

**LEAD PLAINTIFF'S COUNTERSTATEMENT OF  
ADDITIONAL MATERIAL FACTS IN DISPUTE**

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**I. THE SENECA TRANSACTION**

**A. Defendants' Knowledge of Severe Impairment of the Remaining E-Service at the End of the First Quarter 2001**

224. As of March 31, 2001, Omnicom held sixteen investments in internet services companies (the "E-Services Assets") in its Communicade subsidiary. (LP Ex. 1 at OMC 0035111)<sup>1</sup>

225. Three of those investments consisted of common stock in publicly-traded companies: Agency.com, Organic Inc., and Razorfish Inc. The cost of those three public E-Service Assets was about \$138 million. However, as shown by the following internal Omnicom chart, Omnicom knew that by March 27, 2000, the market value of those three assets was \$100 million less than their cost:

<b><u>Company</u></b>	<b><u>Omnicom's Book Value</u></b>	<b><u>Market Value on 3/27/2000</u></b>	<b><u>Amount of Impairment (%)</u></b>
Agency	\$73,406,063	\$21,217,900	\$52,188,163 (71%)
Organic	\$38,359,000	\$11,462,326	\$26,896,674 (70%)
Razorfish	\$27,040,403	\$5,958,333	\$21,082,070 (78%)
Total	\$138,805,466	\$38,638,559	\$100,166,907 (72%)

All numbers shown above for book value and market value, with the exception of the book value for Organic, are taken from a contemporaneous record of Communicade's portfolio that was sent from Defendant Philip Angelastro ("Angelastro"), Omnicom's Controller, to Assistant Controller Andrew Castellaneta and Jerry Neumann, the CFO of Communicade. (LP Ex. 83 (Dep. Ex. 176), Communicade Portfolio as of March 27, 2001, at OMC 0033263)

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<sup>1</sup> For ease of reference and the avoidance of confusion, Lead Plaintiff has numbered the paragraphs in its Counter-Statement beginning where Defendants' Rule 56.1 Statement ended. Thus, paragraphs numbered 223 or less refer to Defendants Statements or Lead Plaintiffs responses thereto (as indicated) and paragraphs numbered 224 and higher refer to the paragraphs in this Counter-Statement.

226. Contemporary Omnicom documents reflect varying book values for Organic. (LP Ex. 136 (Dep. Ex. 169), at AA 0016760; LP Ex. 1, LP Ex. 137 (Dep. Ex. 324); LP Ex. 138 (Dep. Ex. 123), at AA 0019096; LP Ex. 140, at AA 00165783-84 at 83) The value used in the chart above is the value that Omnicom told the SEC that it used to record Organic on its books. (LP Ex. 139 (Dep. Ex. 282), Jones Day May 21, 2002 letter to SEC, at OMC 0001572; LP Ex. 141, Defendants' Supplemental Objections and Responses to Plaintiff's Requests for Admissions ("Defendants' Supp. Admissions") ¶ 36 (denying \$38.36 million basis was higher than actual cost basis) *see also* ¶¶ 663-669 (detailing how use of this basis was misrepresentation to the SEC))

227. Defendant John Wren ("Wren"), Omnicom's CEO, and another senior Omnicom officer, Bruce Redditt, were directors of Agency in 2000 and the first quarter of 2001. (LP Ex. 142, Agency Proxy Statement dated April 30, 2001, at 4-5)

228. In this capacity, Wren and Redditt were well aware of Agency's failing financial condition. They attended meetings and received written board materials in which Agency's financial difficulties were discussed in detail, and, in March 2001, they were informed of Agency's imminent plans to conduct a second substantial employee layoff and incur additional restructuring charges. (LP Ex. 143, Wren Tr. 205:12-207:21, 337:19-342:2; LP Ex. 144, Suh Tr. 168:11-180:3, 219:5-17; LP Ex. 145 (Dep. Ex. 6), Management Update., Feb. 5, 2001, at OMC 0006966-67, 79; LP Ex. 146 (Dep. Ex. 7), Agency board minutes for March 21, 2001, at JD 023754-58; LP Ex. 147, March 21, 2001 Agency board materials, OMC 0056314-401 at 378, 88, 391-401)

229. Wren also circulated the Agency board materials and financial projections to other senior executives at Omnicom. For example, a February 27, 2001 e-mail from Angelastro

to Weisenburger, Omnicom's Chief Financial Officer, discusses Agency board materials and financial projections that had been prepared for an upcoming meeting. Angelastro's e-mail demonstrates that he and Weisenburger were aware of the restructuring costs that Agency was then undergoing and the fact that more significant restructuring costs were soon to come. Angelastro stressed that Agency should be persuaded not to make any final decisions on these matters during the first quarter, so as to avoid incurring a charge in this quarter (which would require Omnicom to report its share as a loss under equity accounting). (LP Ex. 148, Angelastro email re Agency.com, OMC 0054092)

230. Defendants were also aware of Organic's struggling operations. Bruce Redditt was a director of Organic, attended meetings and received written materials during this time period discussing Organic's precarious financial situation and the company's response, including restructuring and layoffs. (LP Ex. 149 (Dep. Ex. 15), Organic board minutes for Feb. 7, 2001, at JD 017349-50; LP Ex. 150 (Dep. Ex. 21), Organic board minutes for March 21, 2001, at JD 017383-84)

231. In February 2001, Organic's CEO directly informed Weisenburger of Organic's plans to conduct a significant reduction in force in March 2001. (LP Ex. 151 (Dep. Ex. 34), Kingdon email re Organic projections)

232. In early March, Organic's chairman confirmed its plans for the company's reduction in force in an email to Wren. (LP Ex. 152 (Dep. Ex. 35), email from Nelson to Wren, at OMC 0006531)

233. Weisenburger also received various emails with Organic's financial projections during this time period. (LP Ex. 151 (Dep. Ex. 34), Kingdon email re Organic projections; LP

Ex. 153 (Dep. Ex. 17), Kingdon emails; LP Ex. 154 (Dep. Ex. 36), Kingdon email re Materials for tomorrow)

234. The dramatic decline in the values of Agency, Organic, and Razorfish below Omnicom's book values also attracted the attention of Omnicom's auditor Arthur Andersen, LLP ("Andersen") In a series of internal emails in March 2001, Andersen noted that the three companies' market values had declined from 20-40% below Omnicom's book value at year-end, to 60-70% below book value by mid-March. Dylan Haverty-Stacke, an Andersen auditor, wrote:

[T]here may eventually be a hefty write down if the values do not recover. The bigger question may be, given the continued decline, do we still buy that the losses are temporary?

