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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: TRIAL TERM PART 48

RETIREMENT PLAN FOR GENERAL EMPLOYEES  
OF THE CITY OF NORTH MIAMI BEACH  
and ROBIN STEIN,

Petitioners,

- against -

THE MCGRAW-HILL COMPANIES, INC.,

Defendant.

Index No. 650349/2013

May 17, 2013  
60 Centre Street  
New York, New York 10007

B E F O R E: THE HONORABLE JEFFREY K. OING, Justice.

A P P E A R A N C E S:

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Terry-Ann Volberg, CSR, CRR  
Official Court Reporter.

Terry-Ann Volberg, CSR, Official Court Reporter

## 1 Proceedings

2 THE COURT: The court has before it the  
3 matter of Retirement Plan for General Employees of the  
4 City of North Miami Beach and Robin Stein v. The  
5 McGraw-Hill Companies, Inc. This is a petition. This  
6 is motion sequence number one of a petition seeking  
7 from the respondent -- the petition seeks from the  
8 respondent the following: To produce and permit  
9 petitioner, their attorneys and their accountants to  
10 inspect, examine and copy the books, records and papers  
11 of The McGraw-Hill Companies, Inc. pertaining to its  
12 investments, operations and activities as detailed in  
13 petitioners' petition and to take extracts therefrom  
14 and make photostatic copies and so forth.

15 Would the parties state their appearances for  
16 the record?

17 For the petitioners.

18 MR. ROSEMAN: Good morning. Robert Roseman  
19 on behalf of the petitioners, Spector Roseman Kodroff &  
20 Willis.

21 THE COURT: For the respondent.

22 MR. MARKLEY: Brian Markley from Cahill  
23 Gordon & Reindel for the respondent.

24 THE COURT: Thank you.

25 I read the file here. I guess this all  
26 emanated from the CDOs and the real estate transaction,

## 1 Proceedings

2 and the residential mortgage backed securities, not so  
3 much that McGraw-Hill was sort of the issuer of those  
4 type of vehicles, but because of Standard & Poor's,  
5 which is a McGraw-Hill subsidiary or affiliate, that  
6 issued ratings for these investment vehicles, and that  
7 we now know, hindsight having 20/20 vision, that a lot  
8 of these investment vehicles were allegedly worthless  
9 at the time. Now we have petitioners seeking to find  
10 some information in order to consider whether or not  
11 to, I guess, commence an action or bring an action in  
12 derivative form on behalf of McGraw-Hill. I think  
13 that's pretty much it.

14 Tell me why I should grant your petition to  
15 compel, at least have McGraw-Hill give you all of the  
16 information you are looking for.

17 MR. ROSEMAN: Under New York common law,  
18 which is what we are proceeding under, you have to  
19 state a proper purpose as to why a shareholder of a  
20 company is entitled to review documents. The law in  
21 New York is clear that one of those proper purposes is  
22 to investigate mismanagement. That's the core of the  
23 issue here.

24 THE COURT: How does that play out with  
25 Section 624, BCL Section 624?

26 MR. ROSEMAN: 624 is a statutory provision

## 1 Proceedings

2 that allows documents, but it's a very limited category  
3 of documents.

4 THE COURT: It only provides for -- so we  
5 have it in the record here -- Section 624 -- here it  
6 is -- 624(b) "Any person who shall have been a  
7 shareholder of record of a corporation upon at least  
8 five days' -- upon at least five days' written demand  
9 shall have the right to examine in person or by agent  
10 or attorney during usual business hours its minutes of  
11 the proceedings of the shareholders and record of the  
12 shareholders and to make extracts therefrom for any  
13 purpose reasonably related to such person's interest as  
14 a shareholder."

15 It's very limited in terms of what you can  
16 get.

17 MR. ROSEMAN: That's correct, your Honor.  
18 But under the common law, in cases that have  
19 interpreted common law under New York that is more  
20 expansive as to the type of documents that you can get  
21 pertaining to specific circumstances. And in this  
22 circumstance what we are trying to investigate at the  
23 board level, only at the board level, is did the board  
24 satisfy its fiduciary obligations in properly  
25 overseeing the S&P unit.

26 THE COURT: I have to tell you, when I was

## 1 Proceedings

2 looking at -- and also 624(e) provides that you are  
3 entitled to get the annual balance sheet and profit and  
4 loss statement. 624 is very limited.

