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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ROBERT KENT McDONALD, an individual, and MARY ANN McDONALD, an individual,

Plaintiff,

vs.

ALAIN S. CORCOS, an individual, ALLIANCE FINANCIAL MANAGEMENT, a California corporation, ALLIANCE INVESTMENT MANAGEMENT, a California Corporation, MAXIMUM HOLDINGS, INC., a California Corporation, METROPOLIS PUBLICATIONS, INC., a California corporation, FLOURISH, a Nevada corporation, PARK AVENUE GROUP, LLC., a California Limited Liability Group, and DOES 1 though 100, Inclusive; and DOES 1-100,inclusive,

Defendants.

Case No. BC 226 236

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT ALAIN CORCOS

(Filed concurrently with Separate Statement of Undisputed Facts, Declarations of Robert McDonald and Richard D. Farkas, Supporting Exhibits)

DATE: May 24, 2005
TIME: 9:30 a.m.
Department 78

TRIAL DATE: Not set
Hon. Judge William F. Fahey

To all parties and their attorneys of record:

PLEASE TAKE NOTICE that on May 24, 2005, at 9:30 a.m., or as soon thereafter as the matter can be heard in Department 78 of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California, Plaintiffs ROBERT KENT McDONALD and MARY ANN McDONALD will and do move this Court for summary judgment in favor of Plaintiffs, and against Defendant ALAIN CORCOS. This motion is made pursuant to California *Code of Civil Procedure* section 437c, on the grounds that there is no defense to the action, there is no triable issue as to any material fact, and that Plaintiffs are entitled to a judgment as a matter of law.

This motion will be based on the memorandum of points and authorities filed with this motion, the Separate Statement of Undisputed Material Facts of Plaintiffs, the Declarations of Plaintiffs, their counsel, and others contained herein, filed with this motion, and such other evidence as may be presented at the time of the hearing of this Motion.

DATED: May 4, 2008

LAW OFFICES OF RICHARD D. FARKAS

By: _____
RICHARD D. FARKAS
Attorneys for Plaintiffs
ROBERT KENT McDONALD and
MARY ANN McDONALD

I. FACTUAL BACKGROUND OF PLAINTIFFS' CLAIMS.

The complaint in this case alleges causes of action for Breach of Fiduciary Duty, Negligence, Rescission of Securities Transactions (Material Misrepresentations), Joint and Several Liability of Management, Recession and Restitution (Violation of Qualification Requirements), Joint and Several Liability of Offering Principals, Fraud, Conversion, Declaration of Constructive Trust, Negligent Misrepresentation, Conspiracy and Accounting.

The Plaintiffs are two individuals (a retired husband and wife) who invested substantial amounts of their life savings with their "investment advisor," Defendant Alain Corcos, and Alliance Financial Management and affiliated entities.[1] The Plaintiffs' money was improperly "invested" in or with a number of risky and inappropriate entities including Ammons Boot, Park Avenue Group, Fiber Stars, Flourish, Spartan Funding Group, Metropolis Publications Inc., and others. These investments were unnecessarily risky, not properly or legally registered as securities, were made in reliance upon false and misleading information, were inappropriate for individuals situated as Plaintiffs were; moreover, Plaintiffs were unable to obtain information and documentation concerning their investments. The Defendants[2] conducted

[1] As detailed herein, Mr. Corcos and "Alliance Financial Management" sold their interest to James Anderson and his "Alliance Investment Management," now Defendant Hollander Asset Strategies. It was not disclosed to Plaintiffs that, in March 2001, the Certified Financial Planner ("CFP") Board of Standards suspended Mr. Corcos' right to use the CFP certification marks when, as it publicly disclosed, "it discovered that he was named in a 1996 NASD arbitration, 1999 NASD arbitration and a 1999 customer complaint filed with the NASD. CFP Board found that Mr. Corcos misrepresented, recommended and sold unsuitable limited partnerships and insurance policies to his clients and that he failed to adequately disclose conflicts of interest involving his potential management interest in one of the investments. In aggravation, CFP Board found that Mr. Corcos would not change any of his recommendations and would recommend the same investments again." [Farkas Declaration, Exhibit B.] Plaintiffs later discovered that Defendant CORCOS' registration with the National Association of Securities Dealers, Inc. ("NASD") was terminated.