(LP Ex. 57 (Dep. Ex. 125), e-mail from Haverty-Stacke to Kathleen Eagan, March 13, 2001 at AA 0019101)

235. Haverty-Stacke's Andersen colleague, Kathleen Eagan, said she believed that, regardless of the need for a write-down at year-end 2000, Andersen should "push for disclosure" in Omnicom's 2001 Form 10-K because "in the aggregate these numbers are pretty big." She suggested that either she or Haverty-Stacke would speak with Angelastro about the need to consider whether or not these declines were temporary. (LP Ex. 57 (Dep. Ex. 125), emails re Market Risk Report, at AA 0019101)

236. In addition, Omnicom's private E-Service Assets were impaired by the first quarter of 2001. Lead Plaintiff's valuation expert, Richard May, based on then-available relevant information concerning the E-Service companies concluded that, on March 31, 2001, the fair market value of the private E-Service Assets was \$48.4 million or about \$91.7 million less than the value of those assets on Omnicom's books. (LP Ex. 42, May Report at p. II-10-11)

237. Omnicom had representatives on the board of directors of almost all the E-Service companies in which it invested, and as a result it regularly received revenue projections, financial

statements and other materials that reflected the true state of the companies' financial positions in early 2001. (*E.g.* LP Ex. 155, (SUBP\_00096638; LP Ex. 156, Healthology Board Minutes 6/13/01, SUBP 00130577-80; LP Ex. 157, Healthology Board Minutes 1/24/01 SUBP 00130581-84; LP Ex. 158, Healthology Board Minutes 2/28/01 SUBP 00130586-88; LP Ex. 159, OMC 0005127; LP Ex. 160, OMC 0005130-31))

238. Wren and Weisenburger regularly received updates on the worsening state of its E-Service Assets from Michael Tierney, President of Omnicom's Communicade subsidiary, and Bruce Redditt, who specialized in Omnicom's investments in interactive assets. (LP Ex. 162, Jan. 10, 2001 Tierney email re Recruitsoft, OMC 0093482; LP Ex. 163, Jan. 25, 2001 Tierney e-mail re E-Health Companies, OMC 0006521-25; LP Ex. 164, Jan. 30, 2001 Tierney e-mail re E-Health Companies, OMC 0006526-29; LP Ex. 165, Feb. 8, 2001 Tierney e-mail re E-Health Companies, OMC 0006530; LP Ex. 166, Redditt memo to Weisenburger re IP Network, OMC 0019818-22; LP Ex. 167, Feb. 20, 2001 Redditt e-mail re IP Networks, OMC 0087856-57; LP Ex. 168 (Dep. Ex. 315) at SUBP 00081093)

239. By March 5, 2001, Wren and Weisenburger were on notice that the projected 2001 performance of Communicade interactive agencies was "highly conditional, and even then dubious." (LP Ex. 168 (Dep. Ex. 315) at SUBP 00081093) On April 16, 2001, they received another e-mail from Tierney stating that some of the companies being transferred to Seneca were "plainly in serious straits." (LP Ex. 169, April 16, 2001 Tierney e-mail, OMC 0086888)

240. Discussion notes dating to May 1, 2001, indicate Omnicom's knowledge of the "cash burn" rates of many of the private E-Service companies about to be transferred to Seneca, as well as how long those companies would survive based on then-current cash on hand. (LP Ex. 80 (Dep. Ex. 298) at OMC 0014887-91)

241. Wren and Weisenburger received several e-mails from Tierney in January and February 2001 expressing serious concerns with a subgroup of the E-Service Assets known as the E-Health companies, which included Caresoft, e-Medicine, and Healthology. (LP Ex. 163, Jan. 25, 2001 Tierney e-mail re E-Health Companies, OMC 0006521-25; LP Ex. 164, Jan. 30, 2001 Tierney e-mail re E-Health Companies, OMC 0006526-29; LP Ex. 165, Feb. 8, 2001 Tierney e-mail re E-Health Companies, OMC 0006530)

242. A January 25, 2001 Tierney memo told Wren and Weisenburger that Omnicom was “highly unlikely to see return of our capital investment . . . let alone a profit, on our e-health investments if they are left on their own.” The memo also said the E-Health portfolio had “real, unpleasant and in some cases impending implications for OMC’s p&l.” (LP Ex. 163, Jan. 25, 2001 Tierney e-mail re E-Health Companies, OMC 0006521-25 at 22, 25)

243. A January 30, 2001 Tierney memo again warned Wren and Weisenburger that the E-Health companies were nearing a complete write-off and that one option, to “discontinue all support,” should be assumed to be “fatal” for the companies. Tierney determined that Caresoft, Healthology and e-Medicine had little or no value for Omnicom without a major outside action. He said: “Without major outside action we will more likely than not have to recognize a substantial write-off for two or three, if not all, of these four [referring to Omnicom’s investments in Caresoft, Healthology and E-Medicine, as well as World Medical Leaders, which was not transferred to Seneca]” (LP Ex. 164, Jan. 30, 2001 Tierney e-mail re E-Health Companies, OMC 0006526-29 at 27-28)

