

**JP Morgan Chase & Co. v Twin City Fire Ins.  
Co.**

2009 NY Slip Op 30652(U)

March 3, 2009

Supreme Court, New York County

Docket Number: 601904/06

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
Justice

PART 53

Index Number : 601904/2006  
JP MORGAN CHASE & CO.  
vs  
AIU INSURANCE COMPANY  
Sequence Number : 007  
ORDER OF PROTECTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered \_\_\_\_\_, are filed in support of his motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with  
accompanying memorandum decision and order.

**FILED**  
MAR 25 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/24/2009

  
**CHARLES E. RAMOS**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X  
JP MORGAN CHASE & CO., J.P. MORGAN SECURITIES  
LTD., J.P. MORGAN SECURITIES INC., JP MORGAN  
CHASE BANK, J.P. MORGAN CHASE BANK N.A. and  
J.P. MORGAN PARTNERS LLC,

Plaintiffs,

-against-

Index No.  
601904/06

TWIN CITY FIRE INSURANCE COMPANY,

Defendant.

-----X  
**Charles Edward Ramos, J.S.C.:**

Plaintiffs JPMorgan Chase & Co., JPMorgan Chase Bank, and J.P. Morgan Securities Inc. (together, JPMC) commenced three actions against defendant Twin City Fire Insurance Company (Twin City) arising out of its refusal to indemnify JPMC in connection with professional services that it provided to Enron Corporation, Inc. (Enron), bearing the index number 600674/06 (the Enron Action), to WorldCom Inc. (WorldCom), bearing the index number 601904/06, and to National Century Financial Enterprises, Inc. (NCFE), bearing the index number 602223/06.

Twin City interposed identical counterclaims and affirmative defenses in all three actions seeking damages and rescission of its participation in the insurance programs applicable to the claims<sup>1</sup>.

In motion sequence 007, JPMC moves for a protective order

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<sup>1</sup>On August 6, 2007, this Court consolidated discovery in the three actions under the index number 601904/06 (Exhibit D, annexed to the Aff. of Michelle Migdon, Esq.).

(CPLR 3101 [a]) barring certain depositions.<sup>2</sup>

In motion sequence 008 in the WorldCom Action, 004 in the NCFE Action, and 004 in the Enron Action, JPMC moves for summary judgment (CPLR 3212) dismissing certain counterclaims and affirmative defenses.

Additionally, JPMC seeks attorney's fees pursuant to 22 NYCRR § 130.1.1.

**Background**

Twin City provided two excess layers of insurance coverage to JPMC totaling \$22.5 million in a banker's professional liability policy covering the time period from 1997-2001 (97-01 Insurance Program<sup>3</sup>). In the fall of 2001, JPMC sought to renew its coverage. The expiration of the 97-01 Insurance Program coincided with Enron's much-publicized and rapidly deteriorating financial condition, in addition to the revelation that it improperly reported financial results through pre-pay transactions that were, in actuality, disguised loans.

On November 28, 2001, JPMC issued a press release (Press Release) seeking to address the scope of its relationship and

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<sup>2</sup>Twin City seeks to depose JPMC employees Diane Butterfield, Janet Caruso, Jeffrey Dellapina, Dina Dublon, Joseph Evangelisti, Suzanne Hammett, Donald Layton, Phil Levy, Donald McCree, Thomas Mendell, Gev Nentin, David Pflug, Neila Radin, Mark Segal, George Serice, Marc Shapiro, Robert Traband and Eric Wilkinson.

<sup>3</sup>In 2000, Twin City acquired Reliance Insurance Company's excess policies that were part of the 97-01 Insurance Program (Hawkins Affidavit).

exposure to Enron. In the Press Release, JPMC disclosed \$500 million in unsecured transactions, and additional secured transactions of \$400 million (Exhibit O, annexed to the Migdon Aff.).