5 When I looked over what you want to get in  
6 terms of the investment operation activities, and also  
7 I looked at the record here that set forth the demands  
8 of what you want to have produced to you, I couldn't  
9 help but think that all that information sounds like  
10 something that's ripe for discovery in a plenary  
11 action. And Article 31 triggers all of the protections  
12 and all of the obligations and so forth that parties  
13 have under Article 31. If you ask me to proceed under  
14 the common law, if I agree with you, you would be  
15 getting all of this information outside of the rubric  
16 of Article 31.

17 Why should I hand over to you all of this  
18 information without knowing what it is that you are  
19 going to -- it's clear, you want to perhaps commence an  
20 action, a derivative action, but in a sense you are  
21 going to get a head start in terms of all of that  
22 without them having the protection of Article 31. They  
23 can't move to strike. They can't move for a protective  
24 order. They can't do any of that. You will get all of  
25 this wholesale.

26 This is a lot of information that you want

## 1 Proceedings

2 from them. It's not just limited. It's a vast amount  
3 of information.

4 Why should I do that?

5 MR. ROSEMAN: I understand, your Honor.

6 That's why through the process of negotiations we have  
7 tried to limit the types of documents limited to board  
8 level only, documents which would go to what the board  
9 knew, when the board knew it, how the board satisfied  
10 its obligations.

11 THE COURT: It's plenary action discovery.  
12 That's discovery in a plenary action. That's no  
13 different -- if you are concerned about a shareholders'  
14 derivative lawsuit under 626, go file a demand, serve a  
15 demand. They will say we reject your demand. The next  
16 day, boom, you will be hit with a massive shareholders'  
17 derivative lawsuit. At that point you can do anything  
18 you want with respect to getting all of this  
19 information.

20 But I am not so sure -- I am agreeing with  
21 you, I know the common law is there for you, but there  
22 is always this thought about -- they are in an  
23 untenable, unenviable position. What will they do,  
24 commence a special proceeding to stop them from turning  
25 over the information? I don't know.

26 MR. ROSEMAN: I understand, your Honor.

1 Proceedings

2 The common law is set up to allow these types  
3 of preliminary investigations to make a determination  
4 of whether it's appropriate at the time to file --

5 THE COURT: Do you have one case that says  
6 that the kind of information that you're seeking was  
7 okay to get? Do you have that? I didn't think I saw  
8 that.

9 I am only looking at -- so I have it, it's  
10 attached to Carl Stine's affidavit or affirmation,  
11 that's Exhibit A. That's all the information you are  
12 seeking from the respondent here.

13 MR. ROSEMAN: The New York case of Tatko v.  
14 Tatko Brothers Slate Company indicates that one of the  
15 proper purposes that the courts will allow this type of  
16 limited discovery --

17 THE COURT: What's the cite again?

18 MR. ROSEMAN: Tatko v. Tatko Brothers Slate  
19 Company.

20 THE COURT: Would you have a copy of that  
21 case by any chance handy?

22 MR. ROSEMAN: I believe I do, your Honor.

23 MR. MARKLEY: I have it (Handed.)

24 THE COURT: It's a Third Department case  
25 back in 1991.

26 There is a big difference already in the

## 1 Proceedings

2 first paragraph. It's a closely held corporation. So  
3 that when you are having a closely held corporation --  
4 even better, they are all seven siblings, brothers and  
5 sisters, or eight siblings. When you are looking for  
6 the information that you seek here, that's vastly  
7 different from a closely held corporation in terms  
8 of -- I think it talks about valuation. They were  
9 valuing the corporation's worth.

10 This is not -- you are not looking to value  
11 McGraw-Hill. We all know what McGraw-Hill's value is.  
12 Look at the stock market. You are looking for much  
13 more than a valuation search. You are looking for  
14 support to formulate your potential lawsuit against  
15 McGraw-Hill. And that's like asking them to give you  
16 the ammunition to go after them.

17 MR. ROSEMAN: As we pointed out, there are  
18 limited cases in New York probably because a lot of  
19 corporations don't reside in New York as they did in  
20 the '50s and '60s which is why we look to Delaware  
21 which is similar on a 220 document request. As we  
22 point out in our papers, the Delaware Supreme Court has  
23 almost mandated plaintiffs prior to preparing  
24 derivative cases, which have been very costly to the  
25 companies, to go and do their homework.

