UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ABU DHABI COMMERCIAL BANK, KING COUNTY, WASHINGTON Together and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

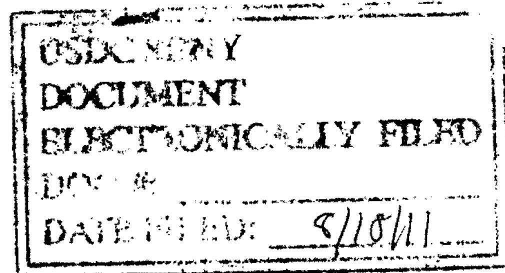
MORGAN STANLEY & CO. INCORPORATED, MORGAN STANLEY & CO. INTERNATIONAL PLC, MOODY'S INVESTORS SERVICE, INC., MOODY'S INVESTORS SERVICE LTD., STANDARD AND POOR'S RATINGS SERVICES and THE McGRAW HILL COMPANIES, INC.,

Defendants.

**REPORT AND RECOMMENDATION NO. 16**

DEFENDANTS' MOTION TO COMPEL SEI INVESTMENTS COMPANY TO PRODUCE "MISSING" E-MAIL ATTACHMENTS

Case No. 08 Civ. 7508 (SAS)




JONATHAN M. REDGRAVE, SPECIAL MASTER:

This Report and Recommendation addresses the issue of Defendants' Motion to Compel SEI Investments Company ("SEI") to produce "missing" e-mail attachments. Defendants and SEI have been unable to resolve the dispute. Defendants and SEI have provided their respective positions in Submissions to the Special Master, and this issue is now ripe for decision.

## I. BACKGROUND

1. On March 28, 2011, Defendants identified and inquired about three e-mail messages that were produced by SEI without their accompanying attachments, which were not logged on SEI's privilege log.[1]

2. Specifically, Defendants informed SEI that:

> SEI's production includes e-mails identifying attachments that appear on their face to be responsive to defendants' document requests, but which are missing from SEI's production. Several examples of what appears to be a pervasive issue affecting SEI's production are SEI-e00028149 (which identifies as an attachment a document titled "CHEYNE CMG pricing Analysis 10 0908.xls"), SEI-e00218989 (which identifies as an attachment a document titled "NAV impact after Cheyne cash distribution.xls"), and SEI-e00235120 (which identifies as an attachment a document titled "SIV update 121907.doc"). These attachments do not appear to be privileged and SEI did not list them on its privilege log."[2]

3. Defendants further asked SEI to provide an explanation and basis for withholding such attachments if they were intentionally withheld. If the attachments were not intentionally withheld, Defendants requested that SEI explain why the attachments were not produced.[3]

4. On April 29, 2011, Defendants again raised the "missing attachment" issue with SEI.[4] In their letter to SEI's counsel, Defendants indicated that SEI did not respond to Defendants' March 28, 2011 inquiries. Defendants reiterated their request for an explanation regarding the "missing attachments" and also requested that, "[i]f SEI did not intentionally withhold such documents, then no later than May 6, [SEI should] produce the missing attachments and explain why they were not produced in the first instance."[5]

5. On May 6, 2011, SEI provided a response to Defendants regarding the three e-mails with missing attachments first identified by Defendants in their March 28, 2011 letter, but SEI did

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[1] Letter from C. Roche to L. Brooks regarding *Abu Dhabi Commercial Bank, et al. v. Morgan Stanley & Co. Incorporated, et al.*, at 4-5 (Mar. 28, 2011).
[2] *Id.*
[3] *Id.* at 5.
[4] Letter from C. Roche to J. Charo regarding *Abu Dhabi Commercial Bank, et al. v. Morgan Stanley & Co. Incorporated, et al.*, at 3 (Apr. 29, 2011).
[5] *Id.*

not provide an explanation for the absence or withholding of any attachments beyond those specifically identified by Defendants.[6]

6. SEI indicated that it would produce the missing attachments for two e-mail messages identified by Defendants,[7] and further indicated that it was unable to produce the attachment for the third e-mail message identified by Defendants because the e-mail was saved on a shared drive without the attachment and SEI was unable to locate the e-mail and attachment in any other locations.[8]