244. Weisenburger acknowledged on December 24, 2000, that Omnicom had paid “too much” for its investment in Recruitsoft. (LP Ex. 170, OMC 0064322-23 at 22.) On January 10, 2001, Wren, Weisenburger and Angelastro were on notice that the completion of a new round of

financing for Recruitsoft would be “painful” to Omnicom. (LP Ex. 171, OMC 0093440) When the financing was finally completed, its terms showed a huge drop in the company’s pre-money valuation from \$83 million to between \$25 and \$40 million (LP Ex. 172, OMC 0066637-39 at 37; LP Ex. 171 OMC 0093440; LP Ex. 173, OMC 0093486) By Omnicom’s own account in early March, 2001, its investment in Recruitsoft had a fair value of only \$6.64 million; but it was subsequently valued at \$9.5 million on its transfer to Seneca. (LP Ex. 174 (Dep. Ex. 221), at OMC 0033082; LP Ex. 56 (Dep. Ex. 180), Recap Binder, at OMC 0001034)

245. Defendants were also aware of impairment problems with their investment in ReplayTV. On February 1, 2001, SonicBlue announced its acquisition of Replay TV (LP Ex. 175, JD 044916), which contemplated that Omnicom would waive the liquidation preference of its preferred shares in Replay TV and receive, at best, 40% of the value of its original investment. (LP Ex. 176, JD 033305) On March 23, 2001, Replay TV and SonicBlue signed a merger agreement that finalized the deal terms. (LP Ex. 177, MD 05800-949) By Omnicom’s own account made a few days before the Seneca Transaction, its investment in Replay TV suffered a \$2.1 million loss and had fair value of only \$1 million. (LP Ex. 174, OMC 0033082)

246. Weisenburger handled Omnicom’s investment in Live Technology. (LP Ex. 77 (Dep. Ex. 186), at SUBP 00054844) On January 14, 2001, Weisenburger described Live Technology as a company that was “fighting to stay alive.” (LP Ex. 178, OMC 0104465) On May 3, 2001, he wrote that Live Technology “was caught in the dot.com downturn,” “in significant distress” and with little chance of success. (LP Ex. 179, OMC 0005693-95 at 93)

247. Weisenburger was a director of Dash.com and received board materials where that company’s worsening financial condition and the need to decide on the strategic exit options were discussed. Dash.com, valued at \$15.2 million by Omnicom upon contribution to Seneca,

began contemplating liquidation as early as January 2001. (LP Ex. 56 (Dep. Ex. 180), Recap Binder, at OMC 0001034; LP Ex. 160, OMC 0005130-31 at 30; LP Ex. 180, OMC 0005108-11 at 10) On January 19, 2001, Weisenburger learned that Dash was considering an immediate liquidation due to its existing contingent liabilities. (LP Ex. 160, OMC 0005130-31 at 30; LP Ex. 180, OMC 0005108-11 at 10.) At the time of the Seneca Transaction, Dash's board received a review prepared by an outside consultant who also recommended quick dissolution of the company's business. (LP Ex. 181, SUBP 00055396-99 at 96.)

248. Weisenburger also knew that the value of Omnicom's investment in Red Sky was severely compromised and the company's liquidation was likely. Memos to him from Tierney as early as March 5, 2001 referred to transferring the "worthwhile pieces of Red Sky" into other assets to be retained. (LP Ex. 168 (Dep. Ex. 315), SUBP 00081093-94) On April 5, 2001 and the following days, he received several e-mails from Red Sky's CEO stating that the company was "in a very precarious position," was delinquent on its payroll taxes, and was trying hard to "preserve all the value possible." (LP Ex. 74, OMC 0005648-50 at 49; LP Ex. 75, OMC 0005658-59 at 58.) By May 1, 2001, Omnicom was aware that Red Sky had hired bankruptcy counsel and that the company's liquidation was imminent. (LP Ex. 79, SUBP 00012183-85 at 85)

249. Weisenburger acknowledged on February 21, 2001, that there was no value in IP Network after accounting for liabilities. (LP Ex. 182, OMC 0087979-81 at 80.)

**B. Defendants' Use of the Seneca Transaction to Avoid Conducting a Detailed Documented Impairment Analysis**

250. Andersen did not require Omnicom to conduct an other-than-temporary impairment analysis at year-end 2000 with respect to the private E-Service Assets. (LP Ex. 55, Benedik Tr. 197:25-199:6)

251. There is no evidence that Andersen was ever told any of the above facts with respect to the private E-Services Assets.

252. Nevertheless, Andersen informed Omnicom that it would require Omnicom to “formally document its analysis of potential impairment [of the E-Service Assets] during the first quarter of 2001.” (Def. Ex. P2 (Dep. Ex. 320), Haverty-Stacke memo re disposition of pre-clearance meeting agenda items, AA 0021168)

253. In January 2001, in the course of negotiations for additional financing for Recruitsoft, Weisenburger gave Tierney instructions to preserve Omnicom’s rights to transfer its preferred stock in that company to another entity. Weisenburger wrote: “We have to have the flexibility to manage our investments – if the company gets to the point of an accounting writedown at the wrong time we have to be able to manage around it.” (LP Ex. 183, OMC 0094599.1-600.1 at 99.1)

254. Omnicom assistant controller Castellaneta got involved in the Seneca Transaction in the early part of the first quarter of 2001. (LP Ex. 63, Castellaneta Tr. 240:13-241:18) Negotiations between Andrew Bursky of Pegasus and Omnicom to create Seneca occurred around the end of the first quarter but, according to Bursky, “some of the seeds of what ultimately became Seneca were planted many, many months before.” (LP Ex. 4, Bursky Tr. 38:4-24) Joseph Verga of KPMG testified that he understood that Omnicom had discussions with Pegasus about the Seneca Transaction in January 2001. (LP Ex. 71, Verga Tr. 26:24-27:2)

255. By March 9, 2001, Omnicom had drafted a letter of intent and term sheet for an entity dubbed the “E-Service Opportunity Fund I LLC,” and Omnicom executive vice president Robert Profusek sent the drafts to Weisenburger. According to these drafts, Pegasus would contribute \$25 million to a new entity that Pegasus would organize in exchange for common

shares in that company. According to Profusek, Omnicom would contribute “\$175 million in securities,” shares in certain E-Services Companies (Agency, Live Technology, Organic, Oyster, Media Space and Red Sky), in exchange for convertible preferred shares in the new entity which shares would have a stated liquidation preference. The letter of intent stated that the parties’ “objective is to sign Definitive Agreements by March 30, 2001.” (LP Ex. 110 (Dep. Ex. 351) at OMC 0110670)

