oxley is the new standard for corporate governance. It is important that the SEC does not give consideration to the argument that damages have not yet been awarded to Blue Water Partners. That is irrelevant. What needs to be focused on is that there was a finding of Mr. Putnam usurping the corporate opportunities of the company that he had the fiduciary duty as President not to do! One of those corporate opportunities being Archipelago.

Thank you for your courtesy in reviewing this letter.

Sincerely yours,

Fane Lozman

Cc: Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth

Secretary Nancy M. Morris

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[4] Post trial motion transcript February 7, 2006
[5] New York Post February 19, 2006

Head Trader Alerts

VIEW INDEX

Head Trader Alert #1999-15 - April 16, 1999
New ECN Information: Archipelago L.L.C. (ARCA)

Please be advised that that the Electronic Communications Network (ECN), Terra Nova Trading L.L.C. (TNTO), will rename itself as **Archipelago L.L.C. on Monday, April 19, 1999**. The symbol for this ECN is "ARCA" and, as with the other ECNs currently operating in The Nasdaq Stock Market®, its symbol will be specially identified with a "#" as a fifth character.

Archipelago L.L.C. is an eligible ECN under the Securities and Exchange Commission's (SEC) ECN Display Alternative Rule. As such, Market Makers that enter orders into Archipelago L.L.C. for display, whether for the purpose of complying with the SEC's Limit Order Display Rule or for the purpose of displaying proprietary interest, do not have to modify their own quotes.

Under the SEC's ECN Rule, in addition to electronic access to the ECN, the ECN must also provide telephone access for persons that do not have electronic access capabilities. For telephone orders, please call Archipelago L.L.C. directly at (312) 960-1318.

You should note that there will be a charge to National Association of Securities Dealers (NASD®) members when they use SelectNet℠ to reach the Archipelago L.L.C. order displayed in Nasdaq®. Billing questions regarding Archipelago L.L.C., including billing for SelectNet access to the Archipelago L.L.C. price, should be directed to the ECN itself at (312) 960-1696.

archipelago

PACIFIC EXCHANGE
STOCK & OPTIONS

February 8, 2006

VIA EMAIL TRANSMISSION;
CONFIRMATION BY OVERNIGHT MAIL

Ms. Nancy M. Morris
Secretary
Securities & Exchange Commission
Station Place
100 F. Street, N.E.
Washington, D.C. 20549-9303

Re: Response of Pacific Exchange, Inc., to Comments on Proposed NYSE Merger
Release No. 34-53077; File No. SR-PCX-2005-134

Dear Madam Secretary:

The Pacific Exchange, Inc., ("PCX") hereby submits its response to comment letters received by the Securities and Exchange Commission ("SEC" or "Commission") in connection with PCX's rule filing ("Rule Filing") – File No. SR-PCX-2005-134. [1] PCX is a wholly owned subsidiary of Archipelago Holdings, Inc., ("Archipelago") which operates the Archipelago Exchange ("ArcaEx") and executes trades in NYSE-listed, PCX-listed, and OTC equity securities, ETFs, and options. PCX is a self-regulatory organization and is registered as a national securities exchange.

This submission is in response to two letters received by the Commission in connection with the Rule Filing, [2] and a third letter received by the Commission, which was submitted in connection with a rule filing made by the New York Stock Exchange, Inc. ("NYSE")(File No. SR-NYSE-2005-77). [3] Hereinafter the three comment letters will be referred to as "the Letters."

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[1] Exchange Act Release No. 34-53077 (January 6, 2006).

[2] Letter from James L. Kopecky of James L. Kopecky, P.C., dated January 16, 2006; and, letter from Philip J. Nathanson of Philip J. Nathanson & Associates, dated February 2, 2006.

[3] Exchange Act Release No. 34-53088 (January 6, 2006); Letter from Michael Kanovitz of Loevy & Loevy, dated February 2, 2006.

100 South Wacker Drive, Suite 1800
Chicago, Illinois 60606
D 312.442.7146 F 312.960.1369
www.archipelago.com

On April 20, 2005, the NYSE and Archipelago publicly announced their intention to merge. In connection with the announced merger, the Commission staff has diligently worked with Archipelago and the PCX to address certain corporate and regulatory governance issues that arise out of and are impacted by the proposed merger. The subject of the Rule Filing, in large part, focuses on these governance issues and the associated changes undertaken by Archipelago and PCX in connection therewith.

The Letters have nary to do with the subject of the Rule Filing. Instead, they attack the character and question the integrity of Mr. Gerald D. Putnam ("Mr. Putnam"). Mr. Putnam was a co-founder of Archipelago and currently serves as its chairman and chief executive officer. He also serves as the Chairman of the PCX. Upon consummation of Archipelago's merger with the NYSE, Mr. Putnam has been named to serve as a co-president and chief operating officer of NYSE Group, Inc., a newly-formed holding company which will be publicly traded on the NYSE.

The attacks stem from two private disputes involving former business ventures in the 1990s. The disputes, which were filed in 1999 and 2000, respectively, are currently being litigated in Illinois state court. In one dispute, after a 6-week trial in 2004, the jury and the judge exonerated Mr. Putnam on all counts and judgment was entered for Mr. Putnam on July 25, 2005.[4] The plaintiffs are now engaging in post-judgment process in an attempt to undo the decision of the judge and the jury. The second dispute, which was settled in 1998 and where the plaintiff is now attempting to re-open the settlement, is currently in discovery phase.[5] Mr. Putnam denies any liability. Also, in both disputes, the plaintiffs initially named Archipelago (or its predecessor entity) as a defendant; and, in both disputes, Archipelago was expeditiously dismissed with prejudice. The Letters merely represent the most recent paroxysm outside of the courtroom by these plaintiffs in an attempt to harass and embarrass Mr. Putnam.

Mr. Putnam has been associated with the securities industry since graduating from the University of Pennsylvania in the early 1980s. Since joining the industry, he has held licenses and/or been regulated in several capacities at one time or another by the SEC, NYSE, NASD and PCX. In the mid-1990s, Mr. Putnam co-founded the Archipelago ECN, one of the first qualified ECNs. Along with other ECNs and marketplace entrepreneurs, the trading of equity securities in the United States was revolutionized; and the ripple effects of that revolution have impacted and continue to impact the options and futures trading businesses as well. The fruits of this revolution are very tangible: U.S. capital markets are more transparent, efficient, and globally competitive, and provide better trade executions for all investors.

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[4] *See Lozman, et al. v. Putnam, et al.*, Circuit Court of Cook County, IL, No. 01 L 16377 consolidated with 99 CH 11347.

[5] See *Borsellino, et al. v. Putnam, et al.*, Circuit Court of Cook County, IL, No. 00 CH 13958.

In 2004, Mr. Putnam guided Archipelago through an initial public offering, which was the first IPO of an equities marketplace in the United States. As noted above, Mr. Putnam serves as the chairman and chief executive officer of the publicly traded Archipelago (PCX:AX), whose board of directors includes, among others, a former SEC chairman. Additionally, Mr. Putnam has sat on the board of directors of the PCX, a heavily regulated self-regulatory organization, since 2000, and with the merger of Archipelago and PCX in September 2005, now serves as its chairman. Since co-founding Archipelago, Mr. Putnam has regularly engaged and interacted with SEC staff and Commissioners on a myriad of subjects and issues.

On April 20, 2005, the NYSE and Archipelago publicly announced their intention to merge. As part of that plan, Mr. Putnam will serve as a co-president and chief operating officer of NYSE Group, Inc. The Letters, and the private disputes underlying them, have no bearing on Mr. Putnam's fitness to serve in those roles. Given his many years of service in the highly-regulated securities industry, Mr. Putnam has a very public record that underscores his integrity and ability to properly discharge his duties and responsibilities as an officer of NYSE Group, Inc.

On behalf of the Pacific Exchange, Inc., and its parent, Archipelago Holdings, Inc., we would like to thank you for the opportunity to respond to the Letters. If you have any questions, please contact me at your earliest convenience.

Very truly yours,

Kevin J. P. O'Hara
Chief Administrative Officer,
General Counsel & Secretary

cc: Chairman Christopher Cox
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth

Mr. Robert L.D. Colby

Verdict Form 1

As to plaintiff Blue Water Partners' claim for usurpation of corporate opportunities brought against defendants Jerry Putnam, Terra Nova Trading, and GDP, we, the jury, find for plaintiff Blue Water Partners and against the following defendant or defendants:

Jerry Putnam: Yes X No _____

Terra Nova Trading: Yes X No _____

GDP: Yes _____ No X

Foreperson

ENTERED

DEC 16 2004

JUDGE A. GOLDBERG-1595

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - CHANCERY DIVISION

FANE LOZMAN, Individually, and BLUE WATER PARTNERS, INC., an Illinois Corporation, Plaintiffs, vs. GERALD PUTNAM, Individually, TERRA NOVA TRADING, an Illinois Limited Liability Company, STUART TOWNSEND, Individually, and MARRGWEN TOWNSEND, Individually, and TOWNSEND ANALYTICS, LTD., an Illinois Corporation, Defendants.	No. 99 CH 11347

REPORT OF PROCEEDINGS at the posttrial motion of the above-entitled cause before the Honorable Allen S. Goldberg, Judge of said Court, on the 7th day of February 2006 at the hour of 2 o'clock p.m.

Reported By: Martha C. Newton, CSR, RPR
License No. 084-003632

APPEARANCES:

PHILIP J. NATHANSON & ASSOCIATES, by
MR. PHILIP J. NATHANSON
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Chicago, Illinois 60602
(312) 368-0255
Representing the Plaintiffs,

MUCH, SHELIST, FREED, DENENBERG, AMENT & RUBENSTEIN, PC, by
MR. ANTHONY C. VALIULIS and
MS. TINA MARIE PARIES
191 North Wacker Drive, Suite 1800
Chicago, Illinois 60606
(312) 521-2000
Representing the Plaintiffs,

IWAN, CRAY, HUBER, HORSTMAN & VanAUSDAL, by
MS. LORI E. IWAN and
MR. RONALD L. WISNIEWSKI
303 West Madison Street, 22nd Floor
Chicago, Illinois 60606
(312) 332-8450
Representing the Defendants,

APPEARANCES: (continued)

BAKER & McKENZIE, by
MR. WILLIAM LYNCH SCHALLER
130 East Randolph Street
Chicago, Illinois 60601
(312) 861-8858
Representing Archipelago.

(Whereupon, the following proceedings were held in open

court.)

THE COURT: Lozman versus Putman. Lawyers are present. Wish to identify themselves, they may.

MR. NATHANSON: Good afternoon, your Honor. Philip Nathanson, Tony Valiulis and Tina Paries for the plaintiffs.

MS. IWAN: Good afternoon. Lori Iwan and Ron Wisniewski for the defendants.

MR. SCHALLER: William Schaller, S-c-h-a-l-l-e-r on behalf of the Archipelago defendants.

THE COURT: Okay. It's here on plaintiff's posttrial motion seeking a new trial or a judgment notwithstanding the verdict and/or a judgment for the plaintiff, among other things.

MR. NATHANSON: Among other things.

THE COURT: Plaintiff, ready to proceed?

MR. NATHANSON: I am, your Honor. We are, your Honor. For ease of all concerned here, I've prepared an outline of the oral argument we intend to make today. We certainly don't intend to waive the other points in the posttrial motion and would let the motion stand for the points we don't mention today. However, we have

decided to sort of highlight some of the -- what we perceive to be some of the more significant points, and I intend to pretty much stick to that script. Those are

all excerpts from the posttrial motion. That's -- I mean the only original writing there is putting a heading on some of the pages. And there's some transcript pages that we've attached which I'll explain as I go along. That's what I intend to present as an oral argument in support of the posttrial motion.

THE COURT: Okay.

MS. IWAN: Your Honor, before we start, I do have another hearing at 4:30 today, and since we've scheduled two days for this, I'm not sure we're gonna go two days, but I would ask that we adjourn at 4:15 today to give me time to get to that other hearing, if that's all right.

THE COURT: That will be allowed.

MS. IWAN: Thank you.

THE COURT: And then we are scheduled for both sides are ready, go over, if we have to, go at 2 o'clock tomorrow.

MS. IWAN: If we have to, yes.

THE COURT: All right. You may proceed.

