IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

THE DOW CHEMICAL COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 99C-05-118
	)	
MG INDUSTRIES, INC.,	)	
	)	
Defendant.	)	

AMENDED OPINION AND ORDER

On the Defendant's Motion to Dismiss and the Plaintiff's Motion for Summary Judgment

Submitted: September 3, 2002
Decided: January 6, 2003
Amended: January 7, 2003
(Amended Pages: Cover, 9, 10, 12, 15 & 16)

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TOLIVER, JUDGE

FACTS AND PROCEDURAL POSTURE

The motions before the Court arise from an action for declaratory judgment brought by the Plaintiffs, The Dow Chemical Company (hereinafter "Dow"), against the Defendants, Messer Griesheim Industries, Inc. (hereinafter "MGI"). MGI is a subsidiary of Messer Griesheim GmbH (hereinafter "MGG"). The claim centers on Dow's sale to MGI of U.S. Patent No. 5,388,650 (hereinafter "'650 patent"), which introduced a method for the production of nitrogen for downhole drilling.

Background Information

On January 31, 1989 Dow and BOC Group, PLC (hereinafter "BOC") entered into a joint venture, known as Generon Systems Inc. (hereinafter "Generon") for the purpose of developing, manufacturing and marketing products for the extraction of gases from air. This joint venture existed for over three years until its dissolution on October 30, 1993. Notwithstanding the termination of the joint venture, Dow

continued to operate Generon on its own. During its existence, Keith Michael, a Generon employee, allegedly developed the technology that resulted in the application for the '650 patent. Under the terms of his employment contract, Mr. Michael assigned his entire right, title and interest in the technology to Generon. Generon applied to the U.S. Patent and Trademark Office for a patent on this technology on June 14, 1993. A patent issued on February 14, 1995.

In March of 1995, Mr. Michael resigned from Generon and became an employee of another of MGG's subsidiaries, U.S. Gas Systems. In the latter part of 1995, Dow and MGI began negotiating for the sale of all of Generon's assets to MGI, including the '650 patent. MGI selected Mr. Michael to conduct due diligence between November 1995 and late January 1996, in order to evaluate the wisdom of such a purchase.[1] He ultimately recommended that MGI acquire Generon. During this

[1] Due diligence, in this case, included investigation of the Dow assets, including the '650 patent, and determining the value of those assets.

period, Mr. Michael was made the Director of Generon International.[2]

The sale/purchase agreement was executed on January 21, 1996. According to the agreement, MGI was to pay to Dow $17,500,000 for all of the assets of Generon. The agreement included Dow's warranty of title to all assets named in the agreement, including title to the '650 patent. Also included was a clause requiring Dow to indemnify, defend and hold harmless MGI from litigation arising under certain circumstances. Final closing on the sale took place on January 26, 1996. In February 1996, shortly after the sale was executed, Mr. Michael was made General Manager of MG Generon[3], and in August of 1996 he received yet another position, this time as Director of Marketing for MGI.

Meanwhile, on January 22, 1996, an undisclosed third party

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[2] Mr. Michael was made the Director of Generon International on January 1, 1996. This position was clearly a temporary one, however, as Generon International is a fictitious name used by MGI during negotiations with Dow to negotiate the purchase of Generon Systems. Generon International never existed as a functioning business enity.

[3] MG Generon was the entity that resulted from the MGI's acquisition of Generon from Dow.

filed a Re-examination Request[4] with the U.S. Patent and Trademark Office with respect to the '650 patent. This request sought to invalidate the '650 patent based upon newly discovered prior art.[5] Any person may file a request at any time for the Office's re-examination the claims of a patent on that basis.

On December 3, 1997, Air Liquide America Corporation (hereinafter "Air Liquide") filed a Declaratory Judgment action in the U.S. District Court for the District of New Mexico[6], challenging MGI's ownership of the '650 patent.[7] Air Liquide claimed to be the true owner of the patent because it had been assigned to them by the individuals nominated by Air

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[4] A re-examination request is, in essence, an attempt to invalidate a patent.

[5] 35 U.S.C. §301. Prior art includes any relevant knowledge, acts, descriptions and patents which pertain to, but predated, the invention in question.