As news concerning Enron's condition began to spread, JPMC's professional liability insurers began requesting information from JPMC's broker, Marsh & McLellan (Marsh), concerning its exposure to Enron. Certain insurers participating in the 97-01 Insurance Program insisted that any potential claims arising out of the professional services that JPMC provided to Enron be noticed under the expiring 97-01 Insurance Program as a condition to binding renewal coverage for the next policy period (Exhibits V-W, annexed to the Migdon Aff.; JPMC's Statement of Undisputed Facts, ¶¶ 15-18).

JPMC determined that it would place the expiring 97-01 Insurance Program on notice of potential claims arising out of its relationship to Enron.<sup>4</sup> On November 29, 2001, the day before

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<sup>4</sup>In order to trigger coverage under the extended claims-made 97-01 Insurance Program, JPMC was required to give notice of claims during the policy period. Additionally, § IV. D. of the 97-01 Insurance Program permitted JPMC to preserve coverage for potential claims that may arise after the policy's expiration by providing written notice of "Wrongful Acts" within the policy period.

"Wrongful Act" is defined in an addendum to the policy as an "act, error or omission by the Insured or any person or entity for whom the Insured is legally responsible, or dishonest or fraudulent act or omission by any officer or employee of the named Corporation or any Subsidiary Company" (Addendum to the 97-

its expiration, JPMC purported to give written notice under the 97-01 Insurance Program of "circumstances which may give rise to a claim" (the Notice) (Exhibit 2, annexed to the Migdon Aff.).

In the Notice, JPMC again disclosed \$500 million in unsecured transactions and \$400 million in secured transactions that were outstanding from Enron, in addition to the downgrading of Enron debt to junk status. Further, JPMC described its extensive financial and lending relationship with Enron and identified certain causes of action that it anticipated would be asserted against it arising out of this relationship, that it believed constituted "Wrongful Acts" under the policy (Exhibit 2, annexed to the Migdon Aff.). Finally, JPMC disclaimed liability in the Notice, stating that it would contest the validity of any claims and had "no actual knowledge" of Wrongful Acts.

The following day, on November 30, 2001, Twin City issued a \$10 million binder for the 01-02 Insurance Program (01-02 Binder), that was a renewal of the 97-01 Insurance Program. The 01-02 Binder altered the limits of liability available, but all other terms and conditions of the 97-01 Insurance Program remained unchanged (Exhibits I-K, annexed to the Migdon Aff.).

Enron filed for bankruptcy on December 2, 2001. Nearly two weeks later, on December 13, 2001, Twin City issued its formal binder for the 01-02 Insurance Program.

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01 Insurance Program).

Thereafter, JPMC was named as a party in numerous actions arising out of Enron's financial collapse, including a series of class action lawsuits that investors in Enron securities brought against JPMC. JPMC agreed to pay \$2.2 billion to settle the consolidated action, an amount well in excess of the \$200 million primary coverage limits under the 97-01 Insurance Program.

Twin City refused to indemnify JPMC for its losses incurred in connection with its settlement of the Enron actions under the 97-01 Insurance Program. Further, Twin City refused to indemnify JPMC for its losses stemming from its provision of services to WorldCom and NCFE under the 01-02 Insurance Program. JPMC has not asserted any claim under the 01-02 Insurance Program for Enron-related losses.

In the Enron Action, Twin City sought to challenge the legal sufficiency of the Notice with respect to the 97-01 Insurance Program. This Court recently held that the Notice was legally sufficient to provide notice of a potential claim under the 97-01 Insurance Program.<sup>5</sup>

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<sup>5</sup> On January 15, 2008, this Court granted JPMC's motion for partial summary judgment to dismiss certain of Twin City's affirmative defenses that challenged the legal sufficiency of the Notice to trigger coverage for Enron-related claims under the 97-01 Insurance Program (2008 Decision). The Court determined that the Notice was legally sufficient as a matter of law because it was clearly designed to give Twin City notice of a potential claim stemming from Wrongful Acts, and Twin City failed to raise a triable issue of fact that the Notice did not, in fact, alert it to potential claims.