[2] The Defendants remaining in the case include Alain S. Corcos and Alliance Financial Management (which had its answer stricken by this Court in May, 2003, because it had been suspended by the Secretary of State, and was not represented by counsel). Plaintiffs settled with Alliance Investment Management (now known as Hollander), having been mediating the matter before this American Arbitration Association, and have also settled with defendants

unregistered offerings of securities, stock and unlimited partnership interests, and investors, including Plaintiffs, were repeatedly and falsely told, without reasonable basis, that public trading in some of these companies, including Metropolis Publications and Maximum Holdings, was imminent. These actionable activities took place through 1999. The original complaint alleged:

> "23. This case involves a large-scale investment fraud perpetrated against the Plaintiffs, and others, by the named defendants. The perpetrators of the fraud are the corporations named as defendants, their officers, directors, controlling shareholders, and managerial employees. Plaintiffs are informed and believe and thereon alleged that the fraudulent enterprise was initially designed and created by Defendant BERGSTEIN, in conjunction with Defendant CORCOS and Defendant SHEFTELL, through the start-up on Defendant SPARTAN FUNDING and Defendant METROPOLIS, both of which eventually led to the creation of Defendants MAXIMUM, as well as Shinno Media, Inc. (hereafter "Shinno Media"), GameFan Distributing, Game Cave, and Ammons Boot. Plaintiffs seek to recover from various entities, shareholders, directors, officers and associated professionals for various violations of California statutory and common law.
>
> 24. Plaintiffs are informed and believe and thereon allege that the scheme or enterprise of the Defendants, and each of them, had one objective: to lure private investors into investing their hard earned money, and in some cases, most of their life's savings with Defendants and their corporate entities, including Defendants METROPOLIS, AMMONS, and others. In exchange for money, shares in these various corporations would be issued to the investors, including Plaintiffs herein, at a certain face value, which was misrepresented to the investors, including Plaintiffs, by the various individual defendants named herein to be an amount far below what the shares were really worth. In most circumstances, the investors believed they were investing in one actual corporation, but in reality, they were giving their money to Defendants BERGSTEIN, SHEFTELL and CORCOS, who would then convert the funds for personal use or funnel the money into whichever of the defendant corporations needed money at that particular time to avoid disruption of their fraudulent investment schemes." [First Amended Complaint, ¶s 23, 24. These allegations appeared in the Related, *Valentino*, Complaint, ¶s 44, 48.]

Judgment in this action was entered against Defendant Corcos' corporation, Alliance Financial Management, Inc. in the amount of $1,421,497.80 on February 24, 2004. [Farkas declaration ¶ 8.] A previously-prepared summary judgment motion against Corcos could not be

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David Bergstein and Craig Sheftell. Plaintiffs were granted default judgment of $1,421,497.80 against Alliance Financial Management, Inc. on February 24, 2004.

pursued because of two bankruptcy filings by him, subsequently dismissed. [Farkas declaration¶s 4-6.][3]

C. Later-Discovered Facts Concerning Defendant Alain Corcos.

As detailed herein, Plaintiffs' "investment advisor," Alain Corcos/Alliance Financial Management, "sold his book of business" to Defendant Alliance Investment Management, now known as Hollander Asset Strategies,[4] owned by his friend, James Anderson (Corcos remained to "consult").[5] After Plaintiffs invested substantially all of their life savings and retirement accounts with Corcos, and into entities in which he had material and conflicting interests, and through this litigation, a number of material facts concerning the background of Mr. Corcos came to light. Had these facts been known, of course, Plaintiffs would not have invested with Corcos, and would have taken steps to liquidate their risky and inappropriate financial positions before their investments were essentially wiped out.[6]

[3] Defendant Corcos was in bankruptcy proceedings from November 12, 2003 through January 13, 2004 (case number SV-03-19198-GM) and January 16, 2004 through May 13, 2004 (case number SV-04-10326-GM).

[4] Hollander (Hollander Asset Strategies is herein occasionally referred to as "Hollander," "Alliance Investment," "Anderson," or "Defendant," as the context may indicate.

[5] According to an April 11, 1997 Agreement between Alain S. Corcos and James L. Anderson, Mr. Anderson agreed to pay $100,000 for "Alain's client base." In addition, "Alain S. Corcos will facilitate the transition of his client base to Anderson and Alliance Investment Management. Alain Corcos agrees to be available for consulting at the discretion of Alliance Investment for investment research, financial planning and insurance research. Compensation for these services will be negotiated at the time of consulting commencement for a period of five years." [Hollander production, H319.]

[6] In or about 1998, Mr. Corcos "sold his book of business" in Alliance Financial to the similarly-named Alliance Investment Management, now apparently Hollander Asset Strategies, Inc. This largely-transparent transaction accomplished little in alleviating Plaintiffs' lack of information and continuing losses. Their "investments" through Alain Corcos and Alliance Financial were carried on the books at Alliance Investment with unrealistic and unfounded values, which served merely to keep Plaintiffs uninformed. Moreover, since, initially, the fees charged to Plaintiffs were based on assets under management, the fees taken by Alliance Investment were based on a percentage of the grossly-inflated values which remained on the Alliance Investment books. [McDonald declaration, ¶ 36.] Plaintiffs' statements contained account "values" in excess of $500,000.00, which resulted in additional "management fees" of many thousands of dollars.6 (Later, the management fee structure was altered to exclude "non-supervised" assets, but this was accompanied by an increase in the percentage taken for the remaining assets.)