[6] The Air Liquide Action was styled Air Liquide America Corporation and Medal, L.P. v. MG Industries, Inc. and MG Generon, Inc., C.A. No. CIV-97-1536-LH/LFG.

[7] The parties disagree as to what initiated Air Liquide's suit. Dow claims that MGI accuse Air Liquide of patent infringement in late 1997, while MGI claims that Air Liquide filed its suit without provocation. This discrepancy is not, however, important to the ultimate resolution of the issues at bar.

Liquide as the true inventors of the downhole drilling technology, Rod Huskey and Paul Allen.[8] Air Liquide further alleged that Mr. Michael had actually stolen the information upon which the '650 patent was based from Mr. Huskey and Mr. Allen.

In February 2000, MGI and Air Liquide agreed to settle the case. In defending this action, MGI claims that it incurred over two million dollars in legal fees and costs. In addition, MGI's settlement of the lawsuit resulted in Air Liquide being granted free use of the technology covered by the '650 patent. MGI subsequently notified Dow of its claim to indemnification pursuant to the sale/purchase agreement for the expenses occurred in the Air Liquide litigation and settlement.

Dow instituted the present litigation in this Court on May 13, 1999, seeking a declaration of its indemnification obligations to MGI. Its complaint encompassed both

[8] Didn't they know Mr. Michael somehow?

contractual and patent law issues. MGI removed the suit to the United States District Court for the District of Delaware, asserting federal jurisdiction over patent issues.[9] On plaintiff's motion to remand, District Judge Robinson of that court remanded the case to this Court on March 21, 2000. She held that the case could be resolved by the Delaware state courts on the contractual issues, without considering the issues raised under federal patent law.

[9] 28 U.S.C. §§1441 and 1338. Section 1441(a) provides in relevant part that "any civil action brought in State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant... to the district court of the United States for the district and division embracing the place where such action is pending." Section 1338 (a) provides that "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents."

THE PARTIES' CONTENTIONS

MGI's Motion to Dismiss and for Partial Summary Judgment

MGI's Arguments

On October 19, 2001 MGI filed a motion to dismiss Counts II and III of Dow's complaint, contending that those Counts do not allege facts, even if taken as true, necessary to establish a claim upon which relief may be granted, nor do they satisfy the elements of an estoppel claim.[10] In the alternative, MGI claims that those Counts, although set forth as an estoppel argument, in reality constitute an "unclean hands" defense.[11] As such, Dow is actually seeking equitable relief, which MGI contends is beyond the jurisdiction of this Court. Therefore, Counts II and III should be dismissed for lack of subject matter jurisdiction.

MGI also declares that if any party had a responsibility

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[10] The Counts (explanation?)

[11] The doctrine of unclean hands holds that in equity, as in law, the plaintiff's fault, like the defendant's, may be relevant to the question of what, if any, remedy plaintiff is entitled to. BLACK'S LAW DICTIONARY 1524 (6th ed. 1990).

to do "due diligence" as to the true inventorship of the '650 patent, it was Dow at the time that it originally applied to the U.S. Patent and Trademark Office. Even assuming, *arguendo*, that Dow had no means of obtaining the facts regarding the actual source of the ideas supporting the '650 patent, MGI holds that Dow did not rely upon any of MGI's actions taken during the re-examination[12] in any way that would justify a claim of estoppel.

MGI then moves for partial summary judgment on the issue of whether Dow breached its warranty of title upon transfer of the '650 patent to MGI. It asserts that Dow did not have marketable title to the '650 patent as a matter of law at the time of transfer, as evidenced by Air Liquide's declaratory judgment action claiming ownership of the patent.

Dow's Response

Dow responds that MGI is precluded from asserting a breach

[12] As a result of the re-examination, MGI amended some portions of the '650 patent, but did no acknowledge the existence of other inventors (i.e., Huskey and Allen).

of warranty claim against Dow because any defect in the '650 patent was directly caused by MGI's own alterations during the re-examination of the patent. In essence, Dow argues that any breach of warranty it may have committed is superseded by MGI's proximate causation of the damage of which MGI complains.[13] In addition, Dow avers that when MGI submitted its alterations of the '650 patent to the United States Patent Trademark Office, it implicitly represented that Mr. Michael was the sole and true inventor of the patent. Particularly, Dow points to MGI's failure to take the opportunity to add any additional inventors to its re-draft of the patent.