7. On May 17, 2011, Defendants responded to SEI's May 6, 2011 communication and stated:

> In your letter, you agreed to produce two email attachments (the attachments to SEI-e00218989 and SEI-e00235120) that SEI withheld from production. Please produce these documents on or before May 20, 2011. While we appreciate your agreement to produce these documents, you still have not addressed the broader issue raised in my March 28, 2011 letter: SEI apparently withheld from its prior productions responsive, non-privileged attachments to emails it produced. In fact, your May 6 letter only underscores the seriousness of this issue; it confirms that SEI had two of the three example documents we identified, that those documents are not privileged, and that SEI nevertheless failed to produce them previously. As I also noted in my March 28 letter, the problem of missing attachments appears to be pervasive throughout SEI's production, affecting more documents than just the three examples I noted in my letter. Additional examples include, but again are not limited to, SEI-E01203076, SEI-E01259448, SEI-E00430204, SEI-E00432753, SEI-E01183751, SEI-E01418050 (listing 4 attachments, only 2 of which were produced). Please explain no later than May 20 why these documents were withheld or otherwise not produced. Please also confirm that SEI has produced all other responsive attachments to produced emails, or otherwise produce those attachments on or before May 24. If the missing attachments are the result of technical problems or limitations in SEI's search capabilities, please let us know so we can work with you to find a solution.[9]

8. On June 3, 2011, SEI responded to Defendants' May 17, 2011 letter and stated, "Plaintiffs produced the attachments to SEI-e00218989 and SEI-e00235120. Regarding the other

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[6] Letter from J. Charo to C. Roche regarding *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, at 2 (May 6, 2011).

[7] *Id.* ("SEI will produce the attachments to SEI-e00218989 and SEI-e00235120.").

[8] *Id.* ("Regarding the final email attachment you reference, in the ordinary course of SEI's operations, SEI saved the email bearing Bates number SEI-e00028149 in a shared drive location without also saving its attachment. The attachment was not located during SEI's search for responsive documents. Accordingly, plaintiffs are unable to produce the attachment."). The attachment that SEI has not been able to locate is titled "CHEYNE CMG pricing Analysis 10 0908.xls."

[9] Letter from C. Roche to J. Charo regarding *Abu Dhabi Commercial Bank, et al. v. Morgan Stanley & Co. Incorporated, et al.*, at 1 (May 17, 2011).

attachments you reference, none are [sic] responsive. As I explained in my June 1, 2011 letter to Mr. Miller and on numerous other occasions, plaintiffs have conducted a reasonably diligent search for responsive documents and produced the non-privileged responsive documents located in that search. I note, however, that Morgan Stanley has not produced a number of responsive Morgan Stanley documents produced by other entities, such as Cheyne. Examples of such documents are listed in my June 1, 2011 letter."[10]

## II. THE PARTIES' POSITIONS

9. Defendants and SEI have provided separate Submissions to the Special Master pertaining to Defendants' present Motion. Below is a summary of the respective contentions of the Parties.

10. Defendants argue that SEI's failure to produce certain attachments to responsive e-mails is "inconsistent with its discovery obligations" for at least three reasons.[11]

11. First, Defendants contend that their Requests for the Production of Documents call for SEI "to produce non-privileged responsive documents as they are kept in the ordinary course of business."[12]

12. Second, Defendants argue that SEI's failure to produce non-privileged attachments to responsive e-mails is in violation of Rule 34(b)(2)(E)(i) and the Southern District's Local Rule 26.3(c)(2), which require a producing party to produce documents as they are kept in the ordinary course of business.[13] Defendants also note that the approach taken by SEI is inconsistent "with the parties' prior practice in this case of producing non-privileged or protected attachments to responsive emails."[14]

13. Finally, Defendants contend that the definition of the term "document" found in The Sedona

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[10] *Id.*

[11] Defendants' Submission Regarding SEI's Improper Withholding of E-Mail Attachments, at 2 (June 28, 2011) ("Defendants' June 28 Submission").