In counterclaims interposed in all three actions, Twin City alleges that in the Notice and Press Release, JPMC deliberately concealed information concerning the extent of its financial exposure to pre-pay transactions with Enron and misrepresented that it had no knowledge of wrongdoing (in the Notice alone) from its investors and its professional liability insurers. Twin City alleges that this omission and misrepresentation tainted its decision to renew coverage and participate in the 01-02 Insurance Program, under which JPMC is seeking coverage for claims relating to WorldCom and NCFE losses. In addition to fraudulent inducement and concealment, Twin City asserts counterclaims for common law and equitable fraud, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and breach of contract.

This Court previously granted JPMC's motion for summary judgment dismissing Twin City's affirmative defenses based upon the fraud exclusions of the respective insurance policies. The Court otherwise denied, pending further discovery, JPMC's motion dismissing counterclaims with respect to whether Twin City's

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In so finding, the Court rejected Twin City's contention that the language of the notice provision contained in the 97-01 Insurance Program did not require actual knowledge of, or an admission of, actual wrongdoing. Consequently, JPMC's disclaimer of liability in the Notice did not undermine its sufficiency in noticing Twin City of a potential claim. Finally, the Court determined that Twin City waived any defense to the Notice's sufficiency, in any event.

underwriters relied upon any alleged misstatement or omission made by JPMC in binding renewal coverage for the 01-02 Insurance Program.

### **Discussion**

JPMC moves for summary judgment dismissing Twin City's fraud counterclaims on the ground that the deposition testimony of Twin City's underwriters confirm that Twin City can adduce no evidence that its underwriters even read, much less relied upon, the Notice, the Press Release, or any other alleged misrepresentations when it agreed to bind coverage for the 01-02 Insurance Program. Further, JPMC disputes that it made any misrepresentations or that it deliberately concealed information concerning its financial exposure to Enron from Twin City, and asserts that Twin City should be estopped from asserting rescission on the basis of waiver.

In opposition, Twin City asserts that are numerous triable issues of fact with respect to each element of its fraud counterclaims. In addition, Twin City asserts that the knowledge and intent of JPMC's senior executives concerning the extent of its Enron-related exposure must be imputed to JPMC. Moreover, Twin City argues that it has been deprived of discovery necessary to establish its counterclaims, and that JPMC's summary judgment motions are premature.

#### **I. Fraudulent Inducement, Concealment and Rescission**

An insurer may rescind an insurance policy that was issued in reliance on material misrepresentations contained in the application where the subject matter of the misrepresentation is material to the risk, and the applicant knew of the falsity and made the representation in bad faith (*Executive Risk. Indem. Inc. v Pepper Hamilton LLP*, 56 AD3d 196, 205-06 [1<sup>st</sup> Dept 2008]). The insurer bears the burden of demonstrating these elements by clear and convincing evidence (*Id.*).

JPMC did not submit a renewal application in connection with the 01-02 Insurance Program (Exhibits L-M, annexed to the Migdon Aff.). In lieu of a renewal application, JPMC provided Twin City and other insurers considering participating in the 01-02 Insurance Program with a packet of information describing JPMC, its financial results and pending claims<sup>6</sup> (JPMC's Statement of Undisputed Facts, ¶ 6).

First, Twin City does not allege that the information packet submitted to it in lieu of a renewal application contained material misrepresentations or omissions that induced the issuance of the 01-02 Insurance Program. Further, the statements

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<sup>6</sup>Twin City argues that as a prerequisite to Twin City's waiver of its application, it required Marsh and JPMC to provide to it the same information it provided to other insurers. However, Twin City does not deny the factual assertion that it accepted from JPMC the information packet in lieu of a renewal application, and does not allege that it did not receive the same information that other insurers received (Twin City's Response, ¶ 11).

contained in the Notice and Press Release were not made part of the renewal proposal packet that was submitted to Twin City in lieu of a renewal application (*compare American Intl. Speciality Lines Ins. Co. v Towers Fin. Corp.*, 1997 WL 906427 [SD NY 1997]).