26 THE COURT: I read that.



## 1 Proceedings

2 Is McGraw-Hill incorporated in Delaware?

3 MR. MARKLEYORNEY: Yes.

4 THE COURT: Why don't you go to Delaware and  
5 get the information? Why did you come here? If you  
6 come here to get the information, I will apply New York  
7 law. I don't have to look at Delaware law.8 Your argument is that Delaware law is very  
9 liberal, I saw that, that there is an impediment for  
10 shareholders to bring a derivative lawsuit down there  
11 because they will say you have to do your homework.12 You could have commenced your proceeding down  
13 in Delaware to get the information.14 MR. MARKLEY: I wanted to correct something.  
15 McGraw-Hill is incorporated in New York. It's the  
16 subsidiary --17 THE COURT: The subsidiary. You can get  
18 that information out of the sub. Counsel, you can  
19 still get this information out of the sub in Delaware.

20 MR. MARKLEY: Theoretically.

21 THE COURT: Theoretically if you come to New  
22 York I have to follow what we do here. I am asking you  
23 all these questions, and you rely on this one case, but  
24 that's a valuation case. This is not a valuation --  
25 this clearly is not a valuation case.

26 MR. ROSEMAN: Right.

## 1 Proceedings

2 Again, your Honor, there are very limited  
3 cases in New York dealing with the type of documents,  
4 mismanagement cases that we cite, dealing with  
5 valuation, dealing with distribution of dividends.  
6 It's the principle that the case stands for, and on the  
7 case we cite you can investigate mismanagement.

8 All we are seeking are a very limited number  
9 of documents to determine whether the board of  
10 directors satisfied their fiduciary duty overseeing the  
11 S&P. We are not asking for the whole world from them.  
12 I am not asking for every document at the S&P unit.  
13 It's been specifically tailored, as we mentioned in  
14 Schedule A, of those documents at the board level.  
15 What did the board review? What information flowed to  
16 the board? What the board's oversight responsibility  
17 of S&P? Once we get those documents, your Honor, and  
18 we determine that the board is impartial to decide  
19 that, they satisfied their responsibilities, then we  
20 don't have a basis to bring a lawsuit, as opposed to  
21 bringing an action now, and going through the motions,  
22 and being told we can't satisfy futility demand.

23 THE COURT: The reason I think there is a  
24 dearth of case law on this issue I think is because,  
25 simply the fact of the matter is that shareholders just  
26 commence derivative lawsuits. And when they commence

## 1 Proceedings

2 those lawsuits, you know, then they get the discovery.  
3 So that you don't have -- this is like pre-action  
4 discovery you are going for more than anything else.

5 MR. ROSEMAN: The problem is that this is  
6 something, with all due respect to the New York courts,  
7 that the Delaware courts have recognized that a lot of  
8 times the plaintiffs' bar comes rushing into a  
9 derivative suit, they base their fiduciary futility  
10 demand allegations on public documents, boilerplate  
11 allegations, and what we are trying to say here is,  
12 here are the specific reasons why the board is  
13 conflicted out, cannot satisfy the demand.

14 THE COURT: If you were to commence a  
15 shareholders' derivative lawsuit you would be  
16 commencing it here in New York?

17 MR. ROSEMAN: Yes.

18 THE COURT: So that I think New York courts  
19 look at whether or not you have dotted your Is and  
20 crossed your Ts, you made a demand, and whether or not  
21 the demand -- or you would argue in your complaint,  
22 allege in your complaint the demand would be futile. I  
23 don't think the courts here -- I haven't seen that, in  
24 my readings here, that the courts have thrown you out,  
25 said you have not done your due diligence prior to  
26 commencing your shareholders' derivative lawsuit, so

## 1 Proceedings

2 get out, I am dismissing this action. I don't think  
3 that happened.

4 MR. ROSEMAN: I am not saying we didn't do  
5 our due diligence, then we run up against issues, but  
6 when you plead futility demand, you have to plead with  
7 specificity.

8 THE COURT: You can look at Teamsters v.  
9 Harold McGraw, the federal case where there was a  
10 demand in that case, and the defendant, I guess the  
11 same here, refused to pursue any legal action, and they  
12 went ahead. So you can point to that case saying, you  
13 know, the demand's refuted because if they did it once,  
14 they will do it again. That federal case, contrary to  
15 what defense says, is not res judicata, not collateral  
16 estoppel, because it was dismissed, and even the  
17 federal judge said, go ahead, replead, do this all over  
18 again.