Corcos' Drug Arrest, Conviction, and Disciplinary Actions. On or about October 25, 1985, Alain Corcos (with his friend Rick McFetridge) was arrested and jailed. Plaintiffs are informed that, on or about July 29, 1987, Mr. Corcos was convicted of possession of cocaine for sale. [Farkas Declaration, Exhibit A.] This arrest and conviction was never disclosed to Plaintiffs. [McDonald Declaration, ¶s 12, 13.]

Also not disclosed to Plaintiffs, either before they made their investments or thereafter, when they still had a chance to mitigate their damages, were the numerous lawsuits and claims which had been made against Corcos and the individuals with who he worked, who managed and controlled the entities into which the Plaintiff's investment funds were placed. In March 2001, for example, the Certified Financial Planner ("CFP") Board of Standards suspended Mr. Corcos' right to use the CFP certification marks when, as it publicly disclosed, "it discovered that he was named in a 1996 NASD arbitration, 1999 NASD arbitration and a 1999 customer complaint filed with the NASD. The CFP Board found that Mr. Corcos misrepresented, recommended and sold unsuitable limited partnerships and insurance policies to his clients and that he failed to adequately disclose conflicts of interest involving his potential management interest in one of the investments. In aggravation, CFP Board found that Mr. Corcos would not change any of his recommendations and would recommend the same investments again." Plaintiffs are further informed that Defendant CORCOS' registration with the National Association of Securities Dealers, Inc. ("NASD") was terminated. [Farkas Declaration, Exhibit B; McDonald Declaration ¶s 14 – 16; Hollander document production, H 262, H262.]

History of Primary Investment Entities. Defendant Corcos' personal finances were inextricably intertwined with the individuals and entities into which he placed the Plaintiffs' funds. [McDonald Declaration, ¶ 17.] He is a cousin to Defendant David Bergstein, and is

believed to have been the Chief Operating Officer or Chief Financial Officer and a primary shareholder of Defendant Alliance Financial Management, Spartan Funding, Maximum Holdings, Metropolis, Shinno and GameFan, as well as a founder of Metropolis, and Defendant Alliance Financial Management. [McDonald Declaration, ¶ 17.]

Corcos' company, co-defendant Alliance Financial, told investors that it was the authorized representative of Metropolis and Ammons, and that these companies were expanding and about "to go public." [Separate Statement ¶15; Farkas Declaration, generally, and Exhibits C, D, G–P attached thereto.] The "investment specialists" also told potential investors, such as the Plaintiffs herein, that only a limited number of shares were being sold at a fixed price, which was in fact false, and fraudulent. Spartan and Alliance were not registered as investment companies under 15 U.S.C.§ 80a-8 and were selling or offering securities in interstate commerce in violation of 15 U.S.C. § 80a-7(a). [Separate Statement ¶15; McDonald Declaration, ¶ 19; Farkas Declaration, generally, and Exhibits C, D, G–P attached thereto.]

As part of the defendants' attempts to secure capital, Defendant Bergstein often enlisted the assistance of his cousin, Defendant Corcos and his company Alliance Financial Management, to lend money to Spartan so that Spartan could provide funds to these companies. Often times, according to discovery in other actions, Corcos made loans to these companies and received a return on these loans ahead of other creditors and in amounts far exceeding the amount actually loaned.

Bergstein, Sheftell and Corcos ultimately decided to form Metropolis Publications, Inc., a multimedia company, into which more than $600,000.00 of the Plaintiffs' money was invested. Because Metropolis was severely undercapitalized and needed a constant influx of cash in order to cover printing, overhead and personal expenses of the individual defendants,

Defendant Bergstein began looking for other methods of funding, specifically private investors, who could be lured into the false promise of high return on their investment from a company on the verge of a yet untapped market.

In order to obtain even more money for their fraudulent scheme, Defendants Metropolis, Bergstein, Corcos and Sheftell began unlawfully circulating copies of a Private Placement offering for Metropolis. Initially, Defendants Metropolis, Bergstein, Corcos and Sheftell solicited investors for this Private Placement by initiating telephone calls from California to other parts of the country, which is illegal under the Securities Act and constitutes wire fraud. This offering memorandum was circulated through the United States mail and it purported to offer shares in Metropolis at a fixed price for either common stock or preferred stock. The offering memoranda were circulated to persons, who were already contacted unlawfully through telephone and electronic mail solicitations. These shares were offered in violation of California and Federal security laws in that they were unregistered at the time of their sale and were not exempt from registration. [Separate Statement ¶ 20; McDonald Declaration, ¶ 22; Farkas Declaration, generally, and Exhibits C, D, G-P attached thereto.]