Twin City does not allege that it even requested JPMC to warrant the factual accuracy of the information contained in the Notice or Press Release, or otherwise to make representations or warranties concerning the extent of its secured Enron exposure or its knowledge of prior acts with respect to the 01-02 Insurance Program (Hawkins Deposition: 184).

Furthermore, it is not clear that Twin City specifically inquired as to the extent of JPMC's Enron exposure as a basis for renewing coverage for the 01-02 period.

The record demonstrates that, shortly before it was transmitted, JPMC's Marsh broker responsible for placement of the 01-02 Insurance Program, Thomas Orrico, sent an e-mail to the insurers considering participation in the renewal program, including Hawkins. Orrico states in the e-mail that he received authorization from JPMC to bind coverage for the 01-02 Insurance Program (Exhibit U, annexed to the Migdon Aff.), and indicates that JPMC would notice the expiring 97-01 Insurance Program of potential claims arising out of the Enron situation. He states,

"As discussed, it was agreed to put the expiring contract [97-01 Insurance Program] on notice of the ENRON circumstance ... JP Morgan Chase is in the process of drafting this notice and putting the prior policy on notice

... If there is any additional information that you need please advise and we will do our best to secure as soon as possible" (*Id.*).

Nonetheless, Twin City did not request additional information from JPMC concerning the "Enron circumstance," the extent of its liability exposure to Enron, or the professional services that it performed for Enron.

Twin City contends that its underwriters, Hawkins and Stephen Guglielmo, were "concerned about the escalating Enron situation in November 2001" (Twin City's Response to JPMC's Statement of Material Fact). Twin City points to Hawkins' deposition testimony, where he states that there was "a lot of ... information out there from a periodical standpoint that JPMorgan had exposure to Enron [and] ... big dollar amounts [were] being thrown around" (Hawkins Deposition: 136).

However, despite the amount of information circulating at the time concerning JPMC's relationship to Enron (Hawkins Deposition: 161-62), and the "big dollar amounts" being discussed, it is not clear from the evidentiary record that Twin City's underwriters sought facts concerning the extent of JPMC's secured Enron exposure.

Nonetheless, Twin City fails to raise a triable issue of fact that its underwriters actually relied upon any of the statements contained in the Notice, the Press Release or the representations of JPMC's broker.

Twin City attempts to raise a triable issue as to its reliance on the Notice<sup>7</sup> on the basis of Hawkins' affidavit testimony that the Notice did not raise "red flags that would have caused us [Twin City] to follow up with more questions" because it omitted the extent of JPMC's Enron secured exposure to pre-pay transactions (Hawkins Affidavit, ¶¶ 8-9). However, Hawkins testified in his deposition that he does not recall actually reading the Notice, and otherwise does not recall asking to see it either before or after it was transmitted to the claims department (Hawkins Deposition: 140-44, 161-62).

Stephen Guglielmo, the other Twin City underwriter involved in binding the renewal coverage also testified that, although it was "probable" that he read the Notice, he did not recall receiving, reading or discussing the Notice with other Twin City employees, prior to binding coverage for the 01-02 Insurance Program (Guglielmo Deposition: 79-81).

Moreover, Twin City fails to demonstrate that JPMC deliberately made misrepresentations or concealed information concerning its secured exposure to pre-pays with Enron in the Notice or elsewhere.

The Notice was transmitted to Twin City's claims department.

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<sup>7</sup> JPMC addressed the Notice to the claims personnel for the insurers participating in the 97-01 Insurance Program, including Patricia Hearn, who handled claims for Twin City (JPMC's Statement of Undisputed Facts, ¶ 24).