MR. NATHANSON: Thank you, Judge.

I have -- we have this set to display on the

wall, but it's the same thing that I just gave the court in writing. I don't know if it's easier for the court to look at it on the wall or look at it in the paper that I handed out. I'm not gonna put anything different up on the wall unless the court asks to see a trial

exhibit or something like that. We have those on the -- on the laptop as well.

Good afternoon again, your Honor. It's been a while since we've addressed you on this case. We have filed, as I said a moment ago, a posttrial motion. And to the extent that I don't mention anything and, for example, I don't intend to address the Archipelago or Townsend issues during this oral argument, they're all set out in the posttrial motion papers on my end and the defense end. They're based on the papers that were filed before you before trial when you ruled on those various matters. So for purpose of oral argument anyways, we're gonna rely on what's in our posttrial motions as to those parties and -- and just discuss verbally some of the issues that occurred at the trial of the case.

The first issue I want to discuss, which based on, your Honor's, decision, appears to be the overriding issue is this issue of whether the court was bound by

the answers to the special interrogatories given by the jury. We cited originally, your Honor, the special interrogatory rule that the purpose of a special interrogatory is to test the general verdict and it's only where the special interrogatories are consistent with a general verdict that they have meaning, and if

they're consistent, not inconsistent, as the second district case says, Kosrow, then the special interrogatories are meaningless and of no consequence. The court rejected that in your decision. So I'm gonna move on to the next point.

There is no doubt that whether a special interrogatory or a jury finding, for that matter, on a common issue between legal and equitable claims is binding on this court when deciding equitable claims is based on the doctrine of collateral estoppel. Justice Hoffman in the Fabbrini case which we cite in the second paragraph of the first page, Fabbrini's 255 Illinois Appellate 3d., 99, specifically says that the whole notion of -- of trying cases to the jury first before the bench is if there's a collateral estoppel effect from a bench trial, you can deprive somebody of a right to trial by jury.

So I'm gonna start out with this notion of

collateral estoppel and whether anything that occurred on the contract claims before the jury could be collateral estoppel on the equitable claims that this court had to decide thereafter. The leading cases of Illinois we cite on the first page, American Family Mutual and Kessinger, they're both Supreme Court of Illinois cases. And they say similar things but they phrase it differently.

The test in the first case, American Family is was the issue actually litigated in the first suit and was it necessary to the judgment. That's the test necessary or is the test in the first -- in the second case. In the Kessinger case the way the Supreme Court phrased it is there has to be a specific fact found that's material and controlling in the first case and also material and controlling in the second case.

Our position is very straightforward on this, your Honor. The jury returned a general verdict for the defendants on the two contract counts. The jury could have found we didn't prove prima fascia case, a breach of contract, however -- however you want to put the liability phrase or that we failed to prove damages. There is no way, as according to our reading of these cases, that a finding on an affirmative defense, and

that's what these all were, release, ratification, et cetera, that a finding on an affirmative defense was either necessary or material and controlling in the breach of contract claim -- two breach of contract claims that the jury decided. Therefore, whether you say the jury verdict included it or not or the special interrogatory, really doesn't matter how you phrase it. All that matters is what was necessary and material and controlling to the breach of contract verdict.

The next case on the next page, Case Prestressing versus Chicago Osteopathic says this expressly. And I've underlined the language at the top. Where there's issues of liability and damages that are sent to the jury and the jury returns a general verdict, estoppel will not be applied since it is not certain whether the jury found against the plaintiff on liability or damages or both.

Well, here it's not certain whether the jury found against the plaintiff on the contract counts based on liability, prima fascia case or damages. Yes, they answered special interrogatories. We gave them the interrogatories, said answer whether this happened, this happened. But that doesn't mean it was the basis for the verdict on those claims at law. Therefore, as a

matter of collateral estoppel law, which is the initial question under state law, is something that occurred on the two claims at law before the jury binding on you as a chancellor in equity. These are the tests that have to be applied to determine that.

We think the answer is clearly no. And it's even more no when you move on to the issue of Boatmen's and the 7th amendment right to a jury trial. Now, this is a completely different issue, your Honor. This isn't -- Boatmen's is not collateral estoppel. Boatmen's is, under the 7th amendment right to a jury

trial, is somebody's right to a jury trial compromised by you considering issues that were litigated on jury claims.

The interesting thing about Boatmen is as we have set fourth in this paragraph is Boatmen relied on a 7th Circuit case called Williamson, a 1987 case, in saying that common -- determinations by a jury on common questions bind the trial judge on any equitable questions thereafter. The 7th Circuit has now rejected Williamson.

We cite the language in the recent case of International Financial Services Corp versus Chromas, 356 F. 3d., 731, where the 7th Circuit says post

Williamson and post Boatmen, the district judge must make an independent judgment on equitable issues insofar as they are not identical to the legal issues that the jury decided. That's a question of 7th amendment jurisprudence on the right to a jury trial.

Now, as Boatmen says, your Honor, Illinois hasn't adopted the 7th amendment. In fact, U.S. Supreme Court hasn't incorporated the 7th amendment into the 14th amendment. It's one of the few Bill of Rights provisions that haven't been incorporated by reference. However, Boatmen did say, to be sure, we're gonna look to this 7th Circuit case, Williamson, to see what the

federal law is on -- on the right to a jury trial.

It's interesting to note as we stated in our posttrial motions and excerpted here, Williamson was an employment discrimination case that didn't deal with any affirmative defenses. The only affirmative defense case I could find in the federal system, Granite Slate said there is no right to a jury trial on an affirmative defense if the defense is equitable in nature.

To sum all this up, your Honor, and I've done that -- I'm sorry, I put in bold, but I was wondering whether this was gonna be viewable -- we believe, your Honor, that the court has to look at what happened in

Boatmen in order to really put this in context. In the Boatmen case there was a chancery proceeding of foreclosure and a counterclaim for breach of fiduciary duty. The case was tried to the jury first on the counterclaim on the breach of fiduciary duty. The jury found for the counter-plaintiff that there was a breach of fiduciary duty. There was no doubt in the world, not then and not now, that it was material, controlling and necessary the jury's finding of breach of fiduciary duty because there was a general verdict, the breach of fiduciary duty. There's no doubt that a breach of fiduciary duty was necessary to that general verdict because the general verdict was that there was a breach of fiduciary duty. Unlike this case where you have a

general verdict for no liability for breach of contract, two of them. And you say to yourself, what's the basis for the general verdict, was it the prima fascia case, was it damages, was it some defense. So Boatmen on that basis doesn't apply.

The same can be said on the issue of identity. Are the affirmative defenses identical on the legal claims and the equitable claims? The answer is, as the court pointed out in the court's opinion, no. A good example is ratification. In the ratification area we

cite the Monco case which says you have to go through the whole equitable analysis to determine whether ratification is appropriate. It's not enough to just retain a benefit for an unreasonable period of time.

So the equitable analysis on ratification and on the release issues is not the same as the legal analysis, after all, your Honor, 2619, I'm gonna get to it shortly, I don't remember the subparagraph, lists specifically release as an affirmative defense. It doesn't mean whether the release is valid or invalid or enforceable or unenforceable. It means there is a release and the question is does it cover the claim in question.

The legal standard for release is different than the equitable standard. So at the start of this

argument, I think it's very important to point out that what this court ruled, which is the court is bound by what the jury said in the answers to the special interrogatories, we respectfully contend is not supported by the cases on the first three pages of my outline. Moving on to the fourth page.

This case is unique in one sense, your Honor. If you look at all the reported decisions, this Lozman case is absolutely unique in one sense. There has been

a finding at trial of breach of fiduciary duty. The defendant Putnam and Terra Nova were found to have breached the fiduciary duty owed to the plaintiff Blue Water Partners. There's not a single reported case in Illinois, not one, where a fiduciary was found at trial to be guilty of breach of fiduciary duty and a release by which he benefited was enforced, not one.

And here's the reason why. When there's a breach of fiduciary duty, your Honor, as we cite in the top paragraph, there's a presumption of fraud that arises. And it's deemed to be constructive fraud. This is set out in the cases we cite in the first paragraph. I don't know how to pronounce it, Neprozatis and Obermaier. There's a presumption of fraud which the defendants have to rebut by clear and convincing evidence. And it's deemed to be constructive fraud, which vitiates any agreement that's tainted with it.

The jury found and you found, your Honor, that there was a breach of fiduciary duty here via usurpation of corporate opportunity. As we stand before you, that's where we're at on the record in this case. The defendant was found liable for breach of fiduciary duty. So the question is, is any instrument that the defendant asks the plaintiff to sign while this conduct was going

on enforceable. Under the Peskin case and the other cases, the test is -- and by the way, this is gonna be the theme at least for this oral argument.

Could you hone in, Richard, on just the language. Could you crop the quote there. Thank you.

Basically every case says the same thing in this area, your Honor. The defendant must show that there was a full and frank disclosure of all relevant information that was made to the other party. This is the touchstone of the presentation today. Why? Because as I'm gonna show the court in a minute, and I've attached the transcript pages to this outline, not only didn't Mr. Putnam disclose all relevant information to plaintiff, he didn't disclose any relevant information to the plaintiffs other than he was alive and he was in business with a company named Terra Nova Trading.

The court quotes this standard in the court's opinion and then doesn't mention a single fact that was

disclosed by Putnam to the plaintiffs. This isn't your Honor's fault. The reason -- there was no evidence that they disclosed anything to the plaintiffs. None, zero. Mr. Putnam admitted he didn't, and Mr. Lozman testified he didn't. And Mr. Putnam had the burden of proof due to the presumption of fraud, due to the constructive

fraud to show by clear and convincing evidence that he disclosed everything, all relevant information.

Exhibit A, the transcript from December 8, 2004. Could you blow up lines 10 through 19, please.

I asked Mr. Putnam that when he went to the Currency Exchange did he make an accounting to Fane Lozman about the revenues that had come in while the agreement was in effect between April 17 and October 8. He said I don't believe I brought an accounting with me in the meeting; there were accountings done. So whatever accounting was done was concealed from my client, because there's a fiduciary duty to disclose it. And I said did you show to Fane Lozman at that meeting here's what we've taken in, here's what the expenses were, here's how it all shakes out. No, I didn't.

That's the first testimony on nondisclosure. Then Mr. Grimm, one of the defense counsel, on Exhibit B, on the next page, this is line 7 through 20, your Honor, Mr. Grimm redirects him on this point and says you were asked some questions did you bring things, an

accounting to Fane on October 9, the date their lease was signed. And Putnam says, yes, I was asked that. And then the question is on line 16 through 20, in the time frame after you asked him to leave, would you have

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been willing to do that, give him the checkbook. Yes, I would have. Had he asked me for it, I would have been happy to give it to him.

Well, your Honor, that's exactly backwards. The defendant Putnam, in order to enforce any agreement he asked my client to sign, had an affirmative duty to make a disclosure to him. Mr. Lozman didn't have to ask him to do that in order for -- in order to learn the truth.

Next one, Richard, Exhibit C. Lines 2 through 6.

Then when my client was on the stand, Mr. Lozman, I asked him did Putnam ever come to you and say here's the checkbook, here's what we've taken in, expenses and here's an accounting. The answer was no. That testimony was never refuted. In fact, as we just saw, Mr. Putnam agreed with that.

The next one, Exhibit D.

This is lines starting -- actually this is two pages that starts on lines 18 through 24 and then goes over to the next page. I asked Mr. Lozman when you were

asked to sign the release on October 9, did Mr. Putnam bring with him an accounting of the monies that had been received under the agreement he asked you to release,

the April 17 agreement. Answer: No. Moving on to the next page. Did he bring any document with him or say to you, Fane, I know I'm asking you to release this agreement that's stapled to the release. No. Did he give the checkbook back. Now we're going all the way -- basically this whole page. Had you ever seen the checkbook? No. On the bottom, your Honor, lines -- this is the second page of Exhibit D. On the bottom which is marked 62, lines 20 through 24: When was the first time you saw the Blue Waters checkbook during the discovery of this lawsuit.

Next Exhibit E, please.

Now, there are other things, as the court knows, that are released.

Could you crop lines 7 through 18 on Exhibit E, please, Richard.

As the court knows, there are other parties and other things referred to in the release one of which was Analytic Services.