In unlawfully soliciting investors to Metropolis, Defendants represented to some of the plaintiffs in other lawsuits, and the McDonalds in this case, that the money they were investing was being used specifically for the purpose of purchasing shares in a corporation that had issued only a limited number of shares. Therefore, each of the plaintiffs acquiring shares in Metropolis believed that their ownership in Metropolis was proportional to the number of shares they were purchasing and that they would receive a return on their investment accordingly. However, Defendants, including Corcos, continued to unlawfully sell additional shares beyond what was initially authorized by the Private Placement offering referenced

above. In fact, Defendants were selling shares in Metropolis and the other corporate defendants named herein, as if the companies were publicly held companies. As a result of these schemes, each of the plaintiffs' shares in Metropolis was significantly diluted. [Separate Statement ¶ 22; McDonald Declaration, ¶ 23; Farkas Declaration, generally, and Exhibits C, D, G–P attached thereto.]

Ultimately, Metropolis was beginning to flounder and needed a constant influx of capital to run its operations. Bergstein then used Spartan Funding Group, his company, and enlisted the assistance of his cousin, Defendant Corcos, to solicit investors to Metropolis. Corcos, affiliated with Unicorp and later Financial West Group, began distributing three offering circulars which were supposed to disclose the risks of investing in Metropolis. According to the offerings purportedly made to selected investors, the stock subscription was to be limited to 35 selected investors. These offering circulars were successful in raising over $12 million for Metropolis from between 1994 to 1998 when Metropolis was shut down.[7]

After Metropolis was shut down by federal marshals in August, 1998 Bergstein and his co-conspirators, including Sheftell, Corcos, Gasparini, Doherty, Young and Puryear, needed another avenue for their fraud. In or about 1998, another entity was formed, Maximum Holdings, Inc. At this time, Metropolis was still Maximum's largest shareholder with seventy-five (75%) ownership of all Maximum stock. Eventually, Maximum Holdings, Inc. merged with DVD Express, Inc. on December 17, 1999. Despite having little or no assets and owing

[7] The investors, such as the Plaintiffs herein, were told that when Metropolis went public, the shares which they were purchasing or about to purchase would be converted to public shares in the public company on a one for one basis. In many cases, Defendants represented that the shares were worth three times the amount that the investor was actually paying for it, which was false and fraudulent. In all of the offering circulars, defendants did not disclose to potential investors that Metropolis Publications, Inc. had issued shares at various times and various price points in 1994, 1995, 1996, 1997 and 1998, which would be classified as cheap stock, and thus, next to worthless. In some cases, Metropolis shares were sold for $1.00 per share, $1.50 per share, $2.00 per share and $5.00 per share, and in many instances, shares were given away. In or around August, 1998, federal marshals closed Metropolis down and it ceased operations. Metropolis shareholders never received any dividends from their investment and the company never went public.

money to various creditors including Metropolis, Maximum Holding, Inc. was somehow able to acquire the only assets of Metropolis Publications, Inc., without the proof of payment of any consideration for these assets.[8] Metropolis shareholders never received a return on their investment from the sale of the only two assets that generated any income from Metropolis. Ultimately, this company, as with the other entities owned or controlled by the Defendants, became valueless.

Plaintiffs (and other similarly-situated investors) never received any notice of annual shareholder meetings or board of directors meetings relative to Metropolis, Maximum Holdings, or Ammons Boot, as required by the California *Corporations Code*. [Farkas Declaration, generally, and Exhibits C, D, G–P attached thereto.][9]

II. NUMEROUS OTHER "INVESTORS" WERE VICTIMIZED, DEMONSTRATING A PATTERN OF ACTIONABLE BEHAVIOR.

Discovery in this action has revealed that a number of other "investors" were victimized in a similar fashion, demonstrating a pattern of actionable behavior. [Separate Statement ¶ 29; Farkas Declaration, generally, and Exhibits C, D, G-P, attached thereto; Hollander production, e.g., H252-H262.]

[8] Alan Powers, former distribution director and controller of Metropolis Publications, Inc., testified that "Even through Bergstein had no right to convey Game Fan Magazine, Inc. and Game Cave, Inc. to Maximum Holdings, Inc., both of which were owned by Metropolis or Metropolis shareholders, without giving adequate consideration stock to Metropolis shareholders, he did no anyway. [Powers Declaration ¶ 13.]

[9] At some point, Corcos transferred his interest in his financial management company, Alliance Financial Management, to his friend James Anderson's company, the similar-sounding "Alliance Investment Management." Apparently, this name was later changed to Hollander Asset Strategies. At no point while their assets were administered by the successor entity, Alliance Investment Management were the McDonalds advised of the true nature of their investments, the precarious financial problems which were becoming apparent, Corcos' criminal and disciplinary history, or any of the material facts described herein. [McDonald Declaration, ¶s 13-16; Farkas Declaration ¶ 9.] Moreover, the McDonald's accounts were charged "management fees" based, in part, on grossly inflated and unfounded values of the investments which were, in fact, becoming worthless. [McDonald Decl, ¶ 36.]