[12] *Id.*

[13] *Id.*

[14] *Id.*

Conference's Glossary provides helpful guidance in the present dispute because it defines "document" as:

> A collection of pages or files produced manually or by a software application, constituting a logical single communication of information, but consisting of more than a single stand-alone record. Examples include a fax cover, the faxed letter, and an attachment to the letter – the fax being the "Parent," and the letter and attachment being a "Child."[15]

14. Defendants further contend that SEI's "failure to identify and remedy the cause(s) of what appears to be a widespread problem affecting SEI's production" and SEI's "refusal to produce attachments (or its failure to explain why it is unable to do so) amounts to a failure to produce documents in their entirety, and thus a failure to comply with its discovery obligations."[16]

15. In support of their argument that SEI is withholding responsive attachments, Defendants point to their May 17, 2011 letter which requested that SEI produce two of the four attachments to a December 3, 2007 e-mail. Defendants note that one of the withheld attachments is titled "Dasher Letter – PB US Final.pdf," and argue that the "attachment appears to be the final version of a November 2007 letter to SEI's investors from then-SEI Chief Investment Officer Karl Dasher containing SEI's response to various market events and describing SEI's understanding with regard to the ongoing performance of the assets in the Cheyne SIV."[17] Defendants further note their belief that the non-produced attachment is "highly relevant and responsive [as evidenced by the fact that] SEI produced a draft of it elsewhere."[18]

16. In its Opposition to the current Motion, SEI disputes Defendants' allegation that there appears to be "'a widespread problem affecting SEI's production.'"[19]

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[15] *Id.*
[16] *Id.*
[17] *Id.* at 1-2.
[18] *Id.*
[19] Plaintiffs' Submission Regarding SEI's Email Attachments, at 1 (July 6, 2011) ("Plaintiffs' Opposition") (quoting Defendants' June 28 Submission, at 2).

17. Rather, Plaintiffs contend that "SEI conducted a reasonably diligent search for responsive documents and produced the non-privileged, responsive documents located in that search."

18. Plaintiffs further note that SEI's production included e-mails and their attachments and that the production "has exceeded 1.5 million pages of documents."[20]

19. It appears that Plaintiffs' main argument, however, is that the attachments identified by Defendants as not having been produced or logged "are [not] responsive [because] they fall outside of the relevant time period of January 1, 2004 through October 31, 2007, [which is] the relevant time period that SEI has consistently stated it would limit its production to."[21]

20. Plaintiffs further contend that, in Draft Report and Recommendation No. 14, the Special Master "recently recognized" that the "relevant time period" defined by Plaintiffs is appropriate.[22]

21. Based on this argument, Plaintiffs contend that "[b]ecause the emails are outside the relevant time period and thus not responsive, the Special Master should not compel SEI to produce their attachments (which are also from outside the relevant time period)."[23]

22. Also based on this argument, Plaintiffs posit that "defendants have only pointed to nine emails for which SEI did not initially produce attachments, ***only three of which*** were from the relevant time period."[24]

23. Plaintiffs reiterate their position that SEI has "already conducted a reasonably diligent search and produced all responsive, non-privileged documents it located during that search," and maintain

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[20] *Id.*

[21] *Id.* at 1-2, n. 2 (Plaintiffs note that "in each of its responses to Morgan Stanley's document requests, SEI has maintained that it would limit its production to the time period of January 1, 2004 through October 31, 2007.").

[22] *Id.* at 1-2.

[23] *Id.* at 2.

[24] *Id.* at 1 (emphasis in original).

that "the Special Master should deny defendants' request for a global recommendation that SEI should produce all non-privileged attachments to emails it previously produced."[25]

24. Plaintiffs appear to contend that any production of e-mails dated after October 31, 2007 was inadvertent because SEI "was forced to complete a million plus page production in a matter of weeks."[26]

25. Plaintiffs further suggest that "[j]ust as the Special Master found [in Draft Report and Recommendation No. 14 related to the Parties' privilege dispute] 'that SEI should not be punished for "overlogging" (if it has done so),' SEI should not be compelled to produce attachments to non-responsive emails it produced."[27]

