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May 23, 2007  
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Re: Breakaway Solutions, Inc. v. Morgan Stanley & Co., et al.  
C.A. No. 19522-VCN  
Date Submitted: April 30, 2007

Dear Counsel:

The Plaintiff has moved for leave to file its second amended complaint. The Defendants do not so much oppose that motion as they quibble about it. A few issues require a brief discussion.

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1. This action was brought as a class action. No class was ever certified, and the Plaintiff now seeks to withdraw its class allegations and to abandon its efforts to proceed with a class action.<sup>1</sup> No consideration in any form has been paid by the Defendants to the Plaintiff or its counsel (or otherwise promised). The dismissal would be without prejudice to potential class members, all of whom, given their former status as issuers of publicly traded securities, are likely to be sophisticated parties. In short, elimination of the class aspect of this litigation would be consistent with Court of Chancery Rule 23(e) and the dismissal of class claims may be done without notice to those who might have been class members.

2. The Defendants complain that the Plaintiff has not made all of the appropriate changes to its complaint. The Plaintiff, in its reply papers, has agreed to some further revisions, but not to all of those suggested by the Defendants. There are a couple of answers to the Defendants' concerns. First, they are not now asserting

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<sup>1</sup> See *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 45 (2d Cir. 2006) (holding that similar claims could not be pursued on a class basis because "individual questions [would] permeate this litigation.").

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that the proposed amendment would be futile. Second, one of the prerogatives of being a plaintiff is the right to frame one's complaint. It is not for the Court—and certainly not for the Defendants—to meander through a complaint and strike every largely immaterial allegation.

3. Finally, the Defendants challenge the retention of certain allegations regarding Plaintiffs' indemnification claim—a claim that was dismissed earlier because it was not then ripe, a dismissal that was without prejudice.<sup>2</sup> There is no specific claim in the proposed Amended Complaint for indemnification. The only express claim is one for breach of fiduciary duty. I do not understand the proposed amendment to revive the indemnification claim, but it is a claim that, if it has become ripe, the Plaintiff would not necessarily be precluded from asserting. Whether it would survive on its merits is, of course, not a question before the Court.

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<sup>2</sup> See *Breakaway Solutions, Inc. v. Morgan Stanley & Co., Inc.*, 2004 WL 949300 (Del. Ch. Aug. 27, 2004).

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Accordingly, the Plaintiff's Motion for Leave to Amend and File Its Second Amended Complaint, as revised in its Reply in Further Support of that application, is granted.<sup>3</sup>

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-K

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<sup>3</sup> Leave to amend, by Court of Chancery Rule 15(a), "shall be freely given when justice so requires," a standard satisfied here because the Plaintiff's motion clarifies its operative pleading.