256. Throughout the rest of March 2001, the term sheet was redrafted several times. (See ¶¶ 257-265 *infra*) Profusek drafted the letter of intent and helped draft the term sheet. (LP Ex. 115, Profusek Tr. 148:24-152:3)

257. On March 12, 2001, Profusek sent a revised term sheet draft for “Newco” to Weisenburger, Angelastro and Omnicom tax attorney Kevin Conzelmann. This time, the amount of Omnicom’s cash contribution was undecided and the securities that Omnicom would receive were convertible debt securities. (LP Ex. 108 (Dep. Ex. 296) at 0110677) Later that same day, Profusek sent a revised draft to the same recipients, which now had Pegasus receiving a general partnership interest equal to 83% of Newco for its \$25 million, and gave Omnicom a limited partnership interest equal to 17% of Newco for a \$5 million contribution. (LP Ex. 109 (Dep. Ex. 297) at OMC 0110683)

258. The next day, March 13, 2001, Profusek sent a new draft to the same recipients. The draft had Pegasus contributing \$25 million for Newco common stock and Omnicom receiving preferred shares with an 8.5 per cent dividend and a \$250 million liquidation preference. The securities contributed by Omnicom now included Dash and Razorfish; MediaSpace was removed. (LP Ex. 111, OMC 0110686-89)

259. On March 14, 2001, Profusek again sent a revised draft to the same recipients; it had Omnicom contributing either \$30 million in cash or an equivalent number of Omnicom shares for the preferred. Omnicom's liquidation preference was now \$225 million. (LP Ex. 111, OMC 0110690-94 at 93)

260. On or around March 17, 2001, Omnicom submitted a letter of intent and term sheet for "Newco" to Veritas Capital Inc. with the same terms as were in the draft described in ¶ 258 above. Again, the documents were first sent to Weisenburger by Profusek. Weisenburger had worked with Veritas's management, Thomas McKeon and Thomas Campbell, while he was employed at Wasserstein Perella prior to his employment with Omnicom. Veritas subsequently declined to enter the deal. (LP Ex. 184 (Dep. Ex. 352); LP Ex. 185, Campbell Tr. 165:3-16; LP Exs. 104, Weisenburger Tr. 25:23-26:17, 306:12-307:15)

261. Less than a week later, on March 22, 2001, Profusek and Weisenburger were working with a revised draft term sheet for "Newco," which again contemplated Pegasus as the common stockholder. This time, Pegasus was to form "Holdings," an LLC, which would in turn organize another LLC, "Investments." Pegasus would hold the common stock of Investments. \$12.5 million of Pegasus' cash contribution "would be contributed to the capital of Investments at closing," and the other \$12.5 million would be on the call "of the Board of Directors of Investments." (LP Ex. 187 (Dep. Ex. 429) at OMC 0110706)

262. On March 23, 2001, Weisenburger emailed the proposed term sheet described in paragraph 257, *supra*, to Bursky. In the transmittal of these terms, Weisenburger wrote: "thank you for your assistance and your trust on this deal." (LP Ex. 38 (Dep. Ex. 353) at OMC 0005596)

263. On March 29, 2001, Andrew Levine, an attorney with Omnicom's outside counsel Jones Day, emailed a draft letter of intent and term sheet to Bursky and to Pegasus' attorneys at Akin Gump. Levine wrote: "Your understanding of the downside protection for Pegasus is confirmed – full indemnities will run from Omnicom as indicated in the summary of Terms (and page two to the summary of Terms has been broadened to reflect your concerns.)" (LP Ex. 188 (Dep. Ex. 454))

264. The letter of intent and agreement in principle were executed on March 30, 2001, the day before the close of the first quarter. The associated term sheet now stated that \$12.5 million of Pegasus' cash contribution "would be funded at closing for 100% of the common stock interest in Holdings" and the other \$12.5 million "will be invested on the call of the Board of Directors," thus effectively removing "Investments" (the pre-deal name for Seneca) from the picture. In addition, the agreement provided that Pegasus would be entitled to \$6.15 million in transaction/management fees. (LP Ex. 61 (Dep. Ex. 159), at JD 006210 (Dep.Ex.430))

265. Also on March 30, 2001, Levine emailed to Bursky and Akin Gump a copy of the final press release announcing the agreement in principle between Omnicom and Pegasus. Levine wrote: "Thanks again for working with us on the timing." (LP Ex. 189, PEG-OM 0001861)

266. On April 2, 2001, the parties issued a press-release announcing their agreement. (LP Ex. 190, SUBP 00108531) In the press release, Pegasus and Omnicom stated, "[o]ur objective in forming the company is to maximize consolidation and other strategic opportunities among companies in the currently depressed e-services consulting and professional services marketplace. We will work with these companies to leverage their client relationships and infrastructure to create stronger, more substantial e-services consulting networks." (*Id.*)

267. Shortly before Omnicom executed its agreement with Pegasus, Weisenburger informed the Omnicom board at the meeting held on March 29, 2001 about its investments in E-Service Companies. (LP Ex. 191 (Dep. Ex. 75) at OMC 0094790) The minutes and attached slides show that, while the Board was informed about a “e-services transaction” involving an “e-Services InvesCo”, the Board was given virtually no details about the transaction. For example:

- The Board was not told that there would be a third party investor.
- The Board was not told that the E-services Assets would be transferred at cost rather than fair value.
- The Board was told that only seven of the E-Services Assets (Agency, Organic, Razorfish, Red Sky, Oyster, Dash.com, and LiveTech), rather than all of Communicade, would be transferred.
- The Board was not told that Omnicom would purport to give up control of the assets but would, in fact, retain control.

(See LP Ex. 191 (Dep. Ex. 75), minutes of March 29, 2001 board meeting with attached slide show at OMC 0097490)

268. Given the facts set forth at paragraph 267, *supra*, it is incorrect to state that the Board “approved” the actual Seneca Transaction.