26. Nevertheless, Plaintiffs indicate their apparent willingness to research the "missing attachment" issue – or at least investigate certain documents – but also suggest that, "[i]f defendants still believe that there are additional responsive, non-privileged documents that SEI has not produced, defendants should identify all of those attachments to plaintiffs at once so that plaintiffs can address them at the same time."[28]

27. In their Reply, Defendants address each of Plaintiffs' arguments as described below.

28. In response to Plaintiffs' contention that Defendants have identified only nine documents that have missing attachments, Defendants provide a list of 126 additional e-mails (all dated between January 1, 2004 and October 31, 2007) that are missing one or more attachments, and indicate

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[25] *Id.* at 2.
[26] *Id.* at 1 (". . . defendants sent a May 17, 2011 letter that pointed to six additional emails (all sent between December 31, 2007 and August 20, 2008) for which SEI did not produce attachments. While SEI inadvertently produced these emails when it was forced to complete a million plus page production in a matter of weeks, neither the emails nor their attachments are responsive as the fall outside the relevant time period of January 1, 2004 through October 31, 2007.").
[27] *Id.* at 2, n.3.
[28] *Id.* at 2.

that the "list is not intended to be exhaustive, and is the result of only a limited, time-consuming manual review of SEI's documents."[29]

29. With regard to Plaintiffs' "relevant time period" argument, Defendants note that several of the attachments they identified as missing fall within the January 1, 2004 through October 31, 2007 timeframe.[30]

30. In addition, Defendants state that "SEI's argument that its post-October 31, 2007 documents are irrelevant disregards the facts that (1) SEI *has already agreed* to produce documents from the January 1, 2004 – June 30, 2009 period. . ., and (2) over 75% of the emails SEI has produced – 20,919 out of 27,274 total emails – were sent *after* Oct. 31, 2007."[31]

31. Defendants contend that "SEI should not be permitted to evade its obligation to produce attachments to responsive, non-privileged emails . . . and should be required to account for its failure to remedy the serious flaws in its production."[32]

## III. LEGAL STANDARD

32. In every discovery context, a motion to compel is entrusted to the sound discretion of the district court.[33]

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[29] Defendants' Reply Regarding SEI's Improper Withholding of Email Attachments, at 1, n. 2 (July 12, 2011) ("Defendants' July 12 Submission"). In all, it appears that Defendants have identified 129 e-mails to Plaintiffs that have been produced without one or more attachments, and such attachments are not found on SEI's privilege log.

[30] *Id.* at 1.

[31] *Id.* (emphasis in original) (citing General Objection No. 10 in Plaintiff SEI Investment Company's Responses to Defendant The McGraw-Hill Companies, Inc.'s First Request for Production of Documents (dated Nov. 2, 2009), which indicates that SEI "objects to the Requests to the extent they are overly broad as to time or scope. However, plaintiff will produce documents concerning the time period from January 1, 2004 to June 30, 2009.").

[32] *Id.* at 2.

[33] *See Am. Sav. Bank, FSB v. UBS Paine Webber, Inc., (In re Fitch, Inc.)*, 330 F.3d 104, 108 (2d Cir. 2003); *United States v. Sanders*, 211 F.3d 711, 720 (2d Cir. 2000).

33. The Second Circuit has noted that a "trial court enjoys wide discretion in its handling of pre-trial discovery, and its rulings with regard to discovery are reversed only upon a clear showing of an abuse of discretion."[34]

34. A district court is considered to have abused its discretion "if it bases its ruling on a mistaken application of the law or a clearly erroneous finding of fact."[35]

35. "The party seeking the discovery must make a prima facie showing that the discovery sought is more than merely a fishing expedition."[36]

36. A review of case law reveals many cases where there is an implication that attachments must be produced with e-mails (or identified via load file data), but most of these cases deal with "form of production" questions and relevance is assumed.[37]

37. Interestingly, however, when confronted with the question of whether e-mails and attachments should be treated separately for the purpose of assessing whether each item can be withheld on the grounds of privilege (albeit in a different context), courts appear to expect that attachments, like earlier strings in e-mail correspondence, need to be treated separately and logged as such[38] absent an agreement of the parties or an order of the court providing otherwise.