THE COURT: Before you go on to that, I can't recall, was there any introduction of this checkbook during the course of the trial? That's the first question. Secondly, did the evidence ever indicate that

the checkbook showed that there was revenues that were

earned by Blue Water Partners that were never told to Mr. Lozman? Is there something -- I mean you apparently got the checkbook, that either side, no matter whose burden it is, and I understand it's probably irrelevant to your argument legally, but from my point of view, I can't remember ever hearing there was something disclosed in that checkbook that would indicate receipts unaccounted for or monies unaccounted for. Can you answer that question?

MR. NATHANSON: I can, your Honor. The checkbook was, if my memory serves me correctly, admitted as a defense exhibit. We can certainly get it and pull it up on the screen. There were revenues. There were some monies that -- that were received, checks were written, many checks were written to Analytic Services, which was the marketing arm to market the software. And most importantly, there was one check that was offered in evidence that showed, and I can find it in my posttrial motion here in a minute, and when I get back up I'll show it to the court, there were revenues that were billed before the release and not yet received that came in to Analytic Services after the release was signed.

THE COURT: I remember that. Right.

MR. NATHANSON: Mr. Lozman was not told about that.

That was not disclosed to him, and Putnam and Long cashed the check, when it came in after the fact. I hope that answers the court's --

THE COURT: Well, I guess my question is once you've got the checkbook, was there some explosion that went off that would indicate evidentiary-wise that had Mr. Lozman been given a checkbook at the time of the signing of the release, he never would have gone through with it, some particular material fact that was withheld once you did discover it. That's really my question.

MR. NATHANSON: Okay. Fair enough.

THE COURT: I guess, because I read a lot of the cases you cited, the Peskin case, there were all situations where there were revenues unaccounted for by the person who had the fiduciary relationship --

MR. NATHANSON: Right.

THE COURT: -- with his partner. That's what I've seen in Illinois. Most of the cases there was some meat to the claim that you ought to have told your partner about it because it would have meant more money to him. Mr. Peskin was cheated out of his opportunity to get his fifty-fifty share of the partnership revenues.

MR. NATHANSON: He was indeed.

THE COURT: Yeah.

MR. NATHANSON: What I'm talking about in this part of the argument is the Blue Water check.

THE COURT: Right.

MR. NATHANSON: The general point we're making is the defendant had a duty to account.

THE COURT: I understand.

MR. NATHANSON: The first point is he didn't account till June of 2000 when the checkbook was --

THE COURT: Right.

MR. NATHANSON: -- produced, which is very relevant on laches, as the court's gonna see in a moment. He didn't make any accounting until way back when. Most of the checks are written to Sam Long and Analytic Services in the Blue Water checkbook. No explanation. They're just written. They're not written to Fane Lozman.

THE COURT: Okay.

MR. NATHANSON: So that's number one. But I don't want to lose sight of the larger point here. There was never an accounting --

THE COURT: Right.

MR. NATHANSON: -- of the Terra Nova checkbook.

THE COURT: Okay.

MR. NATHANSON: This court has ruled that the release not only released any claim regarding the monies

of Blue Water but that the word "obligations" in the release means that Fane Lozman of Blue Water were releasing Putnam's fiduciary obligation as to the Terra Nova opportunity. There was never a disclosure of anything regarding Terra Nova, the finances, the capitalization the business plan, who -- who -- what they were gonna do, when they were gonna do it until June of 2000 when discovery started in this case. I'm getting ahead of myself.

THE COURT: Sorry about that.

MR. NATHANSON: That's okay. You know, I want to know what the court's concerns are. The court's the one who's gonna rule on this motion.

THE COURT: When you got the Terra Nova checkbook at some point during the course of discovery, did you get that?

MR. NATHANSON: We got it in June pursuant to a protective order in June of 2000.

THE COURT: Okay. And that disclosed information that was so obviously depriving your client of material information he needed and should have gotten at the time he signed the release or prior to signing the release?

MR. NATHANSON: Well, I would --

THE COURT: I don't remember you arguing that to

the jury or to me, but I could have -- that would be something I would think that happened in the Peskin case. That once -- once they found out that this other gentleman was -- the poor guy shows up at the U.S. attorney's office and sees on the U.S. attorney's desk the fact that Mr. -- whatever his -- Peskin versus, forgot the defendant's name, but that his tax return showed he was receiving revenue in a partnership that his partner never told him about. I just wonder now once you got this after the fact, was there something there that, had your client known about it, would have changed his mind or obviously changed any reasonable person's mind about going through with this release.

MR. NATHANSON: Well, I think of one example that jumps right out, which Mr. Putnam testified to from the witness stand, is that he chose to capitalize Terra Nova with an approximate $200,000 capitalization from his own funds and chose not to capitalize Blue Water virtually at all except for paying for some incidental expenses. My client had no way to know at all if the court -- the court has said that the plaintiffs gave up their right to Terra Nova when they signed this release on October 9.

And I guess the question is at that point if

assuming for purposes of discussion that that release does encompass the Terra Nova business opportunity, which I'm gonna get into shortly, then he had a duty to not only account but to disclose all relevant information about Terra Nova in order to obtain that release of that opportunity.

THE COURT: So you're saying the failure to tell Mr. Lozman that he had --

MR. NATHANSON: Anything.

THE COURT: -- paid capital into the --

MR. NATHANSON: Capital, what the business plans were. We did argue to your Honor and the jury that he was planning the SOES room business where Terra Nova Trading was gonna be the broker/dealer which is on one of these pages, it was. They did run the trades through Terra Nova Trading, that that was part of -- part of the opportunity.

So if the standard is all relevant information, obviously an accounting is one component of it. The easiest part to talk about here is that there was no accounting. But the standard isn't just an accounting. It's all relevant information. And we did argue to the court and the jury that there was nothing disclosed. Nothing.

THE COURT: Okay.

MR. NATHANSON: He said sign the release. They

were at a counter at a Currency Exchange, and he signed it. I have the pages here where Putnam talks about what the discussion was. There was no information regarding Terra Nova in any way, shape or form disclosed, that he was meeting with the Townsends and Borsellino, that he was doing all the things he was doing.

So our position would be that, of course based on Mr. Lozman's testimony, he viewed the release, as the court knows, as applying to the agreement that was stapled to it. That's what he testified to. If Putnam said, oh, by the way, this releases your claim to Terra Nova, and here's what I'm doing with Terra Nova, I don't think it's a big leap to say not only wouldn't he have signed the release, but at the very least it's material to his decision-making process.

So I'm properly reminded that what wasn't -- what also wasn't disclosed in this accounting, your Honor, which did come to light in discovery was the information regarding the soft dollar revenue that Blue Water had interest in under that April 17 agreement but that had been run through Terra Nova and that the way the soft dollars were accounted for and dealt with and

taken in was not mentioned or disclosed until we got the discovery in June 2000. And there was never, obviously, disclosure between the Terra Nova, Townsend deal where

there was a 5 or 10 percent rebate to the Townsends for -- for the software and their interest in these various soft dollar deals. All of those checks were admitted in evidence. I don't know if the court remembers all the ledgers were admitted in evidence. None of that, none of it was disclosed.

THE COURT: And the evidence indicates that was all going on prior to and --

MR. NATHANSON: Yes.

THE COURT: -- at the time of the release being signed?

MR. NATHANSON: Yes.

THE COURT: That's the evidence.

MR. NATHANSON: And since the court has -- well, I'm not sure if the court has said there's ratification. I think you did. Since the defendants raise ratification, that goes to a period some -- some continuum after that date when there's a period of time when you either reject or affirm. It was never disclosed in that period either. And I'm gonna get to that issue as well.

Where was I?

THE COURT: I'll just give you two minutes to find where you're at, and I'll come right back out. Take a short recess.

(A short break was taken.)

(Whereupon, the following proceedings were held in open court.)

MR. NATHANSON: Thank you, your Honor.

THE COURT: Sorry to interrupt you. You may continue.

MR. NATHANSON: Moving on beyond just finances, your Honor. Lines 14 through 18 on that page, Rich, which is Exhibit E, can you crop those lines, please.

I asked Mr. Lozman, your Honor, what, if any, information did Mr. Putnam give you regarding what he was doing in business in the world of electronic trading or anything else on October 9. Answer: He told me nothing. And Putnam did not contradict that.

Now, to get back to your Honor's point on materiality. We contend, and I think the cases say, that the issue is whether all relevant information was disclosed. I think what Putnam's business plans were, what he was doing was planning the SOES business with

the Townsends, with Terra Nova, where he intended to take it, et cetera, et cetera, all of that, whether it's material in the securities law sense or not, I don't know. I don't think we have to prove that.

I think the issue is whether this was relevant information and would be relevant to somebody deciding

whether to sign away their rights to all this in a release.

Exhibit F, please, Richard, page 2 of Exhibit F, which has a Page 91 on it. I want you to crop lines 3 through 8.

This is Putnam's testimony. This is page 2 of Exhibit F. This is Mr. Putnam's testimony at December 7, '04 where I asked him did he talk to Fane when they were signing these documents. And he said not much conversation. Happy it was over with, but there wasn't a ton of conversation.

He had the burden, your Honor, to show that he disclosed all relevant information. To say there wasn't much conversation, I -- I think, needless to say, that's a long way from a disclosure of -- of all relevant information.

We tendered a New York case to the court which I don't want to spend a lot of time talking about. They

have the same fiduciary standards that we do. Illinois' adopted Cardoza's opinions. It's a recent Ajetics versus Rob. The reason I tender it to the court was in this case the corporate officer went and had meetings with some people who are interested in buying the company and didn't disclose that to the people involved in the company. And then they severed their relationship and a release was signed which he attempted

to enforce later on. And the judge in New York said no dice, you had to disclose that you were meeting with people to discuss what you were doing regarding the purchase and sale of this company.

That's precisely what we're saying. Yes, we're saying there was no accounting, that we got the financial documents and -- when we filed suit. But I think it's broader than that. I think Putnam had an obligation to tell this man where he had been, where he was at and where he was going. He said nothing.

Can we go back to the second page of Exhibit 2, please, Rich. It's after the -- it's the next page after those transcripts, your Honor.

This gets back to the McFail standard. I don't think this court cited the McFail standard. The court cited the elements, but I don't remember the court

citing McFail. And the first element, your Honor, and this is the same in Peskin, it's the same in all the cases, frankly, is that there was a full and frank disclosure of all the relevant information.

Could you, Rich, crop the top quote. Quote.

Again the burden of proof was on the beneficiary of the instrument here, Putnam and to show it was fair. And the first item is full and frank disclosure of all the relevant information that he had.

There's no way that there was a disclosure any relevant information that he had. And I suppose I should digress here at this point, your Honor, to say this. Yes, we argue that the court wasn't bound by the jury. But whether one looks at this as the jury's finding being against the manifest weight of the evidence or whether one looks at this as the court shouldn't follow the jury, however one looks at this, however one slices and dices, whoever made the finding, whether it was an individual finding or -- or a joint product between you and the jury, there's no evidence to support the jury statement that there was a full disclosure of all material facts.

First of all, that isn't even the standard in the equity cases. The standard is all relevant

information that the person had. But moving beyond the fact that they're not identical standards, there's no evidence to support it, none, zero. And the time to raise the lack of evidence in support of anything at a trial is on posttrial motion, as the court well knows. Whether the jury found it or the count found it, or you both found it, there's no evidence to support it.

Can we, Richard, go down to the next page on Exhibit 2. Crop the quote up on the top of the page.

Your Honor, I've put up on the screen and this is on the next page in the text from the case at Beerman

versus Graff, which is a partnership case, although there are numerous cases cited in our paper which say that the offers and shareholders in a closely held company had duties -- fiduciary duties similar to partners. And this talks about the issue the court raised with me a second ago what do you really have to disclose in terms of accounting. There's a First District 1993 case.

And I don't think there's any doubt Putnam was responsible for all the financial aspects of this enterprise to maintain regular and accurate records, and the burden was with him to show by clear, convincing, unequivocal and unmistakable evidence that he was

completely frank and honest and made a full disclosure and not dealt secretly behind his back.

I think just the check that was billed for and came in after the fact shows that he didn't meet that standard, and there was no evidence that he met it any other way.

Take that down, Richard.