269. Omnicom board approval was required for any transaction above \$50 million, according to Crawford. (LP Ex. 192, Crawford Tr. 15:25-16:15, 162:7-14)

270. Defendants did not conduct an adequate or documented analysis of whether the E-Service Assets had suffered other-than-temporary impairment at either the end of the first quarter or at the time of the assets were contributed to Seneca. (LP Ex. 25, Devor Report ¶¶ 85-87; LP Ex. 50, Revised Responses, Responses No. 3, 4; LP Ex. 54 (Dep. Ex. 243); Neumann memo re Valuation Analysis)

271. The only contemporaneous document showing any sort of impairment analysis at either the end of the first quarter or at the time of the assets were contributed to Seneca was a

memo sent from Jerry Neumann, CFO of Communicade, to Angelastro and Andrew Castellaneta on April 26, 2001. This memo was a collection of short, non-quantitative analyses of eight of the private E-Service Assets subsequently transferred to Seneca. (Def. Ex. R2 (Dep. Ex. 243), Neumann memo re Valuation Analysis) There was no documented impairment analysis of any of the three public companies that were Communicade's most valuable assets, or the other five privately-held E-Service Assets included in the deal agreed to on March 30, 2001. (LP Ex. 50, Revised Responses, Responses No. 3, 4)

272. Despite their earlier demand, Andersen did not require a detailed review for potential other-than-temporary impairment because it believed – based on Omnicom's representations – that the Seneca Transaction had made the question of impairment of the E-Service Assets a “moot point.” Andersen engagement partner, John Benedik, testified that the announcement and closing of Seneca during the course of the first quarter review had made the question of potential impairment of the E-Service Assets “somewhat of a moot point since now [Omnicom] had a preferred stock investment.” (LP Ex. 55, Benedik Tr. 110:23-111:15) He reiterated the point later in his testimony:

Q. While you were the engagement partner, was Omnicom's conclusion that the e-services assets had not suffered an other than temporary impairment as of March 2001 proper under GAAP?

\* \* \* \*

A. It became somewhat of a moot point with the transfer to Seneca in return for the preferred stock.

(LP Ex. 55, Benedik Tr. 314:3-14) Benedik also testified that the issue of whether the E-Service Assets should be accounted for on the cost or equity method also became moot after the formation of Seneca. (LP Ex. 55, Benedik Tr. 89:2-21)

273. Omnicom apparently relied on execution of the Seneca Transaction as a basis not to conduct an impairment analysis. For example, the Neumann memo, which was the only impairment analysis that Omnicom did perform, was limited to the E-Service Assets that were not included in the Seneca deal as of the March 30, 2001 term sheet. (*Compare* Def. Ex. R2 (Dep. Ex. 243), Neumann valuation memo *with* LP Ex. 61 (Dep. Ex. 159), March 30, 2001 term sheet, at JD 006212; *see also* LP Ex. 51 (Dep. Ex. 126), e-Services Investments memo, at OMC 0005983)

274. There was no impairment analysis performed on the seven E-Services Assets that were included on the March 30, 2001 term sheet – Agency, Dash.com, LiveTech, Organic, Oyster, Razorfish, and Red Sky – even though these seven assets accounted for \$215 million of the \$280 million in book value ascribed to the assets transferred to Seneca. (Def. Ex. R2 (Dep. Ex. 243), Neumann valuation memo; LP Ex. 51 (Dep. Ex. 126), e-Services Investments memo, at OMC 0005983)

275. Benedik stated that Andersen performed no substantive analytical procedures on “other than temporary” impairment during the first quarter review, although Andersen did indicate it had “discussions” on this topic with Omnicom management. (LP Ex. 55, Benedik Tr. 110:23-11-113:18) Andersen’s conclusion that the public E-Service Assets were not other-than-temporarily impaired on this date was based again on Andersen’s view that Omnicom “had a preferred stock investment in Seneca . . . [and] no longer owned the individual companies.” (LP Ex. 55, Benedik Tr. 113:4-18)

276. Castellaneta testified that Omnicom had conducted a detailed review for other-than-temporary impairment sometime between the beginning of 2001 and the transfer of Seneca in May, but he could not recall when. (LP Ex. 63, Castellaneta Tr. 129:23-131:3, 133:17-134:25;

141:16-23) Castelleneta appears to be referencing the Neumann memo, which was the only documented impairment analysis Defendants have identified. (Def. Ex. R2 (Dep. Ex. 243))

277. Andersen believed that the Seneca Transaction obviated the need to conduct an impairment review at first quarter 2001 because Omnicom informed them, and they believed, that the transaction was conducted at fair value. This conclusion was based on the proposition that Pegasus, an independent third-party had negotiated the value of the transaction and made a significant capital contribution. (LP Ex. 51 (Dep. Ex. 126), e-Services Investments memo, at OMC 0005979-80; LP Ex. 62 (Dep. Ex. 175), Castellaneta e-mail with e-Services Investments memo, at OMC 0035690; LP Ex. 55, Benedik Tr. 153:7-14; 230:2-14, 231:1-9)

278. Specifically, both drafts of Omnicom's memo discussing the appropriate accounting for the Seneca Transaction claimed that "this transaction provides third party support for the fair value of the investments as a third party has agreed to contribute \$25 million to [Seneca], which results in an implied value that is in excess of our book value." (LP Ex. 51 (Dep. Ex. 126), e-Services Investments memo, at OMC 0005979-80; LP Ex. 62 (Dep. Ex. 175), Castellaneta e-mail with e-Services Investments memo, at OMC 0035690) These memos also said "the fair value of the assets received are not less than carrying value." (LP Ex. 51 (Dep. Ex. 126), at OMC 0005981; LP Ex. 62 (Dep. Ex. 175), at OMC 003569))

279. Andersen's Benedik believed that the fair value of preferred stock was supported by the fact that its value was agreed to in arms-length negotiations by an independent third-party whose common stock interest would be subordinate to the preferred. (LP Ex. 55, Benedik Tr. 230:2-231:9) Castellaneta also believed that Pegasus's contribution of cash to Seneca provided support for the fair value imputed to the Seneca preferred stock. (LP Ex. 63, Castellaneta Tr. 191:5-192:24)