19 MR. MARKLEY: And that case is very different,  
20 as your Honor is aware of.

21 THE COURT: But similar, also, in a sense  
22 about the demand aspect.

23 MR. ROSEMAN: It was --

24 THE COURT: It makes your life a little  
25 easier.

26 MR. ROSEMAN: It was a defective demand on a

## 1 Proceedings

2 very strange theory that the board of directors  
3 breached its fiduciary duty by applying the Federal  
4 Securities Laws, and the court ruled that the demand  
5 was effective, never got to the question of the state  
6 law claims because it did not accept supplemental  
7 jurisdiction.

8 And now the demand refused case, if we were  
9 to bring an action in this court we have to do one of  
10 two things. We can make a demand, and if they reject  
11 it, maybe follow the case, or the approach we are  
12 taking is, do our homework, satisfactory ourselves that  
13 we can plead a proper futility demand allegation, and  
14 say the board is conflicted out, the demand is futile,  
15 here are the specific reasons.

16 THE COURT: Here's the problem: The  
17 homework you will be doing is a one-way street. They  
18 don't get an opportunity to get homework from you.  
19 Everything is coming from them, from McGraw-Hill,  
20 without them having an ability -- it's like I have sent  
21 them out on a boat without paddles.

22 What will we do? We have to give everything  
23 over to them, and we ask can't ask for discovery from  
24 these folks in terms of having them tell us, well, did  
25 you know about us when we were doing this? There is a  
26 lot of give and take. That's why discovery is the way

## 1 Proceedings

2 it is.

3 I am not still buying -- all this came up  
4 when I was reading the papers last night. I said  
5 everything you are asking for is really very broadly  
6 based. It strikes me as a demand that falls right  
7 under Article 31 in terms of you want everything, and  
8 yet you have not commenced an action, but you are  
9 saying you need to do your due diligence because you  
10 want to make sure if you commence a shareholders'  
11 derivative lawsuit it's on all fours. That does not  
12 necessarily mean it's on all fours even if you get all  
13 the information. It does not mean you hit a grand slam  
14 by getting all of this information ahead of time.

15 I go back to the same thing. Now what I have  
16 done is, I have given you all of the information, and  
17 these guys are at litigation behind the eight ball in a  
18 sense that you have gotten everything you want and now  
19 they have to struggle to get things from you. At that  
20 point tactically I have given you the upper hand.  
21 That's not what Article 31 calls for.

22 I hear what you are saying. I am not not  
23 hearing it. I am not completely sold on the extent of  
24 the information you are looking for as a proper  
25 disclosure or a proper basis of disclosure for common  
26 law when it comes to corporations especially if it's a

## 1 Proceedings

2 large corporation of this sort.

3 MR. ROSEMAN: I guess we are in a Catch 22  
4 situation because we have the common law out there that  
5 allows for limited investigation of the company for  
6 limited purposes as a proper procedure to allow us to  
7 determine whether or not we can allege claims for  
8 fiduciary, breach of fiduciary obligations and also  
9 futility demand. If we go into court next week, file a  
10 derivative complaint, counsel will say the futility  
11 demand allegations are ridiculous, it's based on  
12 common, public documents, you cannot plead it.

13 With all due respect to the courts of New  
14 York, when we look under Delaware, the Delaware courts  
15 recognize that there are tools out there. The tools in  
16 New York State is statutory or common law.

17 THE COURT: I am glad you mention that.  
18 What is it about this case that you should get special  
19 treatment? There is nothing different here from the  
20 other 500 cases I have. Why should this case -- I am  
21 not dealing with widows and orphans that you should get  
22 special treatment. That's exactly -- the statement you  
23 just made sounds like we are entitled to special  
24 treatment because, otherwise, this is what will happen.

25 Well, that's what litigation is all about.  
26 Litigation is not for the faint of the heart. If you

## 1 Proceedings

2 are going to sue, they are going to challenge it. The  
3 court issues a decision. The appellate court will pass  
4 on it whether or not it's an accurate decision or not  
5 an accurate decision. But that is the course of how  
6 litigation plays out.

7 So why should I give you special treatment  
8 and give you -- at least take away that opportunity  
9 from the defendants or from the company to make their  
10 argument that your demand was off the mark and it does  
11 not hit the mark? Why should I take that one argument  
12 away from them now? That's not proper either.

13 MR. ROSEMAN: Your Honor, --

14 THE COURT: That does not mean if you get  
15 all of this information, that does not mean they will  
16 not raise that argument also.