On the end of that page, your Honor, the last paragraph at the bottom, actually the last few sentences, I raise a point that I think was raised by your Honor's construction of the release. The court has read the word "obligations" to include the fiduciary

obligation not to usurp the Terra Nova business opportunity or the broker/dealer opportunity that became Terra Nova, however you want to say it. And there was no disclosure at all as to that.

So the court has ruled in the court's opinion, that the release is valid and broad enough to release the Terra Nova business opportunity when there was no disclosure of any information regarding Terra Nova. For those reasons, your Honor, we don't think that the ruling on the release should be permitted to stand.

Moving on to the next point on ratification. I quoted your Honor's opinion from page 18 of the

opinion at the top where you say if a person retains the consideration for an unreasonable amount of time that that can lead to a ratification. I added a line here, a continuum line, starting from October 9, 1995 to 6/1/2000. That's the date we got our first written discovery in this case from the defendants. When information was disclosed about these businesses.

Now, the court in the court's opinion, I mean no disrespect by this, but this is the way I read it, has basically said that the continuum stops at the first bracket. That the plaintiffs basically had to file suit immediately or tender back immediately whatever consideration they received in this transaction in order to avoid a ratification. In support of that, the court

states that Mr. Fowler could have filed suit or should have filed suit on behalf of the plaintiffs. Your Honor, Mr. Fowler never testified in this lawsuit. The testimony was he was brought in by Mr. Najarian to prepare some corporate documents. There's no evidence in this record that Craig Fowler even does trial work or litigation nor is there evidence that he was retained to do anything more than put the stock certificates in order and draft up a termination agreement.

In terms of the other ratification issues, the

Monco case, which we cite in our papers, says that the ratification analysis looks to the same factors as the McFail case only -- the only difference is, is it's post transaction. So you look at whether after the fact there was a full disclosure of all relevant information going forward whether there was counsel and all of that.

Now, as the court knows, I asked Mr. Putnam what he disclosed to Mr. Lozman after the release was signed. There's three pages of transcripts on this point as Exhibit G after my ratification page. And I'm not gonna go through all of them now. Let's just say I covered the waterfront with ECN's, exchanges, SOES rooms. His testimony was he hadn't even spoken to the guy and he wasn't required to disclose anything to him post transaction.

Well, according to the Monco case, which is the equitable standard for ratification, in order to have a valid ratification, in order to show that somebody waited for a period of time and ratified, you have to show that there was a full disclosure of information and they decided to stand on the deal.

Could you put up page 3, Rich, of Exhibit G, lines 1 through 11.

This I think sums it up, your Honor. I asked

Mr. Putnam at the time you were planning and implementing the SOES room opportunity, and, your Honor, as the court will recall, the evidence was the -- according to the defendants, the evidence was the SOES opportunity was planned from October to December of '95 within a couple months of -- of the release. At the time you were planning the SOES room opportunity, the SOES room business, did you disclose either to Fane Lozman or Blue Water Partners the material aspects of what you were doing. I think that's impossible. I wasn't speaking to the guy. The answer is no. There's absolutely no reason to do that.

We submit as a matter of equity there can't be a ratification during a post transaction period when the issue is should I stand on the deal or reject it, unless there's a disclosure of -- of what's going on so the person can make a decision whether to stand or not

stand. So as a matter of equity, that issue is not the same as legal ratification and therefore under the current 7th Circuit case which I quoted before, this court wouldn't be bound by any jury determination. And in any event, no matter who made the determination, there was no disclosure and, therefore, it can't be ratification.

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Could you go to the next page, please, Rich. This is Exhibit 4. Blow the whole thing up.

I guess this is one of the favorite points of the plaintiff's team, your Honor, that even if the release is valid, which we contest obviously, and have contested throughout this case, that the standard for interpreting it was not applied by this court in the court's opinion. The release talks about the attached agreement which is the commission agreement from April of '95 that was stapled to the -- to the release and the release uses the word obligations.

The court interpreted the word obligations with -- to include not just the obligations under the attached agreement, the commission agreement, but Putnam's fiduciary obligations as well which had the effect of releasing Putnam's fiduciary obligation to avoid usurping corporate opportunities of Blue Water, the company he's president of.

The rule in Illinois is where there's a specific thing referred to, specific claim like the obligations under the attached agreement, that any general words, obligations or otherwise, are limited to the particular claim to which reference is made. By choosing, Mr. Putnam wanted that commission agreement

released on October of 1995. He stapled it to the release, referred to it as the attached agreement. By making sure that was released, he set in motion under the rules for interpreting release the distinct possibility, and we hope more than that when the court takes a look at this again, that the release, even if it's valid, even if you reject everything, even if you say it's ratified, if you say it wasn't voidable, it's ratified, it's valid, there it is, still you've got to deal with the issue, does it release his fiduciary obligation using the word obligation where a specific reference was made to another claim, namely, the attached commission. We've argued throughout this case, your Honor, that even if all arguments about validity are rejected, that the release should be limited to that commission agreement.

Can we move on to the next one, Rich. Would you crop the upper half.

The court has alternatively held, in the court's opinion, that the plaintiffs were guilty of

laches. We are aware that the court had a laches decision affirmed on appeal relatively recently. I read that case again, your Honor. It didn't involve a fiduciary relationship. This case involves a

fiduciary's failure to disclose and it, therefore, comes within the rule of Prueter versus Bork, 105 Ill. Ap.3d, 1003, which specifically holds that a different laches rule applies where a fiduciary relationship is involved. And where there's a failure to disclose facts, the failure to use diligence to ascertain those facts is excused. And the time begins to run for laches when the fraud is discovered by the plaintiff.

Mr. Putnam made no disclosure as to Blue Water or Fane Lozman until June of 2000 when the first wave of discovery was received by the plaintiffs in this lawsuit. We litigated motions to dismiss for a year. His time and the corporation's time to file suit began at that time. The court has ruled in this court's opinion that the plaintiffs failed to use due diligence to discover the facts. Respectfully, your Honor, we feel that's the opposite way to approach this as the cases require.

Putnam had a duty to disclose to the plaintiffs. The burden was on him under all these cases. Plaintiff didn't have the burden to go ascertain

what Putnam was doing, assuming he could ascertain that, other than see that he was in business. We feel that this court's laches analysis which doesn't take into

account the nondisclosure should have.

There's a lot of cases cited in the defense papers, your Honor, which go up on the pleadings. This case wasn't resolved on the pleadings. The court heard all the evidence. The jury heard the evidence. Mr. Putnam was found twice to have by the court -- by the jury and by the court to have violated his fiduciary responsibilities. Therefore, this is more than an allegation like in the Golden case or the Herd case or all the other cases the defense is relying on. There's a finding here by two finders of fact that he breached those fiduciary duties. Not an allegation in the pleading.

Last, at least last for oral argument, not last for the posttrial motion, last for today.

Could you go to No. 6, Rich. Could you crop the top part.

To come full circle, your Honor, everyone in this case, at least as the corporate opportunity part of it, agree that the leading case in Illinois was Kerrigan, yet Graham followed after that, but the case recognizing the corporate opportunity doctrine in Illinois was Justice Schaefer's opinion in the Kerrigan

case. Justice Schaefer in that opinion himself

discussed the obligation of the officer to make a full disclosure of the pertinent facts to the corporation and failing to do that and to tender the opportunity resulted in, the last three lines, the directors being foreclosed from exploiting that opportunity.

The first thing that happened here, your Honor, before they go to the Currency Exchange, as this court ruled, before the October 9 meeting at the counter at the Currency Exchange, Putnam had already usurped the broker/dealer business opportunity and diverted it to his own use. That had already occurred. He neither disclosed the details of that nor tendered that opportunity for sure to the plaintiffs. And, therefore, according to Justice Schaefer, he should be foreclosed from exploiting that opportunity. The court has ruled the opposite. That not only isn't he foreclosed from exploiting the opportunity, he gets to keep 100 percent of the benefits of the opportunity for two reasons; the release and laches.

But the release was presented to Mr. Lozman after the usurpation and without any tendering or disclosure of facts. Putnam didn't say to him now, listen, I've transferred this broker/dealer business from Blue Water to Terra Nova, Terra Nova is a hundred

percent mine, you're out, you understand by signing this you're out, here's the structure of Terra Nova, and I'm not giving it back to Blue Water, so understand that. None of that happened.

Respectfully, your Honor, the plaintiffs request you to grant the relief in the post -- posttrial motion. I've limited my remarks to these points today because no way to go through all the elements that are in writing already. The court has them. The court has ruled on many of these issues already. They have to be in a posttrial motion to preserve the record for appeal, obviously. But the thrust of this, without waiving the other points, the thrust of this is Jerry Putnam did not do what he was supposed to do as a fiduciary, and he shouldn't be let off the hook for it. Thank you.

THE COURT: Okay. Just take a two-minute recess and we'll start with yours.

(A short break was taken.)
(Whereupon, the following proceedings were held in open court.)

THE COURT: Mr. Schaller still here?

MR. NATHANSON: Yes, he is.

THE COURT: Mr. Schaller, before I hear from

Ms. Iwan, are you going to be wanting to make oral argument in this case?

MR. SCHALLER: Depending on what Ms. Iwan says, your Honor, I might go about five or ten minutes or I might not. She may cover the same points, so I have to hear her first.

THE COURT: Thank you. You may proceed.

MR. NATHANSON: Thank you, your Honor. Lori Iwan for the defendants.

Your Honor, plaintiff's posttrial motion, which was 216 pages long, had many arguments in it. Many of those arguments were waived because they fail to identify error to the court. Many of them were invited error in which the plaintiffs simply asked the court to do something which the court then did, and now the plaintiffs complain about it. We detail that in our response to the posttrial motion, and I will stand on the brief as to those items. I don't waive them by not raising them today, simply incorporate them, and we'll just address the arguments that plaintiff's counsel raised today.

But most of the posttrial motion reads largely like a closing argument, and that is because it simply reargues conclusions that plaintiffs want to draw from

their selected view of the evidence. It does not disagree with the facts that this court put in its order of judgment. It simply argues with the conclusions. In that instance, the standard of review in a posttrial motion is whether the judgment, in this case the court's verdict -- excuse me, the jury's verdict and the court's findings were against the manifest weight of the evidence. You'll notice you never heard the standard of review from plaintiff's counsel here today, and you won't find it anywhere in their 216-page posttrial motion because they want this court to start de novo review.

You heard another closing argument today. They want you to start all over thinking back a year ago, did I hear evidence on this or didn't I; should I just rely on those few excerpts that were just put up on a screen before me and which some of the lines were read and some of them weren't read, and should I rethink this whole issue.

Counsel wants you to do de novo review and that's not the standard. It's manifest weight of the evidence which means that this court has to be convinced that there was no evidence supporting the jury in the court's findings and that all inferences, which are now

drawn in the defendant's favor in favor of the verdict, that all those inferences when drawn in our favor cannot support the verdict. And you did not hear anything from counsel today that would change the verdict and the judgment entered in this case.

As to the court's fact-finding, the standard of review is whether there was an abuse of discretion. And, again, you heard nothing and you saw nothing in terms of the evidence put back up on the screen whether this court abused its discretion. You saw nothing in terms of a violation of a fundamental right to justice by this court in terms of the law that you applied, your Honor. Never once did you see counsel say, Judge, you applied this case and it was a fundamental error and a mistake to apply this particular case.

They have not met the standard of review either as to any jury finding or as to the court's finding or application of the law. And to do a de novo review would be an absolute error.

For the record, I am also incorporating Archipelago's brief and any arguments that they might make on the posttrial motion.

To specifically address the arguments that were raised today by counsel, starting with plaintiff's

Exhibit 1, plaintiff argues that the jury's answers to the special interrogatories were not necessary to the judgment and somehow should not have been binding on the court and somehow should have led to a different outcome, if I understand today's argument.

The problem with this argument in plaintiff's Exhibit 1 is it's entirely academic because the court in its judgment was very clear and stated that the court independently reached its own findings of fact which in each case happened to agree with the jury's findings of fact, but the court did not rely on the jury's findings. So whether the jury's findings were binding on this court or not, it was academic. The court independently reached its own findings. Therefore, what the jury said or did not say simply is of no consequence to the outcome.