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[34] *In re DG Acquisition Corp.*, 151 F.3d 75, 79 (2d Cir. 1998) (citing *Cruden v. Bank of N.Y.*, 957 F.2d 961, 972 (2d Cir. 1992)).

[35] *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001).

[36] *Evans v. Calise,* No. 92-cv-8430, 1994 WL 185696, at *1 (S.D.N.Y. May 12, 1994); *United States v. Int'l Bus. Mach. Corp.*, 66 F.R.D. 215, 218 (S.D.N.Y. 1974) (burden is on moving party to establish relevance); *see also United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir. 1974) ("Disclosure should not be directed simply to permit a fishing expedition.").

[37] *See, e.g., PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, 2007 WL 2687670 (N.D.N.Y. Sept. 7, 2007)("Without question, attachments should have been produced with their corresponding emails as such are kept in the usual course of business."); *CP Solutions PTE, Ltd. v. General Electric Co.*, 2006 WL 1272615, at *4 (D. Conn., Feb. 6, 2006) ("Defendants chose to provide the documents in the manner in which they were kept in the ordinary course of business. Attachments should have been produced with their corresponding e-mails"); *Miller v. IBM*, 2006 WL 995160 (N.D. Cal. Apr. 14, 2006) (court ordered the producing party to match all e-mails with their corresponding attachments for the opposing party's accurate review).

[38] *See C.T. v. Liberal School Dist.*, 2008 WL 217203 (D. Kan., Jan. 25, 2008)(finding privilege waived for attachments to e-mails that were not separately logged with the allegedly privileged e-mail communication); *see also* Thomas Y. Allman, Anthony J. Diana, Ashish S. Prasad and Matthew A. Rooney; Beth Ann Schultz and Therese Craparo, *Practising Law Institute Electronic Discovery Deskbook*, § 5:3 Key Issues for Discussion (2010)

38. The Special Master was not directed to any cases in the United States that have definitively addressed the precise issue here, even though it would seem to be a fairly significant and recurring issue.[39]

39. Conceptually, there is a good basis for considering each item (each e-mail and each attachment) separately. Relevance is the *sine qua non* of discovery. *See* Fed. R. Civ. P. 26(b)(1). If information is not relevant, it is not discoverable under plain text of the Rule. Thus, if an e-mail attaches three disparate items in one communication package, that does not mean that all three items relate to the same thing or would be equally relevant to a discovery request.

40. At the same time, the "completeness" standard of Fed. R. Evid. 106 states that when part of a document is introduced into evidence, the entire document may be required if it "ought in fairness" be considered contemporaneously. The logic of this evidentiary rule extends backwards to discovery which often leads to a conclusion (or at least a presumption) that if something was attached to a relevant e-mail, it is likely also relevant to the context of the communication. In addition, harkening back to the days of paper discovery, communications and documents that were attached contemporaneously (as with a staple through all pages) were often treated as a single object for relevance assessments.

41. In addition, Fed. R. Civ. P. 34 (b)(2)(E)(i) allows a responding party to "produce documents as they are kept in the usual course of business or . . . organize and label them to correspond to the categories in the request." As some courts have found, there is some appeal to the notion that

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("Similarly, it may be difficult to determine how to address privileged or nonresponsive attachments to a nonprivileged, responsive email and vice versa, that is, a privileged or nonresponsive email with at least one nonprivileged and responsive attachment. Questions may be raised regarding whether the email or individual attachments can simply be withheld from production, without acknowledging that the withheld document is associated with its email or attachment, or whether the privileged or nonresponsive email or attachment must be redacted prior to production and separately logged.").

[39] *Cf. Todd Pohokura Ltd v Shell Exploration New Zealand Limited, High Court,* Wellington, CIV-2006-485-1600, Dobson J, 12 August 2009 (Court accepted proposition that attachments to e-mail were not automatically relevant and allowed consideration of the relevance of each attachment separately, viewing the attachments as separate documents rather than being part of a single electronic communication).

production of a parent e-mail along with its corresponding child attachment satisfies Rule 34's "usual course of business" requirement for parties who opt to produce documents in that manner.[40]

42. Anecdotal evidence and secondary materials indicate that the prevailing practice, absent party agreement or court order to the contrary, is for parties to produce any non-privileged attachment to an e-mail if the e-mail is determined to be relevant, and to produce the e-mail if any of the attachments are determined to be relevant.[41] This does not mean that there is an ironclad legal standard – but this existing pattern of practice serves as a helpful guide for related discovery disputes.