17 MR. ROSEMAN: I understand that except, with  
18 all respect, I didn't look for special treatment. It's  
19 something that a shareholder of a publicly traded  
20 company in New York has the ability to get documents  
21 either under Statute 624 or under the common law.

22 THE COURT: They can get it when you  
23 commence an action under Article 31. You will get it.

24 MR. ROSEMAN: That's not entirely correct.  
25 We would not be entitled to any discovery until we can  
26 overcome the futility demand allegation. Once we



## 1 Proceedings

2 satisfy futility obligations, we then have standing to  
3 stand in the shoes of the company to sue the director.  
4 Until that point in time we cannot get discovery.

5 THE COURT: That futility argument, why  
6 shouldn't that be in play? Why should I make it easier  
7 for you to get over that futility argument? That's not  
8 the purpose of the court, to make it easier for one  
9 side over the other to satisfy a condition. That's  
10 what you guys are trained to do. We are here to call  
11 the shots. I am not here to give you the ball. You  
12 have the ball. You have to move it back and forth.  
13 This is football. I just call the shots. I am not  
14 handing you the ball. Essentially you want me to hand  
15 you the ball so that you have an argument now to get  
16 over the futility, because the futility argument is to  
17 keep components in. That's the concern you have.

18 Why should I give you all that? You either  
19 have it or you don't. The only way you will know is if  
20 you make your demand, you see what happens with the  
21 demand. Who knows? They may surprise you and say,  
22 okay, we will commence an action. I highly doubt it,  
23 but you never know in this world.

24 You make the demand. They reject the demand.  
25 They refuse to go forward. Then you make the argument  
26 saying, you know, look, we made the demand. We made

## 1 Proceedings

2 the demand, they rejected it. Now we can go forward.  
3 That allows you to go forward with the action rather  
4 than not making a demand at all and simply alleging  
5 futility.

6 You can make the demand. If they decline to  
7 commence an action, they decline to act, you can still  
8 use that declination to commence a shareholders'  
9 derivative lawsuit, can't you?

10 MR. ROSEMAN: Absolutely right.

11 THE COURT: What's the problem?

12 MR. ROSEMAN: There is no guaranty if we get  
13 the document that we can establish futility demand.

14 THE COURT: We are past that, that futility  
15 part. We focused on that point. But there is nothing  
16 stopping you from serving a proper demand, because you  
17 know what your facts are, a proper demand upon the  
18 corporation to act because you believe something  
19 happened. If they reject that demand, you don't  
20 need -- all this futility argument that we had a few  
21 minutes ago goes out by the wayside. Now you have a  
22 demand. They failed to act on the demand. That gives  
23 you the green light to commence the shareholders'  
24 derivative lawsuit.

25 MR. ROSEMAN: And as we have seen, the  
26 defense can put together a special litigation committee

## 1 Proceedings

2 and they will stop the litigation in its tracks.

3 THE COURT: But, again, why should I prevent  
4 that from happening?

5 I have had two actions that had that  
6 situation. I had the plaintiff arguing that that  
7 special litigation committee was nothing but a fraud  
8 and nothing but a circus. That was one of the  
9 arguments that was being raised. Why should I take  
10 that argument -- that's why the corporate structure is  
11 the way it is. If your investors didn't like that,  
12 because they had to know that would be there before  
13 they bought into the company -- the special litigation  
14 committee is nothing new. That was there. It's in the  
15 bylaws or whatever. If you buy into a company, you  
16 know already what your parameters are. Why is it now  
17 then that I am going to discount that and say, you know  
18 what, you guys, we are not going to have a special  
19 committee. That's not right either.

20 You know what will happen? I will have  
21 everyone lining up saying we want my case to go to  
22 Judge Oing. I am not interested in having more cases  
23 coming into this part.

24 MR. ROSEMAN: I understand. We are trying  
25 to use the tools available in New York.

26 THE COURT: I understand. If I were on that

## Proceedings

1  
2 side, I would agree with you, yes, you want to have all  
3 of this information. But there is the right way to do  
4 it, and there is the proper way to do it, and there is  
5 the not so proper way to do it. I don't believe that  
6 what you are doing here -- the depth of the information  
7 you are seeking here is so extreme that it just smacks  
8 of full-blown discovery under Article 31 rather than  
9 under the common law which you are basing it on which  
10 gives you this ability to get information for proper  
11 purposes. This information is beyond the proper  
12 purpose.