Secondly, the court did correctly follow Boatmen's in this case because that is the law in the state of Illinois. It does not matter if the federal court went on to change federal law as to some other point. The law in Illinois is Boatmen's. That is the current law.

Third, this is not a collateral estoppel issue. This is not one lawsuit and then a subsequent

lawsuit with similar parties. This was the same case. And that's why Boatmen's and the other cases that

Boatmen's relying on from the Illinois courts were the binding authority that this court correctly followed, and counsel did not demonstrate that this court should have ignored Illinois case law and somehow followed federal case law.

Counsel argues that the -- using again the 9th Circuit case law that somehow the court should not have let the jury resolve the affirmative defense if the defense is equitable in nature. The problem with that argument, and they also make this argument in the posttrial motion in the written brief, is that plaintiffs never once cite a case that the affirmative defense of release or ratification is equitable in nature. They make this assertion, they make it today, they make it in this written submission today, they made it in the posttrial motion, but they never gave you a case that says that.

At trial the defendants provided case law that these were legal defenses. It was an affirmative defense to the contract claims. It did have to be submitted to the jury on the contract claims as an affirmative defense, and it did have to go in as a

special interrogatory.

But more importantly, the special interrogatories, every single one of them were drafted

by the plaintiffs. They were submitted by the plaintiffs. They invited the error. They cannot now come before the court and complain about the error they themselves invited. They can't draft the special interrogatories, ask for special interrogatories and then say it was error to have special interrogatories. That's what the Auton, A-u-t-o-n, case says. You cannot create the error, invite the error when the court does what you ask for, come back and complain that you need a new trial because you don't like the outcome.

Plaintiff's Exhibit No. 2, their second argument was that no reported -- they've titled it, your Honor, no reported case enforces a release in favor of a fiduciary who was found guilty at trial of breach of his fiduciary duty. That's an interesting title because you will never find that argument anywhere in the record of this case until today. It is not in the posttrial motion. It's not heading in that 216-page posttrial motion. It's not in any of the voluminous briefs filed in all the years of this litigation. That argument was never made and it is therefore waived.

The text that follows is cut and pasted from the posttrial motion, but a text that follows that heading does not support the title of that heading under Plaintiff's Exhibit 2. And this is a very important point. This is a new argument in the heading, but the

text that follows doesn't support it. The text that follows says the standard of proof when you're looking at a release is Peskin versus Deutsch.

This court applied Peskin versus Deutsch. This court gave the jury instruction that plaintiff submitted that the Peskin versus Deutsch standard applies in judging a release. So once again, plaintiffs asked for the Peskin jury instruction, the court gave the Peskin jury instruction, the court's judgment order applied the Peskin case law. Nowhere have plaintiffs pointed out that this court misapplied the Peskin case. In fact, the court did again exactly what plaintiffs asked the court to do, and it was the correct law to be applied at the time. I'm sure you don't remember this a year ago and late into the evening, but I said I have to reluctantly admit, Judge, Peskin's law, I'm stuck with it, that's what we're gonna go to the jury with.

The court and the jury listened to all the evidence in the trial. And the court and the jury both

concluded there was a full and frank disclosure of all material and relevant information to both Fane Lozman and to Blue Water Partners. Today you heard some selective evidence. You didn't hear the whole trial again. You heard selective evidence from plaintiffs counsel on this particular issue.

THE COURT: Ms. Iwan, the language that's been quoted, Mr. Nathanson's summary here from the Peskin case.

MS. IWAN: Yes.

THE COURT: Where it starts with in appraising the validity of a release, that language was part of the instruction that the jury had? Is that what you just told me or not?

MS. IWAN: The part about the full -- the bottom part of the quote that's in bold.

THE COURT: In addition, the defendant must show by competent proof that a full and frank disclosure of all relevant information was made at the time.

MS. IWAN: Yes. The full --

THE COURT: The jury had that?

MS. IWAN: The jury had the full and frank disclosure language.

THE COURT: Everything that's in bold or

thereabouts, do you remember?

MS. IWAN: Yes. I actually brought the jury instruction with. They actually had even more than that. They had it reinforced a couple of times. The plaintiff's instruction No. 27 read a release between fiduciaries is to be evaluated in the context of the fiduciary relationship. In appraising the validity of a release in the context of a fiduciary relationship, the

defendant has the burden of showing by clear and convincing evidence that the transaction embodied in the release was just and equitable. In addition, the defendant must show by competent proof that a full and frank disclosure of all relevant information was made to the other party. That was plaintiff's instruction 27.

THE COURT: And then one of the interrogatories for the jury to answer was whether or not a full and frank disclosure was made or something like that? I don't have it in front of me now.

MS. IWAN: Yes. The Special Interrogatory six, was the release signed on October 9, 1995 just and equitable to Lozman and Blue Water Partners, Inc.? That was answered yes. And seven, was the release signed on October 9, 1995 obtained by Putnam without disclosure of all material facts? And that was answered no.

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And then just for completeness, plaintiff's instruction No. 27 (A) further drove home the point because it said factors significant in determining whether a particular transaction between parties standing in a fiduciary relation is fair include showing that the fiduciary has made a frank disclosure of all relevant information which he had that the consideration was adequate and that the other party had competent and independent advice before completing the transaction.

So the jury was given many, many tools and guidance to decide what full, fair, equitable, frank meant in order to make their determination. And the court in its judgment order also independently reached a conclusion on this issue.

Your Honor, there was all sorts of other testimony at trial other than the few selective parts that you heard here as to what the full and frank disclosure was, what Fane Lozman knew. What Fane Lozman knew individually and on behalf of Blue Waters didn't just occur on October 11, 1995 when the release was signed. It started long before that back in November of 1994 when he knew Putnam started a broker/dealer without him.

He knew Terra Nova started operating as a

broker/dealer without him. He knew that because Fane Lozman started working at the broker/dealer that he didn't have an ownership interest in. He also knew who the only two customers were that had purchased ScanShift, that were doing business with the broker/dealer. He knew what trades they were placing. He knew what type of trades they were placing. He knew roughly how much money they had brought in. He knew that he received checks from Terra Nova for the money generated by their commissions. Fane Lozman knew that he had terminated ScanShift's sales as of July 11 of

1995. He knew that Blue Waters Partners had no money and that's what the checkbook showed when he got the checkbook. There was no money in the company. That's what the evidence showed at the trial. There are a lot things that he knew that were not material. And this is what the court and the jury heard during the trial. So it wasn't just the selective piece of information.

The arguments, the lengthy argument you heard today that Fane Lozman or Blue Water didn't know how much Putnam capitalized Terra Nova at, that's a brand-new argument. That's waived. That was never in the trial. That's not even in the posttrial motion. You will not find that in the posttrial motion nor

anywhere in the trial transcript or even the closing arguments.

In fact, I recall this court a year ago almost to the day asking Mr. Nathanson at the equitable closing arguments what material fact did Fane Lozman not know that had he known would have made a material difference. You asked this three different times and Mr. Nathanson never answered your question, even inviting him to answer that question a year ago, there was no answer. In the posttrial motion there was no answer. You're hearing it today for the first time. It is a waived argument.

All of these arguments he makes today about Terra Nova is not the relevant inquiry. It's what did Blue Water know at the time the release was signed, and it knew allegedly that Terra Nova was a usurped opportunity. Allegedly I say because I'm gonna address that a little bit later. It knew that because it knew in November of 1994 Terra Nova opened business as a broker/dealer. That was plaintiff's theme throughout this entire case that when Terra Nova opened as a broker/dealer, Blue Water wasn't one, that's when the usurpation occurred. That wasn't a mystery a year later in October of 1995.

Today counsel argues that there's no explanation in the checkbook as to why Sam Long or Analytic Services received certain monies. Once again, I remind the court that that's just a selective recitation of evidence from the trial. The jury and the court heard all the evidence. Sam Long testified on video and explained how he made his revenues. He was selling ScanShift licenses. He was entitled to a commission for doing that work. That was fully explained during the trial.

The other item that counsel mentioned today was that Blue Water supposedly didn't know the soft dollar arrangement under the April agreement. And once again, Blue Water absolutely knew that. Fane Lozman

knew that. He signed the contract. He knew that contract very well. We went through it in painstaking detail at the trial, and the jury was able to observe his demeanor and his understanding, and the court was able to observe his demeanor and his understanding. He knew exactly what customer fell under what paragraph of that April agreement. He knew exactly what customers had been originated by him or by Jerry Putnam and what revenues had come in from those customers. And the jury was entitled to decide, as was the court, was it

credible that Fane Lozman knew these details or not, was it material or not.

Those issues were resolved based on the evidence, and now all the inferences are in favor of what the court and the jury decided. And the selective bits that this court heard today are not enough to overcome not only the manifest weight of the evidence but also the presumption of all inferences in favor of the verdict and the judgment.

That takes us then to Plaintiff's Exhibit 3 or their third argument today about ratification. Again, the premise behind ratification argument is what -- was there a full and frank disclosure, and the jury answered two questions on that. The court independently reached a finding on that. And that is entitled to all of the

presumptions here. Until the plaintiffs can overcome by the manifest weight of the evidence or by meeting the abusive discretion standard, it cannot prevail under posttrial motion.

The flaw in the argument that they made before the court today is they put up testimony saying, well, but Fane Lozman did not know about the SOES room or the ECN opportunities. However, this court found those were not usurped opportunities. Doesn't matter if Fane

Lozman knew that Jerry Putnam was gonna go on in his career to do the SOES room or the ECN because they weren't usurped opportunities, they weren't material facts that they needed to know. That's putting the cart before the horse. If you say, well, let's go on and look at other things that later happened, this court already found and held as a matter of law they weren't usurped opportunities nor were they started back in October of 1995, according to the jury and the court's findings. That certainly can't be the basis to overturn the verdict and the judgment in this particular case.

Also counsel relies on Monco versus Janus and suggests that this court needed to do some kind of McFail analysis for the ratification finding. The problem with that is Monco is not a correct statement of the law. The court correctly applied the ratification law in this case. The reason Monco is not correctly

applied by counsel is because that was an attorney and client transaction. An attorney was doing a business deal with his client. And the court there said when you have an attorney dealing with your own client, as a matter of public policy, we're going to add a layer of protection of clients, where as a matter of attorney ethics we're going to add this additional layer for

ratification where we're going to add those McFail factors.

The Monco case has not been applied to general businessmen. It was only applied in the context of an attorney-client business transaction, and that was done as a matter of public policy. And the court in our case, Judge, you in particular, correctly applied the law of ratification here, and it would be wrong to now extend Monco beyond the limited facts of that particular exception case.

That takes us to Plaintiff's Exhibit 4. Their fourth argument today is they argued that the release should be limited to the April 17, 1995 agreement. The jury rejected this argument, and the court rejected this argument. Once again, plaintiffs had only one theory before the court and the jury. The jury was specifically told by plaintiff's counsel in closing arguments and in their tendered jury instruction No. 60

that if the jury found that the release covered all the claims and the jury was supposed to answer special interrogatories Nos. 5 through 10. This is what the plaintiffs asked the court to instruct the jury. They had one theory and only one theory, that the release was limited in scope, jury follow instruction No. 60. If

you think that this release is general and covers everything in the universe, then go to special interrogatories 5 through 10. Plaintiffs got what they asked for. The court gave instruction No. 60 and special interrogatories 5 through 10, that's what the jury did. They answered all of that, and they found that the release was general in scope. The jury resolved that ambiguity as did the court.

The plaintiffs cannot now complain that it's error to do exactly what they asked the jury to do. That's the Auton case. The scope of the release was ambiguous. It had to be resolved by the jury. Having been resolved by the jury, plaintiffs can't claim it was against the manifest weight of the evidence when the jury does exactly what they asked them to do in this particular case.

Argument No. 5, plaintiffs argue that Putnam's failure to disclose all relevant information precludes a finding of laches. But once again the assumption behind the plaintiff's argument is that laches can't begin

until the plaintiff knows all relevant information. And as we've already demonstrated on the manifest weight of the evidence standard, the jury and the court found the plaintiffs did know all relevant evidence back in 1995.

And they violated the reasonableness standard in terms of following up on that information.