## IV. FINDINGS

43. A review of the legal authorities suggests that the best practice is for parties to discuss the production and logging of e-mails and attachments as singular or separate items in advance of production and to reach agreement as to the treatment of e-mails and attachments for responsiveness and for privilege purposes. Regrettably, it does not appear from the Parties' Submissions that this was done in the present case.

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[40] *See, e.g.*, *Consolidated Rail Corp. v. Grand Trunk Western Railroad Co.*, 2009 WL 5151745, at *3 (E.D. Mich. Dec. 18, 2009) (finding that producing party's document production complied with Rule 34's "usual course of business" requirement where *inter alia* "[e]mail attachments were produced directly following the corresponding email."); *cf. U&I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667, 675 n. 14 (M.D. Fla. 2008)("The dubious practice of producing e-mails without attachments in federal discovery has not gone unnoticed by other courts.") (citing *PSEG Power*, 2007 WL 2687670, at *5-7)).

[41] *See, e.g.*, Federal Trade Commission's Bureau of Competition's Production Guide, at 2. b. (indicating that the parent/child email/attachment relationship must be preserved by including a reference to all attachments; and that attachments must be produced as separate documents and numbered consecutively to the parent email) available at http://www.ftc.gov/bc/guidance/bcproductionguide.pdf ; *see also* Department of Justice's Electronic Production Letter (template)("the integrity of any produced e-mail must be maintained except as limited by any claim of privilege") available at http://www.justice.gov/atr/public/electronic_discovery/243194a.htm.

44. That said, according to Defendants, the withholding of purportedly non-responsive attachments from the production of "parent" relevant e-mails is inconsistent with the Parties' past practice in this case – a point which Plaintiffs do not dispute.

45. Based upon Defendants' July 12 Submission, it does not appear that the issue of withheld or non-produced attachments is isolated to a handful of examples. Rather, the Special Master understands that Defendants have identified to Plaintiffs nearly 130 e-mails produced by SEI that did not include all of the corresponding attachments, and such "missing" attachments do not appear in SEI's privilege log.

46. The Special Master also finds that Plaintiffs' statements regarding missing attachments fail to explain fully why a number of e-mail attachments are not included in SEI's production. In particular, it is unclear if the omissions are largely because e-mails were located and collected from repositories where they had already been disassociated from their attachments in the ordinary course (which may be a legitimate explanation), or if there was a concerted effort to review e-mails and attachments separately for the purpose of relevance determinations, and a determination to withhold from production attachments deemed not relevant.

47. Separately, the Special Master believes that Plaintiffs have misapprehended or misconstrued the Special Master's statements regarding the "relevant time period" in Draft Report and Recommendation No. 14. There, the Special Master did not intend to – and plainly did not – define the relevant time period in this case from January 1, 2004 through October 31, 2007.[42]

48. Rather, the Special Master invited the Parties to set forth their respective positions on whether January 1, 2004 through October 31, 2007 in fact accurately reflects the relevant time period in

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[42] Draft Report and Recommendation No. 14, at ¶¶ 62-66 (July 1, 2011).

this case as evidenced by the Parties' discovery requests and related objections that had been made available to the Special Master at that time.[43]

49. Although Plaintiffs now contend that SEI has "consistently stated it would limit its production to" January 1, 2004 through October 31, 2007, on the same day it indicated the time period from which it would produce documents in response to Morgan Stanley's document requests (*i.e.*, January 1, 2004 through October 31, 2007), SEI also indicated it would produce documents from January 1, 2004 through June 30, 2009 in response to The McGraw-Hill Company's document requests, which include a request for "all documents concerning the Cheyne SIV."[44]

50. In light of the fact that, in response to some document requests, SEI agreed to produce documents through at least June 30, 2009, and the fact that, according to Defendants, more than 75% of SEI's produced e-mails are dated after October 31, 2007, the Special Master finds that Plaintiffs' suggestion that SEI's production of e-mails dated after October 31, 2007 was "inadvertent" due to the purported rush in which SEI was "forced" to produce documents is not persuasive when considering the potential preclusion of further discovery.