William and Suellen Hiatt, for example, were among those who filed complaints against Alliance Investment and Corcos. In their NASD complaint against Corcos, Alliance Investment Management, and Financial West Group, the Hiatts alleged that the defendants recommended and executed transactions in unsuitable investments, made material misrepresentations and omissions, and (with respect to Alliance Investment and Financial West) failed to supervise the investment recommendations made by Corcos."[10] [*Hiatt vs. Corcos, Alliance Investment Management, and Financial West Group*, attached to Farkas Declaration as Exhibit C.]

Similarly, Julie Cross, in her NASD statement of claim, alleged that Corcos "seemed to be genuinely concerned" about her, as a 21-year old woman whose mother had just passed away. "He preyed upon her vulnerability and presented himself as the consummate professional," who was not only "a stockbroker, but also a certified financial planner who touted the advantages of long-term, conservative financial planning." He then proceeded to put this young woman into "illiquid and speculative limited partnerships," including Ammons Boot Co., Inc., in which, he claimed, "he had purchased 200,000 shares for himself" since "Ammons was destined to 'go public' which would cause an increase in the share price and translate into profit for both of them." As with so many others, this victim "did not even come close to meeting the suitability standards necessary to purchase this investment." [*Cross vs. Corcos, et al*., case no. 96-00259, attached to Farkas Declaration as Exhibit D.]

Many other investors had similar stories to tell. Ronald Wright, for example, was an early investor with Alan Corcos. Mr. Wright is the brother of Bonnie McFetridge, who is the mother of Richard McFetridge (apparently the same "Rick McFetridge who was arrested with Alain Corcos in a cocaine drug bust several years earlier). Mr. Wright testified that "According to Alain Corcos, Ammons was about to go public, and a huge profit could be made if we bought

[10] In their complaint, the Hiatts note that James L. Anderson of Alliance Investment acknowledged that its management reports (including Metropolis) "prevented a true representation of the actual rate of return." [*Hiatt vs. Corcos, Alliance Investment Management, and Financial West Group*, attached to Farkas Declaration as Exhibit C, ¶ 19.]

shares in Ammons before the first of the year and before it went public. [Wright declaration (Exhibit P to Farkas Declaration), ¶ 3.] He declared that 'Mr. Corcos told me various things about Ammons Boot Company; He said the company was going to go public in 1994, that the company needed money for expansion, machinery and advertising, that Ammons' boots were selling well in Japan where people appeared to like $5,000 or $10,000 boots, that movie stars and celebrities liked Ammons boots, and that once the company whet public, Ammons stock would be worth five or six times the purchase price." [Wright declaration ¶ 5.] He said "Mr. Corcos also said that he had invested in Ammons and that his father had also invested in Ammons"[11] [Wright declaration ¶ 6] and that "Mr. Corcos stated that he was doing me a favor by allowing me to purchase Ammons stock before the first of the year and that he was doing it as a favor to me because I was Richard's uncle. Mr. Corcos said that he was waiving his broker's fee with respect to the purchase of Ammons stock again as a favor." [Wright declaration ¶ 7.][12]

Elaine Schings, similarly, testified that she "met Alain Corcos early on when Metropolis first took over Game Fan Magazine because he seemed to be bringing in a lot of investors into Metropolis Publications, Inc. and Game Fan and showing them around the offices." [Schings declaration (Exhibit M to FarkasDeclaration), ¶ 10.] After advancing more than $250,000.00 to the defendants' entities, and after "Federal marshals came in and closed down the Metropolis Publications, inc. Los Angeles office and the Game Fan offices in Agoura Hills," [Schings declaration ¶ 20] she said that "Alain Corcos came to Metropolis/Shinno's offices, walked around and picked up some magazines. Corcos would call me frequently and tell me that he was

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[11] Corcos later admitted in deposition that his father did not invest in Ammons Boot. [Corcos deposition, December 11, 2001, page 107, lines 19, 20.]

[12] When his investment proved not to be "a favor," Mr. Wright "immediately called Alain Corcos to try to find out why Ammons was no longer paying dividends. It took me several months to get a hold of Corcos. I spoke to Richard [McFetridge, the former cocaine arrest co-defendant] and he told me that Corcos was not in town. When I finally did speak to Corcos, he told me that things were going bad for Ammons but that things would pick up. I told Corcos that I at least wanted my investment back and wanted to sell the stock. Corcos told me that I could not sell the shares or cash out because I was committed to holding the stock for five years." [Wright declaration ¶ 12] Later, he testified, "I attempted to call Alain Corcos but never received a return phone call." [Wright declaration ¶ 16.]

sending down potential investors and told me to show them around the office and let them see what was done with Game Fan Magazine." [Schings declaration ¶ 27.][13]

Larry Lane Gurney was another unfortunate investor who had been told, in 1996, that Metropolis was "on the verge of going public within the next 90 to 120 days;" he invested over $100,000.00, and then received documents from First Trust Corp. with meaningless "fair market value" calculations. Having heard "no news from Metropolis concerning the Initial Public Offering," Mr. Gurney spoke with Mr. Corcos, who told him that "the public offering was 'just a matter of time,' and that 'there were a few kinks to work out and then the company will be going public.'" [Gurney Declaration, January 5, 2000 ¶11-13.][14]