The Terrin versus Pallenari case was followed by this court. It's the current and relevant standard. It's almost right on point factually and legally with what happened here. There a businessman just sat by for 15 months and waited to see if something would come of his business partner's other venture. And he waited to see. If they made money, he was gonna file suit against them to try and get a piece of it. If they didn't, he didn't really much care what they were doing. Pretty much exactly what Fane Lozman did except here Fane waited four years. This court found that that was an unreasonable time. The jury found under ratification that he waited an unreasonable time. There is nothing to suggest that those findings were against the manifest weight of the evidence. And again, you have not heard that those findings were not supported by any evidence whatsoever in the record. And, again, that's the standard of review. We don't retry the case. We don't do de novo. We go by the manifest weight standard.

Finally, plaintiff's argument No. 6 which is the court's decision to allow the defendants to retain their benefits from two frauds is a violation of public

policy in Illinois. I'm not quite sure what plaintiff's reference is here to two frauds. The plaintiff's argument No. 6, this is a new argument. This argument, the title at least, is not in the posttrial motion. This is not in anything in the briefs before this court and is waived because it's a new argument today. Damages, to the extent this goes to damages, were not addressed by the court, and, therefore, if this is a damages argument, it's nothing more than harmless error at best under Chubb and the Tuttle case which we cite in our response to the posttrial motion. Because the court didn't get to damages, any damages argument will be harmless error in any event.

The important thing, though, about the Kerrigan case, since the plaintiff ended on that, I want to add one thing to the record about it. The thing that was lacking in this case is the jury's understanding that if a business partner has knowledge of an opportunity and gives consent for a partner to go pursue that opportunity, it cannot be usurpation. And this court entered a judgment based on release, ratification and laches. And I believe the manifest weight of the evidence as well as the correct standard of laws were

all applied that uphold the judgment on all of those

grounds.

But the court did find there was a usurpation because of the broker/dealer opportunity. But on all of the evidence in this case, believing everything Fane Lozman said, Fane Lozman from the start of this case right through the trial of this case consistently said he knew Terra Nova was a broker/dealer, he consented that Blue Water wouldn't be the broker/dealer because he wanted the Townsends involved. And to have the Townsends involved in Blue Water, to get them involved in ScanShift, he knew Blue Water couldn't be the broker/dealer and Terra Nova would have to be the broker/dealer, and he consented to that. And he would get his money out of the written contract, the April agreement. The jury wasn't told that knowledge and consent is a key element in usurpation.

That's what the Kerrigan case says. It says at page 28 it may be conceded that if a corporation has been informed by a director of a business opportunity which it declines, the director may then be free to pursue the opportunity himself. This court has the opportunity to clear up, in addition to the grounds of the judgment, to clear up the finding with respect to usurpation of the broker/dealer because the evidence in

this case is Fane Lozman said he consented, originally Blue Water was gonna be a broker/dealer. There's no doubt about that. But he consented that the business plan changed and he consented it would not be a broker/dealer anymore. Terra Nova would be a broker/dealer and that was okay with him on behalf of Blue Water. It can't be usurpation if he agrees and if he knows about it. And if that's the case, then you can't have usurpation. You cannot at that point have a judgment against Jerry Putnam and Terra Nova for usurpation.

Terra Nova was also never an officer or director of Blue Water. And I understand that there's a lot of law about what makes someone a fiduciary, but to be a fiduciary for purposes of usurpation, you must be an officer or director of that company. For a usurpation claim, you have to be a fiduciary of that company. Like Putnam was an officer and director of Blue Water. Terra Nova, as a matter of law, cannot be guilty of usurpation. I understand the court's opinion that, like GDP, it might be vicariously on the hook, but it cannot be guilty in the first instance in count four of usurpation.

Finally, usurpation has three elements to it

for a prima fascia. And this court can direct a verdict in favor of the defendants on usurpation because the plaintiffs never proved damages. They never even argued damages for the SOES room. The jury found no damages as to Archipelago. The court found no usurpation as to SOES and Archipelago, and there were no damages caused by the usurpation. Evidence went in that there was no gain to Terra Nova whatsoever that Blue Water got every penny it would have gotten under that contract, that April 17 contract. It got every penny it would have gotten if it were a broker/dealer that it got under the contract.

If there are no damages, if there's no gain to Terra Nova, you don't have usurpation. That's the third prima fascia element of usurpation. This court, while it can enter and keep that judgment upheld on the grounds that it did, it can also affirm the judgment and correct the record with respect to no usurpation by Putnam because Fane Lozman consented. He consented by April of 1995 that Blue Water would not be a broker/dealer because he wanted the Townsends involved and that was consented and acknowledged and contracted for and it was okay with him.

The court had also found that there were three

abuses of assets of Blue Water. And, again, I believe on the record, there's absolutely no evidence of this. I don't believe that I'm disagreeing with conclusions, your Honor. But with all due respect, there's simply no evidence, Fane Lozman conceded at the trial, there was no lease by Blue Water. It held no office space. It paid no rent. It had no property rights anywhere. There could not have been an abuse of Blue Water's lease or property rights because the testimony from every witness is it had no property.

The testimony also as to a second asset about Jerry Putman's time, Fane Lozman said we owe no time to Blue Water. We had no agreement that we had to put in an amount of time. There was no commitment of time. Time of Jerry Putnam could not have been an asset of blue Water.

And the third was Blue Water's relationship with Townsends, the court's judgment said was used to establish Terra Nova Trading. Terra Nova Trading was established solely by Jerry Putnam. It was only his customers. It was only his money. The Townsends did not get involved with Terra Nova trading until 1999. That was not until five years later.

There's no dispute about the evidence that

Terra Nova did not begin in 1994 with any help whatsoever from the Townsends. They had nothing to do with the formation of Terra Nova in 1994. And I do believe on those three issues under the manifest weight standard, you'll find there's no evidence in the record of those three assets having been usurped in any respect for Blue Water.

So for those reasons, your Honor, I believe that the plaintiff's posttrial motion and other requests for relief should be denied. The judgment should be affirmed, and the court has an opportunity on usurpation to clarify the record on those additional grounds. Thank you.

THE COURT: Mr. Schaller, you want to add something?

MR. SCHALLER: Your Honor, William Schaller again for Archipelago defendants.

Let me just say that first of all that the Archipelago defendants adopt as their own the oral arguments made by Ms. Iwan today. Ms. Iwan has covered essentially all the material that I had planned to cover, so I won't go on and on about it.

I think the main point I wanted to make did in fact relate to her last point about the court's

broker/dealer finding. Ms. Iwan is correct. The unique aspect of this case is that it is just like Terrin vs. Pallenari and unlike most of the other cases in that most corporate opportunity cases involve a situation which the plaintiff claims that it was unaware of the opportunity and unaware that its fiduciary was secretly pursuing it, and only after the fact does it come about, get this knowledge and bring the lawsuit.

This case is very much like Terrin where the plaintiffs here were fully aware of the saline facts at all relevant times. And I think the jury understood that when it found that -- when the jury disposed of the claims on corporate opportunity when it found that Mr. Lozman did not have an oral agreement to share in Terra Nova. That finding goes to the reasonable expectation of the parties. That is the actual test imposed on cases such as Dremco and under the Second Circuit U.S. Court of Appeals decision in Berg versus Horn, Dremco versus South Chapel Hill is an Illinois Appellate courts case from 1995, and for that matter, Graham versus Mimms, the Illinois Appellate Court decision 1982 as a similar reasonable expectations test.

In the middle of those decisions, of course, was Illinois Supreme Court's decision in Kinzer versus

City of Chicago, a 1989 decision which teaches the fiduciary duties in this state are not torts but rather

are a product, an amalgam of contract agency and equity law. And the crucial element there is contract law.

The jury having found there was no agreement to share, there could not have been a reasonable expectation, then, that Mr. Putnam was acting on behalf of Mr. Lozman in forming a broker/dealer. That is what has changed from when this case was first alleged until when this case was tried. Perhaps a jury was necessary to decide if there was some oral understanding here, and that they did come, that jury did make that decision. They rejected that oral claim.

We would therefore, Judge, revise that one part of your opinion to find that on these facts and in light of that jury verdict, there was no reasonable expectation of these parties that Lozman was to share in Terra Nova, the broker/dealer. And, therefore, by definition, Ms. Iwan is correct that the time of Mr. Putnam is irrelevant. Of course, there was implicitly no exclusive agreement that his time he spent with Blue Waters if in fact he was to spend time with a broker/dealer, Terra Nova as well.

And Ms. Iwan correctly notes all the facts

relating to the ownership of the property, all of which favor Terra Nova, none of which favors Blue Water Partners and Mr. Lozman.

I would close, then, where I began. This is a unique case in the sense that it's a -- you could call it a two company case as in Terrin versus Pallenari as Ms. Iwan noted or as in Berg versus Horn from the Second Circuit or as in Dremco versus South Chapel where the developers have side by side parcels but no agreement to share parcel No. 2. There, of course, the agreement was in writing. It was a formal contract. But that's not Ms. Iwan's point. Her point is that if you have an implied understanding, implied consent, then all of these tests are met and the broker/dealer finding should have gone for Mr. Putnam.

So with that one exception, we would urge the court to continue and uphold all of its prior findings. We would urge the court to revise that one finding with respect to the broker/dealer. Thank you, sir.

THE COURT: What time do you have to leave, Ms. Iwan?

MS. IWAN: I'm sorry? 4:15, your Honor.

THE COURT: Can you finish by 4:15? I'm not telling you to.

MR. NATHANSON: I know.

THE COURT: We have all afternoon tomorrow.

MR. NATHANSON: It's up to the court. If the court wants me to argue tomorrow, I'll argue tomorrow.

THE COURT: I just as soon have you go right now.

And if you're not done, then we'll do it tomorrow. Finish it tomorrow.

MR. NATHANSON: Okay. That's fine.

Let me start out, your Honor, where Ms. Iwan started out, on the proper standard of review for a posttrial motion. She says that we have misapplied the rule that it's only a manifest weight of the evidence and abuse of discretion and it's not de novo review. I respectfully dissent and disagree to this extent. When the court says at the outset of the court's opinion that you are bound by what the jury did and that you can't change what the jury did as a chancellor in equity, that's got nothing to do with the manifest weight of the evidence. That goes to the proper standard of how to assess who should win or lose the case.

And we argue throughout our posttrial motion extensively that the court was not bound by the jury's conclusions. And, therefore, the court applied the legal standard to the evidence in assessing whether the

release was valid and whether there was ratification rather than an equitable standard. And the application of the correct standard is not a question of fact. It's a question of law or equity. So I think counsel's wrong in that. But she knows she's wrong on that.

How can I prove to you that Ms. Iwan knows

she's wrong in what she just said to you? Well, your Honor, at the instruction conference on December 14, 2004, the p.m. session which is, I'm sure the court recalls, went very late into the night, at pages 195 and 196 you asked Ms. Iwan the following question.

If the jury determines there's a valid release, can I overturn that and you would agree with that? Answer Ms. Iwan: Yes. But ratification can overturn your decision. And their verdict on ratification under Herd and Golden would then be the final outcome, but, yes, that is the law. I don't like it, but that happens to be the law, that equity can overturn what the jury says about the release. And the previous quote referenced just what she told you, that Peskin and Thornwood were the equitable standard for releases.

So you were told by defendants that their ratification defense was something you couldn't alter if

the jury agreed that there was ratification, which I didn't agree with then and don't agree with now, but let's be fair to Ms. Iwan. She did assert that you couldn't change the ratification. But on the Peskin issue, you were told unequivocally that that was for you to decide even if the jury went the other way.

Now, let me pick up on this Peskin point. The Peskin issue, your Honor, is whether there was or was

not a disclosure of all relevant information. That's what the case says. That's the standard promulgated in the case. There was a disclosure of new information here, none. Ms. Iwan said we didn't argue that there was no disclosure at all. We do. We did today and we do throughout our motion. It's in there.

But we suggest that the court did not perform an equitable analysis under Peskin and McFail and Monco of these issues but instead felt bound by what the jury did. And I know that your Honor put in there several times in the decision that I agree with the jury in any event. But respectfully, your Honor, was the court saying you agree with the jury on the jury's legal analysis, or based on equitable principles as set out in the cases defining equity jurisprudence in this state that you agree as a chancellor would look at it or as a

judge performing an equitable review would look at it?