In it, JPMC represented that, in providing insurers under the 97-01 Insurance Program with notice of potential claims of "Wrongful Acts" arising out of its relationship with Enron, it was denying any knowledge of wrongdoing. This Court already determined that this denial of wrongdoing was a disclaimer of liability, and that no admission of wrongdoing was required to notice potential claim under the 97-01 Insurance Program (January 15, 2008 Decision, 8).

Further, the parties have deposed all of the JPMC employees responsible for furnishing the information for inclusion in the Notice, and those responsible for drafting and reviewing it.

JPMC employee Richard Straub drafted the Notice and sent it to JPMC employees Stephen Krol and Sandra Wilkins (Straub Deposition: 797-98, 823, 837). All three testified that at the time, November 2001, they were unaware of any actual wrongdoing or breaches of duty on the part of JPMC in connection with Enron (Straub Affidavit, ¶ 8,10; Kroll Deposition: 250; Wilkins: 165, 176), or in connection with WorldCom and NCFE, for that matter (Krol Deposition: 125-26, 179, 401; Straub Affidavit ¶ 7).

Straub testified that he consulted two attorneys in JPMC's legal department, Kent Stauffer and Kevin Kelley, concerning the text of the Notice prior to drafting it. Stauffer does not recall seeing a draft or providing any input to Straub (Stauffer Deposition: 66-69, 78-82). Kelley provided Straub with a schedule listing JPMC's credit exposures with Enron. However, he

testified that when he sent the schedule to Straub, he believed it to be a complete list of all of JPMC's exposure to Enron that he was aware of (Kelley Deposition: 183-7, 208).

Nonetheless, Kelley testified that at that time, he was not aware of any acts of wrongdoing or breaches of duty by JPMC in connection with Enron (Kelley Deposition: 109-112, 121, 215-17). In fact, according to a member of JPMC's legal department, prior to Enron's bankruptcy filing on December 2, 2001 (subsequent to the issuance of the 01-02 Binder), JPMC's legal team had not commenced a review of JPMC's potential liability exposure to third parties in relation to its relationship with Enron (Stauffer Deposition: 36-41).

The only other JPMC employees with whom Straub communicated either directly or indirectly concerning the text of the Notice, testified that they were not aware of any actual wrongdoing or breaches of duty by JPMC in connection with Enron during the period of time when JPMC sought to renew its coverage, that Enron was improperly accounting for the pre-pay transactions, or otherwise that JPMC deliberately sought to conceal additional secured exposure to Enron stemming from the pre-pay transactions (Sclafani Deposition: 200, 210, 213-19, 241-42, 245-48; Kelley Deposition: 111-112, 121, 187, 207-09, 216; Stauffer Deposition: 38, 77-82; Borden Deposition: 68-9, 231-32; Magleby Deposition: 188-195, 202-04, 215-18, 242-49; Krol Deposition: 101-06; Wilkins

Deposition: 126-29; Borden Deposition: 234, 246-7; Krol  
Deposition: 125-26, 179, 401; Shapiro Deposition: 140, 193-94;  
Straub Deposition: 325-332, 634-36, 662, 686-87, 795-97, 823-26,  
876-77; Brew Deposition: 167; Shapiro Deposition: 117, 140, 193-  
94).

Twin City points to Hawkins' testimony where he recalls a conversation with JPMC's Marsh broker, Orrico, who stated that JPMC's trading relationship with Enron would not have a "material impact" on it financially or operationally (Hawkins Deposition: 174). In addition, Twin City points to Hawkins' testimony elsewhere where he states that he had conversations with Marsh about concerns he and other Twin City underwriters had concerning JPMC's exposure to Enron, demonstrating that such information was material (Twin City's Memo. of Law).