Dow also argues that its argument of assignor estoppel is valid against MGI's breach of warranty claim. It refutes MGI's contentions that Dow is asserting an "estoppel in pais" claim[14], and insists the legal premise of assignor estoppel is

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[13] In support of this proposition, Dow cites Exxon Co. v. Sofec, Inc., 517 U.S. 830, 116 S. Ct. 1813, 1819 (1996).

[14] MGI does not explicitly label Dow's claim one of "estoppel in pais" (also known as "equitable estoppel"), but the label is apt, given the definition of the doctrine as one "by which a person may be precluded by his act or conduct..., from asserting a right which he otherwise would have had... The doctrine rests upon principle [sic] that when a person by his acts causes

the bar on which its arguments rest.

Finally, Dow views MGI's motion for summary judgment to be factually and legally meritless, and frivolous as a result. Dow describes MGI's argument in the motion for summary judgment as hinging on Air Liquide's allegation that it was in fact the true owner of the '650 patent. Dow protests that an allegation made by a third party in unrelated litigation (to which Dow was never a party) falls woefully short of establishing that Dow breached its warranty to title as a matter of law.

Dow concludes by pointing to the specific warranty Dow gave MGI regarding the '650 patent, in which it stated that "[t]o Generon's knowledge,..., all such Intellectual Property Rights are exclusive, valid, uncontested, and in good standing and Generon is aware of no impairment to suing or enforcing

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another to change his condition to his detriment, person performing such acts is precluded from asserting a right which he otherwise might have had." BLACK'S LAW DICTIONARY 551 (6th ed. 1990). This is essentially what MGI argues, albeit incorrectly, that Dow's estoppel claim encompasses.

such rights."[15] Consequently, Dow argues that it cannot be held to have breached a warranty that specifically limited Dow's responsibility to the extent of its actual knowledge. It therefore cannot be held responsible for Mr. Michael's exclusive knowledge that the title to the '650 patent was not marketable.

In its reply brief, MGI reiterates its belief that Dow has failed to demonstrate how its allegations support a claim of estoppel, pointing to Dow's failure to cite sufficient Delaware authority on its own behalf.

MGI goes on to argue that MGI's actions in the U.S. Patent and Trademark Office, whether they tainted the '650 patent or not, are beyond the jurisdiction of this Court, as they are patent issues, and thus governed by federal law. Further, MGI claims that Dow is judicially estopped from asserting matters of substantive patent law, as Dow relied on the argument that this case was purely contractual when it sought to have it

[15] Pl.'s Memo. in Opp. To Def.'s Mot. to Dismiss at 10.

removed from the District Court of Delaware.

In support of its motion for the dismissal of Count III of Dow's complaint, MGI accuses Dow of warranting that the '650 patent had a good and marketable title at the time of the sale, while it was actually subject to a claim of ownership by a third party.[16]

Finally, MGI argues that Dow has a responsibility to honor the warranties it made to MGI in the purchase agreement, despite the "specific knowledge" warranty contained therein. In any event, MGI declares that the resolution of conflicting provisions in the agreement (i.e., between general and specific warranties of marketability) is a matter of law, and thus amenable to summary judgment.

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[16] It is important to note that the date the agreement was "executed" was January 21, 1996, while the "closing" date of the purchase was January 26, 1996. Interestingly, it was on January 22 that the "undisclosed" third party requested a re-examination of the '650 patent. While it is conceivable that Dow could have received notice from the U.S. Patent and Trademark Office regarding the request for re-examination by January 26, 1996, it is impossible for Dow to have known of that request on January 21, 1996. As a result, precision as to the actual date the sale was consummated is required to determine whether Dow should have been aware of imperfections in the '650 patent's title.