51. After reviewing the document requests served on SEI and the accompanying responses, including those in which SEI indicated that it would produce documents from January 1, 2004

[43] Indeed, Draft Report and Recommendation No. 14 indicated that the discussion of the relevant time period was limited to the Parties' dispute regarding documents on SEI's privilege log. *See* Draft Report and Recommendation No. 14, at ¶ 65 (July 1, 2011) ("Rather than making a *per se* finding that any documents with a date of November 1, 2007 or later are non-responsive, the Special Master finds that such documents are presumptively non-responsive (as there may be no request that has been served on SEI that requests production of such documents). As set forth below, however, the Special Master will recommend that SEI be required to confirm that none of the post-October 31, 2007 documents listed on Exhibit A are responsive to requests for documents that specify a timeframe other than January 1, 2004 through October 31, 2007. The Special Master also will recommend that Defendants be provided with an opportunity to respond to any further Submission by SEI.").

[44] Plaintiff SEI Investments Company's Responses to Defendant The McGraw-Hill Companies, Inc.'s First Request for Production of Documents General Objection No. 10 (dated Nov. 2, 2009) (indicating that SEI "will produce documents concerning the time period from January 1, 2004 to June 30, 2009."); *see also id.* at Request No. 3 ("All documents concerning the Cheyne SIV.").

through June 30, 2009, the Special Master finds that Defendants have met their burden of showing that the present motion to compel is not an attempt at a fishing expedition.

52. Indeed, the one example provided by Defendants regarding the Karl Dasher letter (apparently attached to SEI-E01418050-71, but not produced by SEI) suggests that there may be numerous relevant – and responsive – attachments to e-mails that SEI has not produced.[45]

53. The Special Master finds that it would be not only inefficient, but also patently unfair, to place the burden on Defendants to identify all of the e-mails that are missing attachments and to identify those e-mails to Plaintiffs for the purpose of further productions.

54. However, the Special Master further finds that simply requiring SEI to produce all non-privileged attachments that were not produced but were attached at some point in time to relevant e-mails that SEI has already produced may be inefficient, and its benefit may not be justified by the burden and expense to Plaintiffs.

55. Thus, in order to fully understand the nature and scope of missing e-mail attachments and to move forward with production, and in light of the unique relationship of attachments to e-mails that support an inference of contextual relevance – or where production of the attachments may be required for fairness or completeness, the Special Master believes that SEI should be required to:

    a. Produce to Defendants those attachments to the 126 e-mails identified by Defendants in their May 17, 2011 Letter and their July 12, 2011 Submission in support of their current Motion; or

[45] The Special Master notes that Plaintiffs did not dispute Defendants' speculation regarding the contents of this withheld e-mail attachment in their Submission in Opposition to Defendants' Motion. Furthermore, the Special Master notes that the two attachments initially withheld by SEI, but produced in response to Defendants' March 28, 2011 Letter (provided as Exhibits 4 and 5 to Defendants' June 28, 2011 Submission) clearly relate to the Cheyne SIV and are plainly responsive to the document requests served on SEI.

b. If SEI contends that such attachments cannot be located or produced without undue burden or expense, provide a detailed explanation regarding how the attachments were separated from the "parent" e-mails and/or why they cannot be located or produced without undue burden or expense.

56. The Special Master further finds that, if SEI has purposefully separated and withheld e-mail attachments on the grounds that such non-produced attachments (whether identified by Defendants or not) are not relevant, SEI should identify, by Doc-id/or "Bates number," all such e-mail attachments withheld along with the identification of the parent e-mail if such information is readily available. SEI should provide such identification (by list or as otherwise agreed upon) to Defendants.

57. After production of the attachments to the 126 e-mails identified by Defendants (or provision of a detailed explanation as to why such attachments cannot be located or produced without undue burden or expense), Defendants may move for the production of additional e-mail attachments. Any such motion must be predicated on a demonstration that either (a) the newly-produced e-mail attachments were relevant and reveal that SEI's relevance determinations were erroneous as to the subset and thus should not trusted with respect to other withheld attachments; or (b) SEI's explanation for why such non-produced attachments to produced, relevant e-mails cannot be located without undue burden or cost is inadequate.