IV. GENERAL LEGAL AUTHORITIES; STANDARD OF REVIEW.

The appropriate standard to be used by the court when considering a summary judgment motion is contained in Federal *Rule of Civil Procedure* 56(c), now recognized as the federal counterpart to the California *Rules of Civil Procedure* governing summary judgment. Rule 56(c) states in part that a Court must grant summary judgment "if the pleading, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The initial standard under Rule 56 was addressed by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, where the Court stated that:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's

[13] Andrew Fell, who founded the predecessor of GameFan Magazine (later acquired, but not paid for, by Metropolis) testified (in his lawsuit against Corcos, and others): "Metropolis and Bergstein did not have the funds available to pay me pursuant to our contract or many of the other expenses of the company…." [Fell declaration (Exhibit G to Farkas Declaration), ¶7.] He accepted a stipulated judgment against Metropolis, Game Fan, Game Cave and Bergstein "because I was told by Bergstein and Alan Corkos [*sic*] that Metropolis was developing a business under Metropolis Publications named Maximum which Bergstein and Alan Corkos [*sic*] said would generate substantial returns for Metropolis shareholders." [Fell declaration ¶10.]

[14] Mr. Gurney's son, Larry Gurney, Jr., also purchased $100,000.00 of shares after "Bergstein told me that he was going to make it possible to me to purchase Metropolis shares at $2.00 a share even though he already had commitments from other investors at $5.00 a share.] [Gurney, Jr., Declaration, (Exhibit I to Farkas Declaration), ¶ 5.] Later, he "met Alain Corcos, who told me that Metropolis had 'run into a little hurdle. That the auditors had found some problems but that the problems were corrected." [Gurney, Jr., Declaration, (Exhibit I to Farkas Declaration), ¶ 9.]

> case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgement as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof." [*Celotex Corp. v. Catrett*, (1986) 477 U.S. 317.]

Summary judgment should be granted where "there is no genuine issue as to any material fact." [Fed. R. Civ. P. 56(c).] As the Supreme Court has stated, summary judgment is not "a disfavored procedural shortcut, but rather [is] an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." [*Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).]

"Rule 56(c) mandates summary judgment if a party fails to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." [*Villines v. United Bhd. of Carpenters & Joiners*, 999 F. Supp. 97, 101 (D.D.C. 1998).] The party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts[;] the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)) (citations omitted) (affirming grant of summary judgment in complex antitrust litigation).]

California *Code of Civil Procedure*, section 437c, both before and after substantial amendments to it in 1992 and 1993, provided that "any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." It continued that "the motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law: The purpose of § 437c,

as is true with FRCP 56, "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." *Aguilar* at 843. To that end, the California legislature in 1992 and 1993 amended §437c. The purpose of the amendments was to move §437c closer to FRCP 56 as Rule 56 was interpreted and applied by the 1986 trilogy of Untied States Supreme Court decisions making summary judgment an effective procedure to avoid needless trials in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986).

The 1992 amendments to §437c provided for a mix of burdens of persuasion and production that shift under §437c(o). Thus, under §437c(o)(1) "plaintiff …has met" his "burden of showing that there is no defense to a cause of action if" he "has proved each element of the cause of action entitling" him "to judgment on that cause of action. Once the plaintiff…has met that burden, the burden shifts to the defendants…to show that a triable issue of one or more material facts exists as to that cause of action or defense thereto.

"The defendant…may not rely upon the mere allegations or denials" of his pleadings, but must set forth specific facts. Section 437c(o)(2) declares that "defendant…has met" his "burden of showing that a cause of action has no merit if" he "has shown that one or more elements of the cause of action…cannot be established, or that there is a complete defense to that cause of action.

Justice Mosk, on the twin pillars of the 1992 and 1993 amendments, concluded the California legislature intended to move §437c closer to FRCP 56. *Aguilar* "clarifies" §437c to accomplish that movement. Threading its way through *Aguilar* is the concept that a plaintiff who makes a pretrial showing of entitlement to a directed verdict should not have to go through a trial and is entitled to summary judgment.

A. SUITABILITY. In general, a broker occupies a fiduciary relationship with his client which requires that he exercise his utmost care in justifying the trust and confidence he enjoys in that relationship. One of the ways a broker must satisfy his duty as a fiduciary is to

"know" his customer. This is a technical requirement imposed on all registered brokers by the rules of, among others, the National Association of Securities Dealers ("NASD"). Article III, Section 2 of the NASD's Rules of Fair Practice states:

> **In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.** [NASD Rules of Fair Practice, Art III, section 2, NASD Manual (CCH) p 2152; see also, New York Stock Exchange Rule 405, 2. N.Y. Stock Exch. Guide (CCH) P 2405; Municipal Securities Rulemaking Board, Rule G-19, MSRB Manual, Exchange Act Rel. No. 33,869, 56 S.E.C. Docket (CC) 1062, 1064 (Apr. 7, 1994). See also, generally, Wolfson, Phillips and Russo, Regulation of Brokers, Dealers and Securities Markets P 2.08 at 2-32 (1977).]