280. Although Defendants' own accounting expert admits that the Seneca Transaction did not eliminate Omnicom's need to review its assets for other-than-temporary impairment (Def. Ex. C2, Holder Report, at p. 64 n.263), no such analysis was done at the time of the contribution of the E-Service Assets to Seneca. (LP Ex. 50, Revised Responses, Response No. 4 (citing same document as at March 30, 2001))

**C. The Formation of Seneca**

281. On April 20, 2001, Barry Wagner sent Jim McGuire an email stating that "things are changing" with regards to the additional assets being placed into Seneca. (LP Ex. 193, OMC 0054796) Omnicom subsequently added all its remaining E-Service Assets to the transaction. (LP Ex. 23 (Dep. Ex. 158) at OMC 0006009-10)

282. Omnicom succeeded in completing the Seneca Transaction on May 2, 2001. (LP Ex. 23 (Dep. Ex. 158) at OMC 0005985) The closing of the Seneca Transaction helped Omnicom to avoid conducting a complete and meaningful analysis of "other than temporary" impairment of its E-Services Assets and their write-down at end of 1Q01. (LP Ex. 55, Benedik Tr. 111:6-112:5)

283. Defendants were pushing to close the Seneca transaction quickly. On May 2, 2001, the closing documents' signature pages were faxed to Bursky at an airport. (LP Ex. 194, PEG-OM 0000247-254)

284. When the Seneca Transaction closed on May 2, 2001, Omnicom's interests in the sixteen remaining E-Service Assets were purportedly "sold" to Seneca. (LP Ex. 195 (Dep. Ex. 529)) Defendants' letter to the Court dated December 1, 2005 at pp. 2-3, LP Ex. 196, Defendants' Motion to Dismiss dated July 30, 2003 at 15; LP Ex. 55, Benedik Tr. 147:17-148:1, 150:12-22, 157:15-158:9, 200:14-25, 221:8-16, 253:1-7, 258:14-24) Defendants also purported to transfer \$47.5 million in cash to Seneca, in return for which Omnicom received Seneca non-

voting preferred stock. The voting common stock Pegasus. (Def. Statement of Undisputed Facts ¶ 161)

285. The transaction was presented to Omnicom's auditors as an arms-length deal in which Omnicom contributed the sixteen E-Service Assets and \$47.5 million in cash to the new venture. In return for the investments, Omnicom received preferred stock in Seneca, which Defendants recorded on its books at a value exactly equal to its cost basis for the transferred assets. (LP Ex. 51 (Dep. Ex. 126) at OMC 0005983, e-Service Investments memo sent to Andersen; LP Ex. 88 (Dep. Ex. 129), Feb. 5, 2002 Andersen memo at AA 0016731, 33) Pegasus purportedly contributed \$12.5 million in cash (with an additional \$12.5 million "on call") and committed to manage the new entity in order to realize value from the underlying assets. (LP Ex. 88 (Dep. Ex. 129), Feb. 5, 2002 Andersen memo at AA 0016731) Pegasus Holdings, a wholly owned subsidiary of Pegasus, received all the common stock of Seneca. (LP Ex. 23 (Dep. Ex. 158), Seneca Formation documents, at OMC 0006116)

286. Although the preferred stock is technically non-voting, several provisions in the Seneca Charter (LP Ex. 23 (Dep. Ex. 158) at OMC 0006024-33) required that certain corporate actions, including certain acquisitions, receive the prior approval of the holder of the preferred stock. Such features effectively give the preferred stockholder a "veto" power and in essence constitute a de facto majority voting power over such actions. Further, the veto power in effect made Omnicom the sole source of cash for Seneca, since Seneca could not raise cash by selling assets without Omnicom's approval; without such approval, Seneca had to ask Omnicom for cash. Tierney Decl. and Complaint ¶¶ 125, 198-207)

287. As a result of the Seneca Transaction, the Defendants made several false and misleading statements in the quarterly filings with the SEC. On May 14, 2001, Omnicom filed a

Form 10-Q for the quarterly period ended March 31, 2001 with the Securities and Exchange Commission. The 10-Q was signed by Omnicom CFO Randall Weisenburger and Omnicom Controller Philip Angelastro. In its first disclosure of the Seneca transaction, Omnicom described it as follows:

In May 2001, Omnicom contributed to a new holding company the equity of an entity that held our investments in several public and private companies which had been classified as long term investments. The investments were primarily companies in the e-services industry. We received 8.5% cumulative preferred stock for its contribution. The common stock of the new holding company is owned by a private equity fund. No gain or loss was recognized in the transaction.

Management continually monitors the value of these investments to determine whether an other than temporary impairment has occurred. As of the quarter ended March 31, 2001, the carrying value of these investments approximated their fair value.

(LP Ex. 198 (Dep. Ex. 289) at JD\_033922, 925)

288. On August 14, 2001, Omnicom filed a Form 10-Q for the quarterly period ended June 30, 2001 with the Securities and Exchange Commission. The Form 10-Q was signed by Omnicom CFO Randall Weisenburger and Omnicom Controller Philip Angelastro. In this filing, Omnicom described the Seneca transaction as follows:

In May 2001, the Company contributed to a new holding company investments in several companies, primarily in the e-services industry, and cash. Upon contribution, the investments were reclassified from long-term investments and investments in affiliates to cost basis investments and included in other assets in the accompanying balance sheet. No gain or loss was recognized on the transaction.

Management continually monitors the value of its investments to determine whether an other than temporary impairment has occurred. As of the period ended June 30, 2001, the carrying value of the Company's investments approximated its fair value.

(LP Ex. 200 (Dep. Ex. 357) at OMC 0000353, 356; LP Ex. 186, Weisenburger Tr. 361:13-23)

289. On November 14, 2001, Omnicom filed a Form 10-Q for the quarterly period ended September 30, 2001 with the Securities and Exchange Commission. The Form 10-Q was signed by Omnicom CFO Randall Weisenburger and Omnicom Controller Philip Angelastro. In this filing, Omnicom described the Seneca transaction as follows:

In May 2001, the Company and an unrelated third party formed a new holding company. The Company contributed investments in several companies, primarily in the e-services industry. The co-investor contributed cash. Upon contribution to the holding company, the Company reclassified its investments from long-term investments and investments in affiliates to cost basis investments and included them in other assets in the accompanying balance sheet. No gain or loss was recognized on the transaction. The Company holds a preferred equity interest and the co-investor holds the common equity interest in the holding company.