Twin City argues that a triable issue of fact is raised from Hawkins' seemingly conflicting affidavit and deposition testimony that, despite not recalling reading the Notice, it did not raise "red flags" in his mind concerning the extent of JPMC's Enron exposure, although he was simultaneously "concerned" about JPMC's Enron exposure prior to issuing the 01-02 Binder.

However, in order to meet its evidentiary burden on this motion for summary judgment, Twin City must provide more than simply its own suspicions that JPMC intended to mislead Twin City, and that Twin City's underwriters actually relied upon the

statements contained therein (*S.E.C. v Credit Bancorp, Ltd.*, 147 F Supp 2d 238, 253-54, *reconsideration denied* 2001 WL 1135652 [SD NY 2001]).

With respect to the Press Release,<sup>8</sup> JPMC explicitly acknowledged therein that it had additional secured exposure in addition to what was quantified. It stated that it has "approximately \$500 million of unsecured exposure to Enron ... [and] **additional exposures** that are secured, including \$400 million in loans secured" (emphasis added) (Press Release, Exhibit O, annexed to the Migdon Aff.).

First, Twin City fails to even submit an affidavit from one of its underwriters that underwriting decisions to bind renewal coverage are made on the basis of public statements of an insurance applicant, which statement is not incorporated into the application itself or otherwise warranted for accuracy (*Executive Risk Indemnity, Inc.*, 56 AD3d at 206). In any event, Twin City

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<sup>8</sup> JPMC shareholders also challenged the Press Release, who claimed that they were defrauded, inter alia, insofar as JPMC did not divulge the full extent of its exposure to pre-pay transactions with Enron (*In re JP Morgan Chase Securities Litig.*, 363 F Supp 2d 595, 634 [SD NY 2005]). The court dismissed the claim for failure to plead a material falsehood, because the exposure at issue was insured by surety bonds.

The plaintiffs filed a 322-page second amended complaint, that included volumes of new material from the Senate, SEC, and bankruptcy examiner investigations into JPMC's allegedly illicit conduct. The fraud claim based upon the Press Release was dismissed for identical reasons as in the first action (*Id.*, 2007 WL 950132 [SD NY 2007], *affirmed* 553 F 3d 187 [2d Cir 2009]).

fails to raise a triable issue of fact that JPMC's failure to quantify the additional secured exposures was done with the intent to mislead its insurers or its investors.

Nonetheless, this Court cannot rule as a matter of law that, had the information been disclosed, namely, the quantification of JPMC's secured exposure to the pre-pay transactions with Enron, that the renewal of its insurance program would have not been handled differently (*Executive Risk Indemnity, Inc.*, 56 AD3d at 206; *Miller v Doniger*, 272 AD2d 73, 73 [1<sup>st</sup> Dept 2000]).

In any event, Twin City has waived its right to assert rescission of the 01-02 Insurance Program on the grounds of fraudulent concealment and inducement.

Due to an insured's compelling need to know whether it is covered under a policy, an insurer may be estopped from asserting its right to rescind based upon fraudulent inducement and misrepresentation if it unreasonably delays notification (*Continental Ins. Co. v Helmsley Enterprises, Inc.*, 211 AD2d 589, 589 [1<sup>st</sup> Dept 1995]; *GuideOne Specialty Mut. Ins. Co. v Congregation Adas Yereim*, F Supp 2d, 2009 WL 143707, \*10 [ED NY 2009]) or continues to accept or retain premiums (*Scalia v Equitable Life Assur. Soc. of U.S.*, 251 AD2d 315 [2d Dept 1998]).

Here, Twin City did not assert its claimed right to rescind its participation in the 01-02 Insurance Program until July 2006, when it filed its answer and counterclaims in this action.

However, JPMC fully disclosed the quantity of its additional secured exposure relating to the pre-pay transactions in a press release issued on December 19, 2001. Further, in March 2002 and fall 2002, Marsh forwarded to Twin City copies of complaints naming JPMC as a defendant in actions brought by Enron, WorldCom and NCFE investors. The complaints in these actions detailed the alleged wrongdoing that JPMC participated on behalf of Enron, WorldCom, and NCFE.