In *Duffy v. Cavalier*, 215 Cal.App.3d 1517 [No. A035279. Court of Appeals of California, First Appellate District, Division Three, November 27, 1989.], the California court noted that a stockbroker's fiduciary duty requires more than merely carrying out the stated objectives of the customer; at least where there is evidence, as there was here, that the stockbroker's recommendations were followed, the stockbroker must "determine the customer's actual financial situation and needs. [Citations.] (*Twomey*, supra, 262 Cal.App.2d at p. 719.) If it would be improper and unsuitable to carry out the speculative objectives expressed by the customer, there is a further obligation on the part of the stockbroker "to make this known to [the customer], and [to] refrain from acting except upon [the customer's] express orders. [Citations.]" (Ibid.) Under such circumstances, although the stockbroker can advise the customer about the speculative options available, he or she should not solicit the customer's purchase of any such speculative securities that would be beyond the customer's "risk threshold." [Id., at p. 721.]

The existence of a stockbroker's fiduciary duty to a customer does not depend on a showing of special facts, including whether or not the stockbroker serves as an investment adviser or controls the account. Stockbrokers act as agents for buyers and sellers of securities. Any agent is also a fiduciary, whose obligation of diligent and faithful service is the same as that of a trustee. [*Civ. Code*, § 2322, subd. (c); Rest.2d Agency, § 13; *Twomey*, supra, 262 Cal.App.2d at p. 709; 2 *Witkin*, Summary of Cal. Law (9th ed. 1987) Agency and Employment, §§ 41, 287, pp. 53, 284-285.] As repeatedly stated in *Twomey* and the many subsequent cases following it, the relationship between any stockbroker and his or her customer is fiduciary in nature, imposing on the former the duty to act in the highest good faith toward the customer. [*Twomey*, supra, 262 Cal.App.2d at p. 709; *Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174 , 201 [210 Cal.Rptr. 387]; 2 *Witkin*, op. cit. supra, at § 287, p. 285.] Particularly in a trust or pension context, a fiduciary or confidential relationship will arise whenever confidence is reposed by persons in the integrity and good faith of another. If the latter voluntarily accepts or assumes that confidence, he or she may not act so as to take advantage of the others' interest without their knowledge or consent. [*Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1150 [265 Cal.Rptr. 330].

California courts have imposed strict and protective requirements concerning the fiduciary relationship between a stockbroker and investor/client. [See *Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690; *Main v. Merrill Lynch Pierce Fenner & Smith* (1977) 67 Cal.App.3d 19.] A leading California case on the issue of a stockbroker's fiduciary duty is *Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690 [69 Cal.Rptr. 222]. The *Twomey* court's statement of the extent of a stockbroker's fiduciary duty is

as clear as it is broad. "Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. ..." [Citations.] ... "An agent is a fiduciary. His [or her] obligation of diligent and faithful service is the same as that imposed upon a trustee." [Citations.] "'The relationship between broker and principal is fiduciary in nature and imposes on the broker the duty of acting in the highest good faith toward the principal." [Citations.] With respect to stockbrokers it is recognized, 'The duties of the broker, being fiduciary in character, must be exercised with the utmost good faith and integrity.'" [Citations.] [*Twomey*, supra, 262 Cal.App.2d at pp. 708-709.]

The obligations of stockbrokers to their customers for whom they handle nondiscretionary accounts were also described by the court in *Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690 [69 Cal.Rptr. 222]: "It is contended that the sole obligation of the broker-dealer is to carry out the stated objectives of the customer. This may well be true when the broker is acting merely as agent to carry out purchases or sales selected by the customer, with or without the broker's recommendation. Here, however, there is evidence to sustain the finding that [the broker's] recommendations, as invariably followed, were for all practical purposes the controlling factor in the transactions. Under these circumstances, there should be an obligation to determine the customer's actual financial situation and needs. [Citations.] If, as appears from the evidence and as found by the court, it was improper for her to carry out the speculative objectives which defendants attribute to her (but which her testimony does not fully admit), there was a further obligation to make this known to her, and refrain from acting except upon her express orders. [Citations.]" [*Id.* at p. 719; accord *Duffy v. Cavalier* (1989) 215 Cal.App.3d 1517, 1531-1532 (264 Cal.Rptr. 740).]

B. FRAUD. Actual fraud consists of, among other things: "the suppression of that which is true, by one having knowledge or belief of the fact; a promise made without any intention of performing it; or any other act fitted to deceive,... committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract." [California *Civil Code* Sections 1572; 1572.3; 1572.4; 1572.5.] Other elements of fraud are knowledge of the misrepresentation of a material fact by the party making it, and justifiable reliance and damages suffered by the aggrieved party. [*Cicone v URS Corp*. (1986) 183 Cal.App.3d 194, 200, 277 Cal.Rptr. 887.]