Dow's Motion to Dismiss[17]

Also before the Court is Dow's Motion to Dismiss MGI's Counterclaim. This motion is based upon the theory of assignor estoppel. That theory holds that one who assigns a patent and those in privity with the assignor may not later attack the validity of the patent.[18] Here, Dow asserts that Mr. Michael and MGI are or were in privity, due to Mr. Michael's high position at MGI, as well as his considerable involvement in MGI's acquisition of Generon and the '650 patent. Because Mr. Michael assigned the '650 patent to MGI, neither he nor MGI may repudiate the representations that Mr. Michael made to Dow in assigning the '650 patent.

MGI answers on three fronts. First, they contend that assignor estoppel is not applicable here. They propose that assignor estoppel only applies in situations where the

[17] Because Dow submits deposition testimony in support of its motion to dismiss MGI's counterclaim, it is rendered a motion for summary judgment. *See* discussion *infra* pp. 14, 21.

[18] Diamond Scientific Co. v. Ambico, Inc., 848 F.2d 1220, 1224 (Fed. Cir. 1988).

assignor of a patent attempts to defend against an infringement claim made against him. In the instant case, MGI's action against Dow is not an infringement claim, it is a claim for indemnity. Furthermore, even assuming assignor estoppel is applicable in this instance, MGI argues that the requisite level of privity is not present between Mr. Michael and MGI.

Second, MGI charges that assignor estoppel is an equitable remedy that is beyond this Court's jurisdiction. Finally, MGI maintains factual issues regarding the true inventor of the '650 patent must be resolved before the Court can enforce assignor estoppel. As a result, summary judgment on Dow's motion is inappropriate at this juncture.

DISCUSSION

Standards of Review

A motion to dismiss a complaint pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief can be sustained will not be granted unless the plaintiff will not be able to recover under any circumstances given the allegations raised in that document.[19] For purposes of reviewing the complaint, those allegations are accepted as true and the test of sufficiency is lenient.[20] The nonmoving party is entitled to an opportunity to present material in response.[21] Where matters outside the pleadings are considered, such as affidavits and depositions, the motion becomes a motion for summary judgment and is disposed of pursuant to Superior Court Civil Rule 56.[22]

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[19] Spence v. Funk, 396 A.2d 967 (Del. 1978); and Bissel v. Papastavros' Assocs. Med. Imaging, 626 A.2d 856 (Del. Super. 1995), appeal denied, 623 A.2d 1142 (Del. 1993).

[20] State ex rel. Certain-Teed Prods. Corp. v. United Pac. Ins. Co., 389 A.2d 777 (Del. Super. 1978).

[21] Super. Ct. Civ. R. 12(b).

[22] Shultz v. Delaware Trust Co., 360 A.2d 576 (Del. Super. 1976), Malpiede v. Townson, 780 A.2d 1075, 1090 (Del. 2001).

The burdens of a motion to dismiss and a motion for summary judgment are similar. A motion for summary judgment will only be granted where the moving party establishes that there is no genuine issue of material fact in dispute and that the movant is entitled to judgment as a matter of law.[23] The facts must be viewed in the light most favorable to the nonmoving party[24], and the motion will not be granted, even in the absence of any dispute of material fact, where it seems desirable to inquire further into the facts to clarify the application of the law to the facts.[25] However, the role of the Court is not to weigh evidence, and uncontroverted statements are to be accepted as true.[26]

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[23] Martin v. Nealis Motors, Inc., 247 A.2d 831 (Del. 1968); and Burish v. Graham, 655 A.2d 831 (Del. Super. 1994).

[24] Pullman, Inc. v. Phoenix Steel Corp., 304 A.2d 334 (Del. Super. 1973)

[25] Guy v. Judicial Nominating Comm., 659 A.2d 777 (Del. Super. 1995).

[26] Battista v. Chrysler Corp., 454 A.2d 286 (Del. Super. 1982).

MGI's Motion to Dismiss and for Partial Summary Judgment

When contemplating the first two portions of MGI's motion, the Court will not grant the motion unless MGI has proven that Dow could not prevail under any set of circumstances. The Court finds that MGI has not met this burden in either regard.