13 MR. ROSEMAN: Would it help -- one thing we  
14 always try to engage in is to limit the documents.  
15 They really are a small, discrete set of documents.

16 THE COURT: Whatever I decide here, I am  
17 keeping an open mind. I know I am beating him up. You  
18 will be next in that regard. I will decide this  
19 petition, but whatever you guys decide outside, I am  
20 not here to give you pointers on what you need to do.  
21 I won't put a meter on that.

22 MR. ROSEMAN: If I can refer you again, your  
23 Honor, when you are reviewing our materials, look at  
24 the original petition as to what we were asking for.

25 THE COURT: I saw it.

26 MR. ROSEMAN: What's in Schedule A, which is

## Proceedings

1  
2 what we are now seeking, which is as a result of the  
3 meeting we first had and the additional restrictions, I  
4 think the court will see exactly a very discrete set of  
5 documents which goes to, you know, three or four  
6 issues, primarily flow of information to the board, the  
7 board's oversight responsibilities of Standard & Poor's  
8 basically getting to what the board knew about S&P, how  
9 it oversaw S&P. It's very discrete.

10 THE COURT: You want to know if they were  
11 activity allowing that to happen.

12 MR. ROSEMAN: Were they satisfying their  
13 fiduciary obligations by due care and overseeing S&P.  
14 That's where it ends. And Schedule A really deals with  
15 those type of documents.

16 THE COURT: Like I said, for the record,  
17 Schedule A looks like a document demand production of a  
18 full-blown plenary action going forward. So that it's  
19 not as limited as -- I am looking at it. I remember  
20 looking at it. It's the November 18, 2011 letter.

21 MR. ROSEMAN: Schedule A attached to our  
22 opening petition.

23 THE COURT: It's dated November 18, 2011.

24 MR. ROSEMAN: Yes.

25 THE COURT: So we have that. So we know  
26 what we are looking at; correct?

## Proceedings

1  
2 MR. ROSEMAN: It's attached to our opening  
3 petition, our motion, sorry.

4 THE COURT: This one? That's it, right?

5 MR. ROSEMAN: No, your Honor. It's the  
6 petition in support of -- our memorandum in support of  
7 our petition. There is an Exhibit A attached to that.

8 THE COURT: Can you hand that to me? I  
9 don't think I have it. (Handed.)

10 Schedule A, right?

11 Looking at Schedule A, it's very similar  
12 to -- I am just making commentary that all of this  
13 information being sought sounds more akin to an Article  
14 31 disclosure demand. Okay. Thank you.

15 You know, why don't you turn it over because  
16 you might be buying yourself a lawsuit by resisting.  
17 Give him everything and say, look, go away.

18 MR. MARKLEY: Your Honor, we did make an  
19 offer to produce a significant amount of information on  
20 the demand itself when they initially made it. It was  
21 not as limited as Schedule A, way overbroad. Schedule  
22 A is narrower, I will grant them that, but still very  
23 broad. I can tell you why.

24 At the end of the day, Judge, the answer to  
25 your question is that the law does not require us to do  
26 that. New York law is very different than Delaware

## Proceedings

1  
2 law. As you point out, Section 624 is extremely  
3 narrow. The coordinating statute in Delaware, Section  
4 220, is different. It's broader, has wide discretion.

5 THE COURT: They didn't bring the proceeding  
6 in Delaware. We are here in New York.

7 MR. MARKLEY: Right.

8 The common law in New York -- I find it very  
9 interesting that Mr. Roseman cites the Tatko case. You  
10 pointed out the differences. It goes beyond that.  
11 What they sought were things like stock record books,  
12 ledgers, journals, books of account. Then the court  
13 said it was overbroad and they produced even less.

14 At the end of the day this is essentially  
15 pre-litigation discovery. There is absolutely no  
16 precedent for it in any New York court in any decision.  
17 If this decision is the best they can come up with for  
18 a parallel, then there really is no parallel at all.

19 I think at the end of the day if you look at  
20 Schedule A, it goes back to 2002. It covers things  
21 like all communications with the board about S&P.  
22 That's extremely broad.

23 THE COURT: You have already produced some  
24 documents?

25 MR. MARKLEY: We have produced everything  
26 and offered to produce everything called for in 624.

## 1 Proceedings

2 We went beyond to try to avoid this because when we  
3 were here before you last time, my colleague was here,  
4 you made it clear that we should try to work this out.  
5 What we proposed to give them was a set of documents  
6 that McGraw-Hill produced to the permanent subcommittee  
7 on investigations in the Senate.