Defendants, as described herein, obtained money from Plaintiffs fraudulently, selling securities which were not qualified and which were misrepresented in all respects. Despite their knowledge of the true facts, the Defendants concealed their activities from Plaintiffs and the general public for years, making continued misrepresentations to lull the investors into complacency. Defendants' failure to inform Plaintiffs of the true nature of their investment, and their continuing activities in reassuring the Plaintiffs and others through ongoing misrepresentations constitutes concealment within the meaning of the fraud statute. Defendants' further act of continuing to sell the same security through misrepresentations to others is evidence of intent to deceive Plaintiffs into thinking that they had a secure investment with Defendants. Defendants' similar pattern of deceit affected many other unsuspecting investors. Evidence of other instances of fraudulent conduct is admissible to show intent, knowledge, or to lay a foundation for exemplary damages. [*Atkins Corp. v. Tourny*, 6 Cal.2d 206, 57 P.2d 480; *Borse v. Superior Court*, 7 Cal.App.3d 286, 86 Cal.Rptr. 559.]

Plaintiffs justifiably relied on Defendants' actions and representations. Defendants acted as principals, financial advisors, and brokers, which further constituted a fiduciary

relationship between them and Plaintiff. Defendants breached the trust and confidence that Plaintiffs reposed in them.

C. NEGLIGENT MISREPRESENTATIONS. Plaintiffs have also established that Defendants are liable for negligent misrepresentations and suppressions of fact. *Civil Code* sections 1709 and 1710 provide the basis for actionable fraud when someone makes assertions not based on reasonable grounds, or suppresses facts likely to mislead for want of communication of those facts. Based on the facts related above, Defendants had no reasonable grounds for believing the representations which had been made, to the Plaintiffs and others throughout the country. In fact, by continuing to sell these securities to others, Defendants were negligently misleading Plaintiff and others into believing that their investments were secure.

D. CONVERSION. "Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." [*Messerall v. Fulwider* (1988) 199 Cal.Appr.3d 1324, 245 Cal.Rptr. 548, *mod. reh. den.* 200 Cal.App.3d 490c.] During the time Plaintiffs were investing with the Defendants, by and through Defendant CORCOS, the Plaintiffs deposited with Defendants significant sums of money for the express purpose of obtaining securities which were misrepresented and not qualified for purchase by Plaintiffs. Defendants wrongfully exerted dominion over Plaintiffs' money by failing and refusing to return that sum of money to Plaintiffs.

E. PUNITIVE DAMAGES. *Civil Code* section 3294(a) provides for punitive or exemplary damages in "an action for breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiffs, in addition to the actual damages, may recover damages for the

sake of example and by way of punishing the defendant." Subsection (3) of section 3294(c) defines "fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

The undisputed facts of this case show, clearly and convincingly, that Defendants engaged in a pattern of (1) concealment of material facts; (2) intentional misrepresentation; and (3) making promises without any intention of performing them, thereby depriving Plaintiffs of their invested dollars.[15] Defendant and his principals knew, or should have known, the nature and background of the Plaintiffs' investments, and those who had been involved with them. Plaintiffs were lulled into complacency, maintaining their accounts when they still could have mitigated their losses, and continued to pay "management fees" on values which were fiction.

VI. CONCLUSION.

The facts sufficient to support summary judgment against remaining Defendant Corcos, the main player in this case, are undisputable: Defendant and his principals had a fiduciary duty to their clients (whose "book of business" was later sold by Defendant Corcos and Alliance Financial Management). Defendant had duties to advise his clients as to material facts concerning their investments (of which Defendant was well aware), which were originally

[15] Plaintiffs also alleged a cause of action for Declaratory Relief. California Code of Civil Procedure Section 1060 provides that any person "who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action ... for a declaration of his rights and duties in the premises..... He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such right or duties, whether or not further relief is or could be claimed at the time." An actual controversy presented in this case is whether Defendants owe Plaintiffs the return of their invested dollars, and whether Plaintiffs are entitled to rescission based on fraud. Plaintiffs seek adjudication, based on the undisputed facts presented herein, that they are entitled to monetary damages from Defendants, and each of them.

placed through fraud, misrepresentation, and which were mismanaged in violation of numerous laws and securities regulations.

The true facts were not communicated to Plaintiffs, who were damaged by Defendants' actions and omissions in a variety of ways, including the loss of management fees and the ultimate loss of nearly all of their investments from being lulled into complacency in liquidating their positions when there was the possibility of doing so. Plaintiffs seek $1,778,000.00, plus interest from June 17, 1997, the date of their last investment in Metropolis with Defendants. This consists of lost investment funds of $700,000.00, attorneys' fees and costs of $78,000.00, plus punitive damages of $1,000,000.00. [McDonald declaration, ¶41.]

DATED: May 4, 2008

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