Twin City does not dispute the factual assertion that it became aware of the alleged misrepresentations that form the basis of its claim for rescission as early as December 2001 and as late as the fall 2002, but that it did not assert its right to rescission until July 2006.

Where the underlying claim is not related to death or bodily injury, generally, the insured must additionally demonstrate that it suffered prejudice by the insurer's delay (*Fairmont Funding, Ltd. v Utica Mut. Ins. Co.*, 264 AD2d 581, 581-82 [1<sup>st</sup> Dept 1999]). JPMC argues that it would have immediately sought a replacement insurer to provide coverage if Twin City had promptly asserted its right to rescind within the term of the 01-02 Insurance Program (Straub Affidavit, ¶ 18). Nonetheless, JPMC does not address whether it was prejudiced by the delay.

Notwithstanding JPMC's failure to address whether it suffered prejudice, Twin City does not dispute the factual

assertion that it retains (to this day) the premiums paid by JPMC under the 01-02 Insurance Program (JPMC's Statement of Facts, ¶ 61; Twin City's Response to JPMC's Statement).

Further, JPMC notified Twin City that claims were being asserted against it for WorldCom and NCFE-related losses (JPMC is not seeking coverage for Enron-related losses under the 01-02 Insurance Program) in August and November of 2002, respectively (JPMC's Statement of Material Facts, ¶¶ 70-71).

Its acceptance and retention of premiums with knowledge of the alleged misrepresentations upon which it claims to have relied when it issued the 01-02 Insurance Program, while simultaneously seeking to reserve its right to rescind the 01-02 Insurance Policy for alleged misrepresentations, is unreasonable as a matter of law (*Continental Ins. Co.*, 211 AD2d at 589; *Garbin v Mutual Life. Ins. Co. of New York*, 77 Misc 2d 689, 690 [App Term, 1<sup>st</sup> Dept 1974]; *GuideOne Specialty Mut. Ins. Co.*, 2009 WL 143707 at \*11; NY Jur 2d Insurance §§ 935, 1361; see also *SEC*, 147 F Supp 2d at 257-258).

For these reasons, the continued retention of premiums approximately four years after discovery of the alleged misrepresentations upon which it claims to have issued the 01-02 Insurance Program, amounts to a waiver of the right to rescind based upon fraudulent inducement and concealment.

### III. Fraud Counterclaims

Twin City's failure to raise a triable issue of fact as to the elements of misrepresentation and reliance, outlined above, are fatal to its counterclaims for common law and equitable fraud, and negligent misrepresentation.

Twin City asserts that it has been deprived of necessary discovery from certain high-ranking JPMC employees in order to establish that they knew that JPMC's prepay transactions were disguised loans to Enron, and that they knew that JPMC's exposure stemming from these transactions was much greater than that represented in the Notice and Press Release. Twin City contends that the doctrine of collective knowledge would enable the trier of fact to impute to JPMC an intent to defraud Twin City if JPMC's senior management knew of wrongful acts arising from its relationship with Enron, irrespective of whether Straub, who drafted the Notice, knew of wrongful acts.

However, the "collective knowledge" doctrine, upon which Twin City relies, is not applicable with respect to its counterclaims for fraudulent inducement, concealment, common law and equitable fraud, where intent to defraud is a requisite element of liability (*Executive Risk. Indem. Inc.*, 56 AD3d at 205; *Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 488 [2007]; *Nationscredit Financial Services Corp. v Turcios*, 55 AD3d 806, 807-08 [2d Dept 2008]; see also Restatement [Second] of Agency § 275, comment b).

After deposing every witness directly and indirectly involved in furnishing information for inclusion in the Notice, drafting and reviewing the Notice, and placing the 01-02 Insurance Program, no evidence has surfaced that JPMC issued the Notice with the intent to deliberately conceal or mislead its insurers as to the quantity of its secured exposure to pre-pay transactions with Enron.