8 THE COURT: The special litigation  
9 committee?

10 MR. MARKLEY: This was a committee of the  
11 U.S. Senate that investigated McGraw-Hill and served a  
12 demand seeking communications to the board related to  
13 RMB and CDO and structured finance documents. We  
14 produced the redacted documents, the relevant portions.  
15 We have those, and they are readily available from '05  
16 to '07. '02 is not relevant. We offered to produce  
17 them. We did so with a condition that it would be in  
18 satisfaction of the demand because we didn't want to  
19 produce them and then be here before you being asked to  
20 produce so much more than that.

21 That offer was extremely reasonable  
22 especially when combined with the fact that we produced  
23 everything under 624, and, in addition, it identified  
24 attachments to the shareholders' meeting that we are  
25 still holding and ready to produce.

26 THE COURT: Do you think that what you



## 1 Proceedings

2 produced already, that they are concerned about the  
3 futility argument and everything, that you have  
4 produced enough for them to get to, at least make a  
5 colorable argument that, look, it would be futile if we  
6 make a demand because of what we have?

7 MR. MARKLEY: I think they should go ahead,  
8 make the demand, as your Honor suggested. I am not  
9 here to predict what McGraw-Hill will ultimately do.

10 THE COURT: We don't know.

11 MR. MARKLEY: I think there is a process for  
12 that. That's the point. There is an established way  
13 to go about this. This would be a diversion from all  
14 of this precedent.

15 THE COURT: The way I look at it, we focused  
16 on futility a lot, but the bottom line is that nothing  
17 prevents them from making a bone fide demand to the  
18 company, and the company then deciding whether or not  
19 to accept the demand or reject the demand, and then  
20 from there on you can commence a derivative,  
21 shareholders' derivative lawsuit without having to make  
22 any discussion or talk about futility because you have  
23 done what you have to do under the law and the  
24 corporate law, BCL, and it's the whole nine yards at  
25 that point.

26 Thank you.

## 1 Proceedings

2 I heard the arguments here today, and I  
3 can't -- even with Schedule A, the limited version of  
4 what we have here, this is my decision and judgment  
5 with respect to the petition.

6 Reviewing Schedule A, and I know what  
7 petitioners' counsel said, it's a little bit more  
8 limiting, but I can't -- it's inescapable that what is  
9 being sought here -- to get it for the record, there  
10 are nine paragraphs of items sought to be discovered or  
11 sought to be produced here -- these items all strike me  
12 to be items that are typically demanded in discovery  
13 under Article 31 during the pendency of a plenary  
14 action. To have the defendant or to have the  
15 respondent now turn over all of these documents without  
16 the protection or obligations under Article 31 I think  
17 would be a mistake.

18 I don't believe that the common -- first of  
19 all, Section BCL 624 clearly does not authorize the  
20 production of these documents. It's very limited in  
21 terms of what is produced.

22 As to the common law my position is that --  
23 petitioners' counsel mentioned that he has not found,  
24 there are not many cases in this area and that's for a  
25 reason because usually people commence a plenary  
26 action, they don't commence a special proceeding. I

## Proceedings

1  
2 now look at this special proceeding as essentially  
3 pre-action disclosure or discovery which we talked  
4 about, argued about. It's really unnecessary because  
5 they can make a demand, and the company can either  
6 reject or accept the demand. If they reject the demand  
7 they have now complied with the BCL and can commence a  
8 plenary shareholders' derivative lawsuit against the  
9 company. That's where that whole aspect of doing  
10 pre-action discovery is really not necessary or not  
11 required.

12 Then going further, as I mentioned, as we  
13 talked about during oral argument, I don't believe that  
14 the BCL and common law should be interpreted to have  
15 the parties ignore or at least get around Article 31  
16 and the obligations set forth there, and get sort of,  
17 as I mentioned during oral argument, sort of get a leg  
18 up in terms of an action here. Discovery is a two-way  
19 street. By this process here it's one-way. It's only  
20 going from the respondent to the petitioners without  
21 any obligation of turning anything over to the  
22 respondent. I don't believe that the case law or the  
23 common law should be read to do that.

24 So for all the reasons stated during oral  
25 argument I find that the petitioner has failed to  
26 demonstrate an entitlement to discovery or for