What happened here cannot withstand equitable review. It can only -- that's why the defendants are telling you that you are bound by what the jury did, which is contrary to what they said at the instruction conference.

And then they tell you that the plaintiffs got exactly what they asked for. The plaintiffs drafted these special interrogatories and got exactly what they

asked for. The plaintiffs did not get what they asked for. And the reason the plaintiffs did not get what they asked for was the following. This court ruled that all of these issues that were being submitted were advisory. Had this court not ruled that all the issues were advisory, I would have been a candidate for a lobotomy to submit 15 special interrogatories to a jury.

The plaintiff submitted those special interrogatories based on this court's ruling the day before trial that the equitable issues in this case would be decided by the jury on an advisory basis only. And I knew what that meant because I participated in the Sears wrench case, Roberts versus Sears, where the plaintiff's lawyer did not ask that the jury be advisory on the equitable issues, and the 7th Circuit ruled that

the plaintiff elected their remedy by going to the jury without seeking a determination that the jury verdict was advisory only on the equitable issues.

They're arguing to you that we made an election to be bound by the jury's answers to the special interrogatories when you had ruled that the jury's answer was advisory only. Once the court ruled that, we were required as trial lawyers to follow this court's ruling and to conduct ourselves in accordance with it which we did. It was only after all this was over that they took -- and they liked the jury's answers

to the special interrogatories that they took the position that they were binding, including on the release, as Ms. Iwan just told you, which is contrary to what she told you the night before the closing argument at the instruction conference.

But let me take up the mantle of manifest weight of the evidence. Manifest weight of the evidence is that it's clearly evident that a contrary factual decision should be made. That's the standard. That's what all the cases say. If there's no disclosure at all, none, if Putnam said I didn't tell them anything when I presented the release to him, we didn't have much of a conversation, I didn't show him the books and

records, he sure as heck didn't tell him anything about Terra Nova, there's no evidence at all on that point. Whether you talk about manifest weight or no weight or no evidence, what difference does it make. They prove nothing on that, and they had the burden of proof not by a preponderance of the evidence, by clear and convincing evidence. That's what the instruction said. That's what the Peskin case says, and that's what the other fiduciary duty cases say.

And before this trial started you said to the plaintiffs, your Honor, I would keep the Townsends in this case if the standard of proof was preponderance of

the evidence. But because it's clear and convincing, they're out on summary judgment. That's what your summary judgment opinion says. You have drawn a sharp distinction in this case between preponderance of the evidence and clear and convincing. There's no evidence at all, let alone clear and convincing evidence, that Jerry Putnam disclosed any relevant information to Fane Lozman and Blue Water let alone all the relevant information that he had at his disposal.

Counsel argued to you that we're relying on new 7th Circuit law and Boatmen is the case, and that's the state appellate court case, and it doesn't matter

what all these federal cases say. Well, if the court, and I know the court has looked at Boatmen, before I ask the court to look at it again, Boatmen says it's relying on the 7th Circuit case. Boatmen says that Illinois hasn't adopted the 7th amendment, but we're gonna look to this 7th Circuit Williamson case and say that somebody would be denied their right to a jury trial if -- if the jury's finding on the breach of fiduciary duty wasn't applied in the equitable mortgage foreclosure case.

It's got to be fair argument if Boatmen is basing its decision on 7th Circuit authority which it does, to point out that that's not 7th Circuit authority. Boatmen is a downstate appellate court case

in any event. The First District has never passed on this. I understand that you're bound by a downstate appellate court case if there's no First District case. But my point is it doesn't accurately even represent 7th amendment right to jury trial jurisprudence at the moment.

Counsel told you that we waived the argument, the heading that I put on one of the exhibits today, that there's no case evidence where a finding of breach of fiduciary duty was made at trial and a release was

enforced in the context of that. We've never made it before. Well, we've certainly argued that you can't enforce the release where there's a breach of fiduciary duty. And one can clearly say, your Honor, that your decision which reaffirmed the jury's advisory finding which says, and you said you were going to decide the usurpation as an equitable matter, and you did, the jury's finding was clearly advisory on that, that your decision which found usurpation and breach of fiduciary duty but enforced the release is what created the issue in the first place which we're addressing in the posttrial motion.

Now, couple more points, your Honor. Ms. Iwan argued to you that we have raised for the first time today in oral argument and in our outline this issue of

the finances and capitalization of Terra Nova. Not true. If the -- I refer the court to pages 8 and 9 of the posttrial motion that have been filed in this case. I won't read all of it, but I'm gonna read a couple of excerpts because we all may get this transcript of this argument, and I want it to be clear that we made this point.

In the middle of the first full paragraph on page 8, the defendants offered -- I'm reading from the

posttrial motion because counsel said we didn't raise this in the posttrial motion. Defendants offered no evidence at all as to any financial disclosures that were made to plaintiffs regarding Terra Nova Trading on or before October 9, 1995 or thereafter. Nor did defendants offer any evidence as to any disclosures made by defendants, the plaintiffs, regarding any aspect of Terra Nova's business. Therefore, Putnam's fiduciary obligation as to the Terra Nova business opportunity could not be released in the absence of a full and complete disclosure by Putnam to the plaintiffs of all material facts pertaining to that Terra Nova opportunity. That's the first place we raise it.

Last sentence on the first paragraph on the next page, page 9, I refer to the lack of -- we refer to the lack of any financial or other disclosures made by Putnam to plaintiffs of the business plans, finances,

and other material facts pertaining to the Terra Nova business opportunity. That's page 9 of the posttrial motion, the last sentence in the top paragraph. So this is not a new point. This is -- this was raised in the posttrial motion and -- and preserved by the posttrial motion. Can't be waived if it's in the posttrial motion.

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The issue of Monco versus Janus and that it only applies to lawyers, they raise the issue of ratification. They said it was a legal defense. Counsel argued that at the instruction conference. The court says it's a legal defense in the court's opinion. What we have argued in this case to be clear, is this, ratification insofar as it deals with releasing a fiduciary for a breach of fiduciary duty is an equitable issue. Monco says so. It's right in the case. We quote it right in our -- in our posttrial motion. They said it's a question of equity and public policy.

So that's really what makes the ratification defense here equitable rather than legal because the fiduciary has a duty to disclose that's ongoing if he wants somebody to affirm a transaction, which Monco also says.

Now, Ms. Iwan argues to you -- well, Monco only applies to lawyers. So if I do a business deal

with one of my clients, Monco applies but it doesn't apply to other fiduciaries. Well, I invite the court to peruse Monco again because Monco is based upon the restatement of trust and the restatement of contracts. I quote that in our insert.

Now, I left out the part about the

restatement. I apologize. It's in the case. I apologize. The case says based on restatement of trust and restatement of contracts, the lawyer had a duty to disclose during the ratification period. The other fiduciary duty case is involving brothers, sisters, parents, all other guardian and ward also cite the restatement of trust and the restatement of contracts to determine the scope of the fiduciary duties. There's nothing magic about that. There is no -- there's no case saying Monco is limited to lawyers and those restatements aren't limited to lawyers.

But as long as Ms. Iwan brings up lawyers, can any fiduciary, can I do a business deal with a lawyer and not -- and do certain things and not tell them about it and say sign this release and have it be enforceable? Can a guardian? Can a trustee? No fiduciary can do that. The whole point is you're dealing on a different level with a fiduciary than you are in an arms length transaction. And -- and that's the point -- that's frankly, your Honor, where we feel this case should not

be treated like the other cases, and that's why they're asking you to vacate your finding of breach of fiduciary duty. That's why you're being asked to change your mind on usurpation. Because with a finding of breach of

fiduciary duty, that means he had to do certain things that he didn't do, and it means it's constructive fraud.

And what I meant by two frauds was simple. The usurpation was a constructive fraud because that was a breach of fiduciary duty and having him sign that release without a full disclosure was another constructive fraud because he had a duty to disclose. And all of that's argued in all of these papers.

But Ms. Iwan says, well, the Monco thing is just public policy for lawyers. You know, lawyers shouldn't abuse clients, and, therefore, it's -- the basis for that decision is the public policy regarding attorney-client relationships. Well, what is in our insert, the last one, is Kerrigan. And Kerrigan is the public policy in Illinois for corporate officers, which says unless you make a full disclosure to the pertinent facts and tender the opportunity, you can't exploit it which means you can't benefit from it. That's the public policy of Illinois as to corporate officer fiduciary -- fiduciaries which is no different than the one, maybe even stronger, than the attorney-client one

because Monco says if the lawyer makes -- does certain things that -- that the transaction is still enforceable. Kerrigan says you've got to offer to give

it back or you can't benefit from it. When did Jerry Putnam offer to give the broker/dealer opportunity here back? Never happened.

Two more points, your Honor. I think I can finish. The defendants have not filed a posttrial motion. They like the fact that they -- at the moment they won this case. So they didn't file a posttrial motion saying you were wrong in usurpation. Instead they filed responses to our posttrial motion, and at the end of the posttrial motion, at the end of the response say, you know, even if the court does decide that the release is invalid or doesn't apply to usurpation, the court was wrong on usurpation and should vacant like Mr. Schaller just asked you to do. That's not a posttrial motion.

They have -- they're saying we waived various things that are clearly in our posttrial motion, yet they're asking you to vacate the finding of breach of fiduciary usurpation without a posttrial motion. They say, well, you can affirm the judgment for any reason. Respectfully you can't. That's an appellate court rule. That the appellate court can affirm for any reason in the record. Properly preserved in the record I believe

is the way the rule is phrased by the appellate

opinions.

If they wanted this court to vacate or set aside the court's finding of breach of fiduciary duty, then it was incumbent upon the defendants to file a posttrial motion in this court, to timely file one. Time for doing that has long since passed.

I would submit on behalf of the plaintiffs that it is not before this court at the moment whether or not the usurpation is finding that you made and that the jury made is appropriate.

I'm gonna -- I'm gonna end, your Honor, with this laches point because both Ms. Iwan and Mr. Schaller brought up this Terrin case. It's been argued in the papers as a corporate opportunity case. I don't see that in here. I see it as a trademark case. I see that it's a pretium case under the corporate -- the Illinois business corporation act. But I don't -- unless I'm misreading, I don't see anything about corporate opportunity. Nor in the Terrin case is there anything about any analysis of Prueter versus Bork which is the decision -- the laches decision where the First Circuit said there's a different standard for laching when there's a breach of fiduciary duty. I take it that wasn't involved here because there was no breach of

fiduciary duty proven.

There was a salary issue, and they said there was no entitlement to an accounting on the increase in salary. The laches discussion in this Terrin case quotes the standard laches cases, says nothing about breach of fiduciary duty, says nothing that you have to show full disclosure where there's a breach of fiduciary duty. I mean, so I don't think this case applies. I don't think your Honor's case that you affirmed on laches applies for that reason and that reason alone.

There is a proven breach of fiduciary duty in this case. The defense sure doesn't like to talk about those first few answers to special interrogatories where the jury found that Putnam diverted these -- all of these business opportunities. I know the court disagreed with that, but the jury found in the answers to the first three or four special interrogatories that all of them weren't properly deferred. The SOES room, the Exchange, the ECN, the broker/dealer business, all of them.

The jury also said Putnam failed to disclose and tender what he was doing with those opportunities. So you have a finding by the jury on material facts regarding the release, but they also say he failed to

disclose what was going on with the opportunities. We've always argued that those can't really be reconciled, but we've also said it's up to the court under Peskin as a chancellor to decide both issues.

This has become quite a complex legal saga and equity saga at the very least, your Honor. And for the reason stated, and I appreciate the opportunity to present the oral argument today, the plaintiffs would ask you to grant their posttrial motion.

THE COURT: Just one quick question before you sit down, Mr. Nathanson. You -- I remember the defense filing a motion, I don't remember what the title was but something about I should decide which are the equitable issues and which are the legal issues. And then you refer to in your argument just now my holding, I think I wrote an opinion.

MR. NATHANSON: You did.

THE COURT: I think it was a short opinion. I did say something about equitable issues to be advisory only.

MR. NATHANSON: You did.

THE COURT: Did I say anything defining what I meant by equitable issues in there? In other words, did I say the release issues are -- are to be considered

equitable issues to be reviewed by the court anywhere in my opinion, and I guess -- answer the first question.