Consequently, Twin City's counterclaims sounding in fraud must be dismissed.

#### IV. Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing

Twin City additionally asserts counterclaims for breach of contract and the covenant of the good faith and fair dealing. Twin City alleges that the 01-02 Binder obligated JPMC to obtain a lead primary policy from Lloyd's of London (Lloyds), that it failed to do. In addition, Twin City alleges that JPMC was under a duty to negotiate in good faith with Lloyds on the terms of its primary policy.

An insurance binder is an interim policy until a formal policy is issued (*Springer v Allstate Life Ins. Co. of New York*, 94 NY2d 645, 649 [2000]). The interim insurance provided under a binder terminates when a policy is either issued or refused (*Id.*). For this reason, "a binder does not constitute part of an insurance policy, nor does it create any rights for the insured

other than during its effective period" (*Id.*).

In any event, the language of the 01-02 Binder does not contain any express condition that coverage is afforded only if Lloyd's issues a primary policy (Exhibit Y, annexed to the Migdon Aff.). The only condition contained in the 01-02 Binder is that it is in effect until a final policy is issued, which is consistent with applicable law.

Consequently, coverage ceased under the 01-02 Binder when Twin City agreed to issue the 01-02 Insurance Program on December 31, 2001. Therefore, once the 01-02 Insurance Program was issued, the 01-02 Binder was superceded (*North American Van Lines, Inc. v American Intl. Companies*, 38 AD3d 450, 450-51 [1<sup>st</sup> Dept 2007]).

Moreover, Twin City's counterclaim for breach of the implied covenant of good faith and fair dealing is redundant of the non-viable breach of contract counterclaim (see *National Union Fire Ins. Co. of Pittsburgh, Pa v Xerox Corporation*, 6 Misc 3d 763, 781 [Sup Ct, NY County 2004], affirmed 25 AD3d 309 [1<sup>st</sup> Dept], lv dismissed 7 NY3d 886 [2006]).

Twin City seeks leave to amend its contract counterclaims in the event that the Court find that they are defectively pled. However, the failure to demonstrate a good ground for the assertion of these counterclaims does not justify granting leave to replead (CPLR 3211 [e]; *EBC I, Inc. v Goldman Sachs & Co.*, 5

NY3d 11, 23 [2005])).

### III. Protective Order

JPMC moves for a protective order barring Twin City from taking the deposition of eighteen present and former JPMC employees.

Twin City seeks to take, at the outset, the deposition of four senior JPMC executives, who, although not involved in the procurement of insurance for JPMC, were purportedly involved in issuing the Press Release, and were allegedly aware that JPMC had large pre-pay exposure to Enron.

CPLR 3103 provides that the court may make a protective order denying, limiting or regulating discovery to prevent, inter alia, abuse and unreasonable expense.

In light of the Court's disposition with respect to Twin City's counterclaims for fraud, fraudulent inducement and concealment, there is no need for discovery on the extent of JPMC senior executives' knowledge concerning JPMC's exposure to pre-pay transactions with Enron.

For these reasons, JPMC's motion for a protective order is granted.

The Court declines to exercise its discretion to impose attorney's fees (22 NYCRR § 130-1.1).

Accordingly, it is

ORDERED that the motions by plaintiffs JPMorgan Chase & Co.,


JPMorgan Chase Bank, and J.P. Morgan Securities Inc. for partial summary judgment dismissing certain defenses and counterclaims of defendant Twin City Fire Insurance Company in the Enron, WorldCom and NCFE actions <sup>is</sup> granted; and it is further

ORDERED that the motion for a protective order is granted, and it is further

ORDERED that the remainder of the action shall continue.

Dated: March 3, 2009

ENTER:



J.S.C.

**CHARLES E. RAMOS**

**FILED**  
**MAR 25 2009**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**