58. Prior to such motion being filed, the Special Master expects that the Parties will meet and confer regarding the possible resolution of any further requests for e-mail attachments through agreement rather than motion practice.

59. The Special Master further finds that the guidance in this Report and Recommendation must be applied equally to all Parties. As such, the Special Master will recommend that the Parties be directed to meet and confer within ten (10) days of the entry of the Order relating to this Report

and Recommendation to address: (a) whether any Parties have been withholding attachments to e-mails from production on the basis of relevance determinations, (b) whether the Parties are separately identifying e-mails and attachments on privilege logs, (c) the format of the production or re-production of e-mails and attachments by SEI, and (d) the format in which SEI will provide any list e-mail attachments that were reviewed for relevance and were withheld from production on the ground that the attachment was not relevant.

60. The Special Master further implores the Parties to consider reaching an agreement on these issues – whether consistent or inconsistent with this Report and Recommendation – that can provide certainty as to the treatment of these issues by all Parties and, by derivation, the Special Master and Court.

## V. RECOMMENDATION

61. The Special Master recommends that the Court grant in part and deny in part Defendants' Motion to Compel.

62. The Special Master further recommends that:

    a. Within ten (10) days of the entry of the Order relating to this Report and Recommendation, SEI be compelled to produce the non-privileged attachments to the 126 e-mails identified by Defendants in their May 17, 2011 letter and their July 12, 2011 Submission in support of the present Motion that can be located and produced without undue burden or expense;

    b. Within ten (10) days of the entry of the Order relating to this Report and Recommendation, SEI be compelled to: (i) identify – by Doc-id/or Bates number of the parent e-mail and the non-produced attachment(s) – all e-mail attachments that were reviewed for relevance as part of the e-mail "family" and were separated and withheld from production on the ground that the attachment was not relevant to the

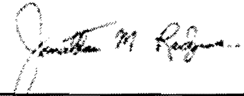
extent such information is readily available, and (ii) provide such identification (by list or as otherwise agreed upon) to Defendants;

c. If SEI contends that it cannot (a) locate and produce one or more of the attachments to the 126 e-mails identified by Defendants without undue burden or expense, and/or (b) identify one or more withheld attachments with the document identification and relationship information required above because the information is not readily available, then SEI will provide a detailed, written explanation of these burdens, expenses and unavailability of information to Defendants and the Special Master within ten (10) days of the entry of the Order relating to this Report and Recommendation; and that

d. Defendants be allowed to move for the production of additional non-privileged attachments to relevant e-mails that have not been produced in this case. Any such motion must be predicated on a demonstration that either (a) the newly-produced e-mail attachments were relevant and reveal that a meaningful percentage of SEI's relevance determinations were erroneous as to the subset of 126 e-mails and attachments and thus SEI's remaining relevance determinations with respect to other withheld attachments are not reliable; or (b) SEI's explanation for why such non-produced, non-privileged attachments to produced relevant e-mails cannot be located or produced without undue burden or cost is inadequate and should not preclude further efforts to identify, retrieve and produce such attachments. The Parties must meaningfully meet and confer in advance of filing any such motion.

63. Finally, the Special Master further recommends that all Parties be directed to meet and confer within ten (10) days of the entry of the Order relating to this Report and Recommendation to address: (a) whether any Parties have been withholding attachments to

e-mails from production on the basis of relevance determinations; (b) whether the Parties are separately identifying e-mails and attachments on privilege logs; (c) the format of the production or re-production of e-mails and attachments by SEI; and (d) the format in which SEI will provide any list of e-mail attachments that were reviewed for relevance and were withheld from production on the ground that the attachment was not relevant.



Jonathan M. Redgrave
Special Master

Dated: August 16, 2011

The clerk of the court is directed to docket this Report and Recommendation. Objections to R&R are due by August 23, 2011.
So ordered,

Shira A. Scheindlin
U.S.D.J.
8/18/11