MR. NATHANSON: My first answer is I don't remember. I don't remember what your opinion said other than the conclusion which I think it said all equitable matters or any equitable matters, but, you know, I'd be paraphrasing. I honestly don't remember what your opinion said. It did say they would be advisory. I remember what the impetus for your -- for their motion was and what the argument was, which was their claim that a usurpation claim is at bottom a breach of fiduciary duty claim, and a breach of fiduciary duty claim is a claim in equity. So --

THE COURT: I don't think there's ever any question in my mind or anybody else's mind regarding that aspect of it.

MR. NATHANSON: I think that's what led to the discussion. I don't remember -- I don't know if you defined what you meant by what was advisory and what wasn't.

THE COURT: Let me phrase it differently. Was it your understanding that applied -- from the gist of your argument, your understanding that applied to all the questions the jury was asked about in the context of

whether there was an appropriate usurp; is that correct?

MR. NATHANSON: The answer is yes. And there's another reason why my answer's yes. Because we had count 14 for recision of the release which everyone agreed was an equitable cause of action for recision of the release. So it was always our understanding that you would be deciding count 14 for recision of the release because that's an equitable claim period. That was never even in dispute. I don't think it's in dispute today.

So, yes, it was our understanding that -- that all of the release issues would be decided under that and that you had decided anything also pertaining to the usurpation would be an equitable claim. And, obviously, I would say the defense as to usurpation would fall within that as well to the extent that they're equitable.

THE COURT: Okay. Want to comment on that at all, Ms. Iwan?

MS. IWAN: Yes, your Honor.

First, your order did not specify. Second, I don't know if you recall at the time of the motion that Mr. Grimm presented a chart that separated out what was equitable and what was legal. And at the time there

wasn't a dispute over the chart, but as the argument ensued, there was a dispute over whether the release would be legal or equitable. And the reason that the conclusion was it was both is because as to the legal causes of action, breach of contract, which as we went into the trial there were three breach of contract counts, the affirmative defenses of release and ratification were legal defenses to those three legal counts.

THE COURT: Okay. So you agree with what you said before the instruction conference that the court had the authority to overrule anything the jury did in answering questions on a release; is that correct? I have the equitable -- I have the right under an equitable analysis to do something different?

MS. IWAN: I think we have to go count by count. On the legal counts, on the legal punitive defenses, no. On the equitable, I think that may be correct.

THE COURT: We already know there's no need to do it on the legal --

MS. IWAN: Right.

THE COURT: -- because the jury ruled for the defendant.

MS. IWAN: Right. But I disagreed with all the

special interrogatories, therefore, were all equitable or advisory questions, because the release questions had

to go to the legal affirmative defenses of release and ratification for our affirmative defenses.

THE COURT: Okay.

MS. IWAN: In laches there's case law in Illinois is also a legal affirmative defense and we had pled it as a legal affirmative defense. So it wasn't that clear-cut, and it's not that clear-cut today to say everything in the special interrogatories was one way or the other.

THE COURT: Okay. Anything further, Mr. Nathanson? You get the last word if you want.

MR. NATHANSON: Thank you, Judge.

Just one more point and this is in our Exhibit 2 which for today's oral argument, page 2 of Exhibit 2 right after all the transcript pages, there's page 1 of Exhibit 2 and then there's a bunch of transcript pages "A" through "F," and then there's a page 2. Do you have that, your Honor?

THE COURT: You're referring to which now?

MR. NATHANSON: I'm referring to this. There's a statement in the middle of the page.

THE COURT: Yeah, I have it. You can have it. Go

ahead.

MR. NATHANSON: Okay.

THE COURT: Go ahead.

MR. NATHANSON: And I think this is the distinction, and I don't think this is really complicated. We quote from Amger, for gosh sakes, the black letter Hornbook rule. Courts of equity will restrict, reform or cancel a general release to conform it to the thing or things intended to be released since the avoidance of a release is a purely equitable matter.

I think on a 2619 release is a legal affirmative defense is if the issue is, is there a release and does it cover this claim. The avoidance of a release, the setting aside of a release, the reformation of a release is an equitable question. So there are times when a release is a legal defense and there are times when it's an equitable defense. And -- and I think it's really that simple.

THE COURT: Okay.

MS. IWAN: Your Honor, may I respond to that?

THE COURT: I know it's 20 after four.

MS. IWAN: I know. I'm mindful of that. But under the scenario Mr. Nathanson just described, that's when the Boatmen's case kicks in. Once the legal jury

decision has been rendered, though, now under the right to trial by jury, that's when the court's hands started to get tied. That's why I couldn't answer your question when you said does the court ultimately have the power in equity to just overturn whatever the jury did.

That's what Boatmen's case said. Because if you demanded a trial by jury, the constitutional right to trial by jury in this state has to follow what the jury said on the release issue.

THE COURT: Okay.

MS. IWAN: Thank you.

THE COURT: You done, Mr. Nathanson?

MR. NATHANSON: And to whether there's a release and whether the scope governs the claim, the equitable part can't be decided by the jury. Thank you, your Honor.

THE COURT: You're done?

MR. SCHALLER: I don't want to join this continuous loop, your Honor. I'm done.

MS. IWAN: Should we enter and continue for a ruling?

THE COURT: Yes. I'll give you a firm date for coming back, then I'll have opinions done before then. I'll issue an opinion like I've done in the past. So

let's do an order -- today is the 7th. 14th of March, 9:30 for status.

MR. NATHANSON: Okay.

THE COURT: And I'll issue an opinion before then hopefully.

MS. IWAN: That will be great.

THE COURT: If you want to go, somebody else can do a separate order.

MR. NATHANSON: I'll do an order, your Honor.

THE COURT: Until March 14, 9:30.

MS. IWAN: I'm just thinking I have to be somewhere on the 14th of March and I'm trying to figure out where it is.

THE COURT: Do you want to come the day before, 13th?

MS. IWAN: That's a holiday, I think.

THE COURT: 13th's not a holiday. March 13's not a holiday.

MS. IWAN: It's not? Isn't it Lincoln's birthday?

THE COURT: Well, not on my printout. It's President's day is the 20th of February. Washington's birthday is the 13th so --

MS. IWAN: I thought Illinois took -- no, leave it on the 14th.

THE COURT: March 14. Just a second.

MS. IWAN: Oh, I'm sorry. You said March 14?

THE COURT: I said the 13th.

MS. IWAN: I'm sorry. You said March. I was thinking February.

THE COURT: The court's in session.

MS. IWAN: I'm sorry. I was thinking February and you said March. I'm fine with March.

THE COURT: March 14. Mr. Nathanson, you'll do an order?

MR. NATHANSON: Yes.

THE COURT: Court is now in recess.

(Whereupon, further proceedings in said cause were adjourned to March 14, 2006 at the hour of 9:30 a.m.)

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

MARTHA C. NEWTON, being first duly sworn, on oath says that she is a court reporter doing business in the City of Chicago; and that she reported in shorthand the proceedings of said hearing, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains the proceedings given

at said hearing.

_____

Certified Shorthand Reporter

SUBSCRIBED AND SWORN TO
before me this _____ day
of _____ 2006.

_____

Notary Public

tles for $300 each.

Stoute, who also works with clients such as Procter & Gamble, McDonald's and the Cleveland Cavaliers, said about half of the multimillion dollar campaign will be spent online.

Name games

The little things make all the difference in business and in life.

In the case of incoming New York Stock Exchange co-president **Gerry Putnam**, one measly letter separates his assumed name from his given name, reports The Post's **Roddy Boyd**.

Putnam turns out to have been born and raised with the surname *Putman*.

Raised in the City of Brotherly Love, a search of birth records turned up the discrepancy, and University of Pennsylvania athletic files — where he lettered in varsity rowing in 1978 — confirmed it.

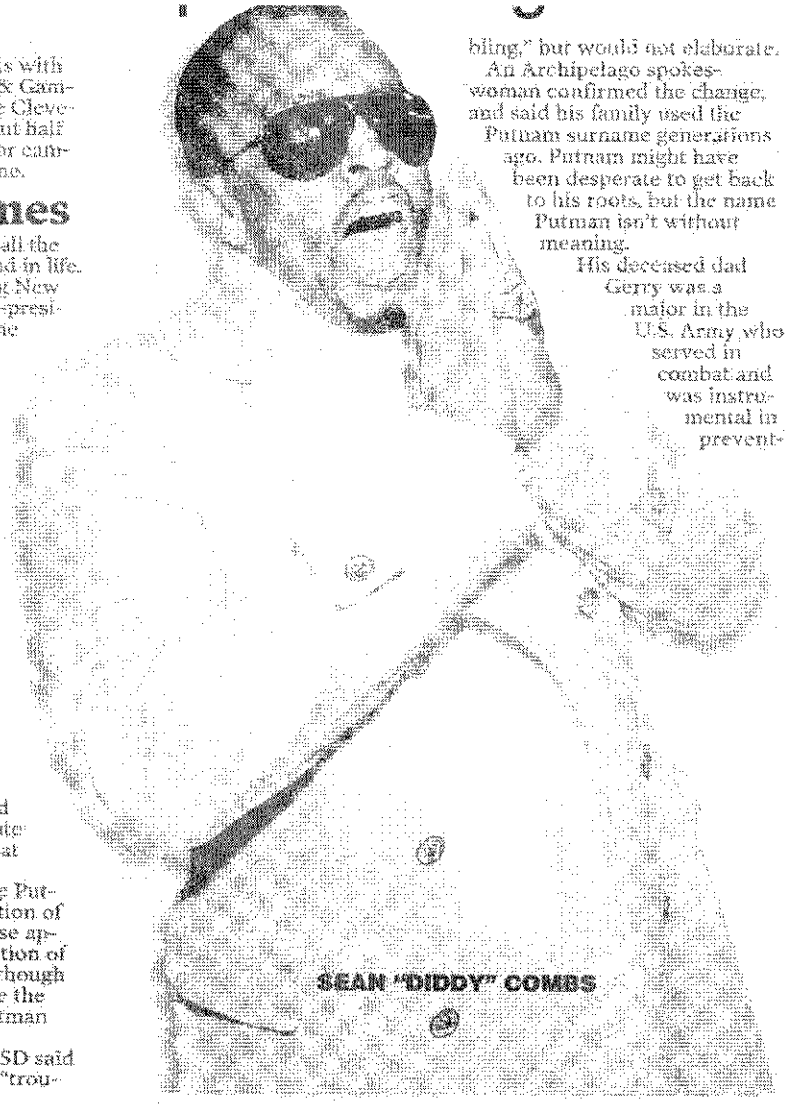
Putnam has used the new surname throughout his Wall Street career, and The Post could find no business associate of his past or present that knew of the change.

Even more interesting: Putnam's National Association of Securities Dealers license application makes no mention of the name change, even though he was supposed to note the fact that he used the Putman name well into his 20s.

A lawyer with the NASD said this kind of omission is "troubling," but would not elaborate.

An Archipelago spokeswoman confirmed the change, and said his family used the Putnam surname generations ago. Putnam might have been desperate to get back to his roots, but the name Putman isn't without meaning.

His deceased dad Gerry was a major in the U.S. Army who served in combat and was instrumental in preventing a massacre of civilians in the Korean war, according to documents obtained by The Post.



SEAN "DIDDY" COMBS

Tough sell

Does New York Jets owner **Woody Johnson** have dreams of becoming a newspaper baron?

Johnson, according to a well-placed source, recently considered buying the New York Observer, the weekly that covers elite Manhattan circles.

He ultimately passed, said the source, because "he concluded there was no way it would ever make money."

The Post's **Keith Kelly** has reported that others, such as **Bruce Wasserstein** and Reed Elsevier, the London publishing firm, have taken a look — but ultimately passed — on buying the money-losing weekly.

Soul training

Island Def Jam Chairman **Antonio "L.A." Reid** is known as heavy hitter in music, so it may not come as a surprise to discover he's also in fighting form.

The longtime hit-maker, who helped engineer **Mariah Carey**'s stunning comeback, is training for a triathlon, a long-distance race combining swimming, running and biking. He's so serious about it that his record company is sponsoring the Highland Triathlon in upstate New York, an annual event held in May by swim coach and trainer **Doug Stern**. Word is Reid may show up on the list of competitors next year.

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