First, MGI claims that Dow has failed to allege or to provide facts to support a claim of estoppel. The Court disagrees. Under Exxon, "where the injured party is the sole proximate cause of the damage complained of, that party cannot recover in contract from a party whose breach of warranty is found to be a mere cause in fact of the damage."[27] The issue in Exxon was whether certain parties were exonerated from possible warranty liability because the supervening negligence of a ship's captain had been found by the trial court to have been the "sole proximate cause" of the damage therein. Here, Dow alleges that MGI failed to take advantage of the opportunity to alter the '650 patent in such a way during re-

[27] Exxon Co. v. Sofec, Inc., 517 U.S. 830, 116 S. Ct. 1813, 1819 (1996).

examination as to properly credit inventors other than Mr. Michael. As a result, Dow reasons that MGI left itself vulnerable to the litigation initiated by Air Liquide, and that Dow is not responsible to indemnify MGI against any losses incurred as a result. Accepting these allegations as true, Exxon indicates that MGI should be estopped from holding Dow responsible for MGI's indemnification when MGI essentially brought the Air Liquide litigation on itself.

MGI also contests that Dow has failed to meet the traditional requirements for an estoppel defense under Waggoner v. Laster.[28] However, the Supreme Court has never analyzed assignor estoppel by reference to the elements of equitable estoppel and has explicitly recognized assignor estoppel to be the functional equivalent of estoppel by deed.[29]

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[28] In Waggoner, the U.S. Supreme Court delineated a 3 step test to determine whether estoppel could be established: 1) the party claiming estoppel lacked knowledge or the means of obtaining the knowledge of the truth of th facts in question; 2) the party claiming estoppel relied on the conduct of the party against whom estoppel is claimed; and 3) the party claiming estoppel suffered a prejudicial change of position as a result of his reliance. 581 A.2d 1127, 1136 (Del. 1990).

[29] Diamond Scientific Co. v. AMBICO Inc., 848 F.2d 1120, 1225 (Fed. Cir. 1988), citing Westinghouse Elec. & Mfg. Co. v. Formica Insulation Co., 266 U.S. 342, 348-49 (1924).

Estoppel by deed is a form of legal, not equitable, estoppel.[30] The primary consideration in the doctrine application is the measure of unfairness and injustice that would be suffered by Dow if MGI and Mr. Michael were allowed to pursue a breach of warranty of title claim. The Court finds that to allow MGI (who we must assume is in privity with Mr. Michael for the purposes of this portion of the present motion) to now claim a defect in the '650 patent's title, and seek indemnification from Dow against losses related thereto, would constitute an intolerable injustice to Dow. Therefore, the Court cannot grant MGI's motion to dismiss in the interest of fairness to the parties involved, and finds that Dow has sufficiently stated a claim - assignor estoppel - upon which relief may be granted under Rule 12(b)(6).

Turning to MGI's contention that Dow constructively seeks relief under an equitable remedy, the Court finds that MGI has

[30] AMP, Inc. v. United States, 389 F.2d 448, 452, cert. denied, 391 U.S. 964(1968).

failed to adequately explain how it reached this conclusion. MGI simply spouts quotes from various treatises, and makes a hazy reference to the "facts as alleged"[31]. This is not a sufficient basis upon which the Court can conclude that Dow seeks recovery under the doctrine of unclean hands.

Finally, as discussed *supra*, MGI has misapprehended the brand of estoppel in dispute here, and has mistakenly proposed that the test in Waggoner is applicable to the case at bar. As a result, MGI's argument that Dow did not exhibit sufficient reliance on any of MGI's actions during the re-examination (or prejudice therefrom) is inapplicable, and does not warrant further analysis.

MGI's motion for partial summary judgment must also fail. MGI argues that Dow breached its warranty of marketable title as a matter of law. However, no matter what MGI alleges Dow's responsibilities may have been surrounding "due diligence", the question remains whether MGI and Mr. Michael were or are

[31] Def.'s Mot. to Dismiss at 8.

in privity. If so, MGI will be barred by the doctrine of assignor estoppel from holding Dow liable regarding the '650 patent's marketability at the time it was transferred to MGI.