Management continually monitors the value of its investments to determine whether an other than temporary impairment has occurred. As of the period ended September 30, 2001, the carrying value of the Company's investments approximated its fair value.

LP Ex. 201 (Dep. Ex. 254) at OMC 0033929, 35, 38.

**D. The Lack of Any Bona Fide Investment by Pegasus in Seneca**

290. Various draft term sheets contemplated a Pegasus capital contribution into Seneca. However, there are critical differences between the last signed term sheet and the actual animating corporate documents forming Seneca. The final deal documents show that Pegasus was not required at the time of closing to pay any money into Seneca and had no obligation to do so. (See ¶¶ 293-294 *infra*.)

291. Earlier draft Seneca term sheets contemplated Pegasus contributing to Seneca \$25 million in cash at closing, and Omnicom receiving a convertible preferred shares, convertible debt, or a limited partnership interest. (LP Ex. 110 (Dep. Ex. 351), March 9, 2001 draft, at OMC 0110671; LP Ex. 108 (Dep. Ex. 296), March 12, 2001 draft, at OMC 0110677; LP Ex. 109 (Dep. Ex. 297), March 13, 2001 draft, at OMC 0110683) The term sheet that was sent to Andersen in January 2002, however, was a March 14 draft which stated that Pegasus would contribute \$25

million in cash for 25,000 NewCo common shares (100% of the common) (LP Ex. 51 (Dep. Ex. 126) at OMC 005982, 5984 (1/17/02 fax to Andersen))

292. But a March 23, 2001 draft introduces a critical change, providing that a separate Pegasus entity (Pegasus Holdings) would be formed to which Pegasus would commit \$25 million, and of this amount Holdings would contribute \$12.5 million to “Investments”, the entity which would later be named Seneca, at closing “and held in an account established for this purpose,” with the balance “payable upon the call of the Board of Directors of Investments.” (LP Ex. 38 (Dep. Ex. 353) at OMC 0005601)

293. The final term sheet and letter of intent were signed March 30, 2001, with a critical change: the word “Investments” was missing and this suggests that the prior meaning – that the additional \$12.5 million is callable by *Seneca*’s board – was no longer applicable. (LP Ex. 61 (Dep. Ex. 159) at JD\_006210) The final term sheet thus removed any provision that Pegasus Holdings would ever have to pay money to Seneca. *See also* LP Ex. 204, (Dep. Ex. 187), Andrew Levine’s May 2, 2001 e-mail to deal’s working group confirming this is the intent, at SUBP\_00134185) (Pegasus contribution “now contemplated to go directly to Holdings rather than Investments.”)

294. The operative corporate documents went through similar changes. Ultimately, in the primary agreement governing Seneca, the Organization and Operating Agreement (the “O&O Agreement”), instead of Pegasus contributing \$12.5 million *to Seneca* and having another \$12.5 million available *for Seneca* if called, Pegasus Holdings, which was 100% owned and controlled by Pegasus, would purchase the common stock of Seneca and put at risk a mere \$100. (LP Ex. 23 (Dep. Ex. 158) at OMC 0005987, 0006116) Pegasus would separately contribute \$12.5 million *to Pegasus Holdings* but neither Pegasus nor Pegasus Holdings would be subject to any

risk because there was no mechanism or incentive, contractually or otherwise, that required Pegasus to invest \$25 million -- or anything beyond \$100 -- into Seneca. Pegasus' \$25 million was under the call of the "Manager," defined as "the Manager of Holdings," (LP Ex. 23, (Dep. Ex. 158) Seneca Formation Documents at OMC 0006004) This was further confirmed in emails between the parties. (LP Ex. 23 (Dep. Ex. 158) at OMC 0005987, 0006116; LP Ex. 204 (Dep. Ex. 187) at SUBP\_00134185; see also LP Ex. 188 (Dep. Ex. 454 at JD\_052183) (Levine, Jones Day, to Bursky "Your understanding of the downside protection for Pegasus is confirmed."); LP Ex. 24, Atkins Report at pp. 28-31 (money never at risk); LP Ex. 25, Devor Report at pp. 127-142 (same))

295. Weisenburger was principally responsible for negotiating the terms of the Seneca Transaction. (LP Ex. 4, Bursky Tr. 151:14-23)

296. Weisenburger and Angelastro were directly informed by e-mail from Jones Day on May 2, 2001 that the money was now going to Pegasus Holdings rather than Investments. (LP Ex. 106 (Dep. Ex. 293) at SUBP00134185)

297. In addition, Profusek was involved in discussions about whether Pegasus would actually have to make a capital contribution to Seneca, as indicated by his markup of the Seneca formation documents. He testified that he drafted the Seneca letters of intent and term sheets while others drew up the lists of securities. (LP Ex. 205, OMC 0060389-420; LP Ex. 187 (Dep. Ex. 429); LP Ex. 115, Profusek Tr.149:6-150:17)) Weisenburger informed Profusek that Pegasus' cash was going to Pegasus Holdings, not Seneca. (LP Ex. 115, Profusek Tr. 162:25-164:1)

298. Tax returns confirm that Pegasus never made any cash contribution to Seneca. (LP Ex. 33 (Dep. Ex. 161) at OMC 0054333, 0054337 (Seneca tax return showing Pegasus made no capital contribution))

299. Defendants have now conceded that Pegasus did not put any cash into Seneca. (Defendants' Statement of Undisputed Material Facts ¶ 34)

300. Pegasus and Pegasus Holdings had no legal obligation or commitment to put any money into Seneca. Both Omnicom and Seneca understood Seneca did not have access to Pegasus' money. Soon after Seneca's formation, in the summer of 2001, Seneca needed cash because the cost of managing the sixteen internet businesses was greater than projected. No one at Omnicom or Seneca asked Pegasus or its subsidiary, Pegasus Holdings, for any money. (LP Ex. 93, Dep. Ex. 350; LP Ex. 300, SUBP 00125221; LP Ex. 226, SUBP 00125272)