In the case at bar, there is much dispute over how much control Mr. Michael exerted over MGI in his various positions.[32] MGI declares that Mr. Michael was a mere employee with a fancy title and little or no autonomy, who exerted minimal control over MGI at the time it purchased Generon. On the other hand, Dow naturally portrays Mr. Michael as a "top dog" who exercised considerable, unchecked authority over the subsidiary that received and conducted the patented business. Further, Mr. Michael spearheaded the due diligence effort that resulted in MGI's acquisition of Generon, and received a portion of the resulting profits as a bonus.

The degree of privity between Mr. Michael and MGI is in dispute between the parties, and is a genuine and material

[32] The Court has been unable to determine whether Mr. Michael's job titles ("Director" of U.S. Gas Systems, "Director" of Generon International, "General Manager" of MG Generon, and "Director" of Marketing indicate positions of real power in the MGI organization.

fact that may have a significant impact on the outcome of the proceedings. As such, the Court finds that further investigation into this relationship is desirable, and as a consequence, summary judgment is premature at this time.

Dow's Motion to Dismiss/Motion for Summary Judgment

Because deposition testimony has been filed in support of Dow's motion for dismissal, it will be considered a motion for summary judgment.[33] Dow's motion is based upon the legal concept of assignor estoppel. "Assignor estoppel is an equitable doctrine that prevents one who has assigned the rights to a patent [or one who is in privity with that person] . . . from later contending that what was assigned is a nullity."[34] As applied to this case, Dow contends that Mr. Michael, in his assignment of the patent to Dow, represented that he was the sole inventor. Thus, MGI, by virtue of its

[33] Malpiede v. Townson, 780 A.2d 1075, 1090 (Del. 2001).

[34] Diamond Scientific Co. at 1224.

relationship with Mr. Michael, is now barred from repudiating that representation, because MGI and Mr. Michael are in privity.

The factual scenario presently before the Court is slightly different from most cases in which assignor estoppel is asserted. In most situations, the assignor is asserting the invalidity of the patent because one in privity with him has infringed on the patent. Here, neither Mr. Michael nor MGI has infringed on the patent. Indeed, it is MGI who actually owns the patent through the sale agreement with Dow. Nevertheless, the practical effect is the same. MGI is asserting a claim of indemnification based upon its claim that the '650 patent is invalid as a result of unmarketable title. As such, justice appears to demand that assignor estoppel be available to Dow as a defense.

Thus, the question becomes one of privity. Specifically, whether the requisite level of privity existed between Mr. Michael and MGI to effectively bar MGI's claim against Dow.

When considering privity in the context of an assignor of estoppel defense, in particular where the assignor is the inventor of the patent in suit and the defense is asserted against the corporation for which he presently works, the court should look to whether "the assignor has exercised substantial control over, and/or held considerable financial interest in, the defendant corporation."[35] When faced with the same privity issue in an infringement case, the Federal Circuit explained that:

> If an inventor assigns his invention to his employer company A and leaves to join company B, whether company B is in privity and thus bound by the doctrine will depend on the equities dictated by the relationship between the inventor and company B in light of the act of infringement. The closer that relationship, the more the equities will favor applying the doctrine to company B.[36]

As discussed *supra*, the Court is unable to determine at

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[35] Acushnet Co. v. Dunlop Maxfli Sports Corp., 2000 U.S. Dist. LEXIS 10123 at *8.

[36] Id., citing Shamrock Techs., Inc. v. Medical Sterilization, Inc., 903 F.2d 789, 793 (Fed. Cir. 1990).

this point in the proceedings whether the requisite level of privity exists/existed between Mr. Michael and MGI to prevent MGI from successfully claiming that Dow breached its warranty of marketable title regarding the '650 patent. Additional information as to the nature of Mr. Michael's positions with MGI and the amount of power he exerted over that organization and its subsidiaries would aid the Court tremendously. As a result, Dow's motion to dismiss *cum* motion for summary judgment must also be denied at this time.

CONCLUSION

For the foregoing reasons, the Defendant's Motion to Dismiss and for Partial Summary Judgment is **denied.** The Plaintiff's Motion to Dismiss/Motion for Summary Judgment is **denied** as well.

IT IS SO ORDERED.

Toliver, Judge