301. The Organization and Operating Agreement ("O&O Agreement") contained other provisions that show that the Seneca Transaction was not a true sale, but rather was a sham. Although it is customary for a seller to indemnify a buyer for certain liabilities, the vast majority of indemnities expire anywhere from six months to three years following closing. Omnicom's indemnification of Pegasus survived "indefinitely" - forever. (LP Ex. 23 (Dep. Ex. 158) at OMC 0005997(b)) In addition, if the full indemnity was not available, Omnicom's and Pegasus' funding of any liabilities would then be in proportion to their respective capital contributions, \$325 million versus \$100. Thus, Omnicom would still fund 99.999% of any losses. (LP Ex. 23 (Dep. Ex. 158) at OMC 0005998(6.3)). *See also* LP Ex. 24, Atkins Report at pp. 29, 31) The O&O Agreement also required that fees and expenses incurred by Pegasus and Omnicom be borne by the party incurring the fees or expenses, and be reimbursed by Seneca, but since Omnicom provided all the cash for Seneca (except \$100), Omnicom was in essence reimbursing

Pegasus for everything. (LP Ex. 23 (Dep. Ex. 158) at OMC 0006001, 0006062-66; LP Ex. 24, Atkins Report at p. 29.)

302. Also as part of the Seneca Transaction, Omnicom agreed to pay Pegasus \$6.5 million pursuant to a management agreement that legally obligated Pegasus to do nothing. The Seneca formation agreements specified that the \$6.15 million first year's management fee had already been "fully earned" at the time of closing – meaning that Pegasus was under no obligation to do anything whatsoever to get paid. (See LP Ex. 23 (Dep. Ex. 158) at OMC 0005991(f); 0006055-60 at 6055(1.2); LP Ex. 98, PEG-OM 0001857) (Omnicom payments to Pegasus)

303. The management fee paid to Pegasus to induce it to be the common shareholder of Seneca was funded by Omnicom and had no relationship to performance. (Tierney Complaint, ¶ 139)

304. Pegasus did nothing in the way of performance and evidently desired noninvolvement. This is evidenced by the fact that, although it held all the voting stock, there is no evidence of a single Seneca shareholder meeting or vote on any Seneca business, nor of any exercise by Pegasus of its legal power to elect a board. (Tierney Complaint ¶¶ 176-180)

305. Pegasus played no management role in Seneca. Bursky testified that "Pegasus was not staffed with operators...we were an investor." (LP Ex. 4, Bursky Tr. 144:15-22)

306. Defendants' expert characterized Pegasus as a "free rider." This meant that Pegasus was "less active or completely inactive in management of the investment and free-ride on the management activity of one of the other investors." (LP Ex. 37, Horvath Report at pp. 34-35)

307. Pegasus' lack of involvement in Seneca is underscored by the fact that when Seneca was considering taking Agency.com private in late spring 2001, the deal was negotiated by Omnicom executives, not Pegasus (or Pegasus Holdings) (LP Ex. 206, Agency.com Revised Definitive Proxy filed October 4, 2001 at MD 02602-06, also available at OMC 0000189-93)

308. Pegasus did not commit itself to any specific "management" services to Seneca. (LP Ex. 23 (Dep. Ex. 158) at OMC 0006055-60; LP Ex. 24, Atkins Report at p. 29)

**E. Omnicom's Control of Seneca**

309. On April 30, 2002, Pegasus Holdings agreed that Seneca would have the right to redeem all of its common stock interest in Seneca for only the amount of Pegasus Holdings' original cash investment in Seneca, which is to say \$100. (LP Ex. 40 (Dep. Ex. 163), April 30, 2002 letter agreement)

310. On June 27, 2003, Pegasus Holdings sold all its Seneca common stock to Seneca's management for \$100. (LP Ex. 98, Pegasus Cash Flows, PEG-OM 0001857; LP Ex. 24, Atkins Report at p. 30)

311. Omnicom's approval was required for the appointment or election of Seneca's officers. (LP Ex. 23 (Dep. Ex. 158) at OMC 0006003 (Conflict of interest transactions #2), 0006028 at ¶ (iii) (forbidding Pegasus from undertaking a conflict of interest transaction)); *see also* LP Ex. 24, Atkins Report at pp. 29, 32)

312. If Omnicom did not approve of any particular sale of assets by Seneca, Omnicom had the right to redeem preferred shares with a liquidation preference value equal to the net proceeds of the sale, giving Omnicom substantial control over Seneca's sale or exchange of assets. (LP Ex. 23 (Dep. Ex. 158) at OMC 0006027 ¶ d); LP Ex. 25, Devor Report ¶¶ 217-220) Seneca did in fact obtain authorization for asset sales from Omnicom. (LP Ex. 26 (Dep. Ex. 327); LP Ex. 27, JD\_052160-63)

313. Omnicom could veto Seneca taking on debt in excess of \$5 million. (LP Ex. 23 (Dep. Ex. 158 at OMC 0006028 ¶ (ii); LP Ex. 25, Devor Report ¶¶ 222-223)

314. Seneca was operated out of Omnicom's offices at 437 Madison Avenue, New York City. The former management of Communicade, Tierney and Neumann, simply moved to a different floor in that building to manage Seneca. (LP Ex. 207 (Dep. Ex. 3), LP Ex. 208 (Dep. Ex. 19), LP Ex. 209 (Dep. Ex. 49), LP Ex. 33 (Dep. Ex. 161), LP Ex. 210 (Dep. Ex. 205); LP Ex. 35, Tierney Complaint ¶¶ 68, 247-248; LP Ex. 36, Tierney Tr. 29:6-30:1; LP Ex. 114, Neumann Tr. 43:3-21)

315. Omnicom controlled its \$47.5 million "contribution" to Seneca after Seneca's formation. It was held in an escrow account administered by Omnicom's Treasury Department. Seneca had to obtain authorization from Omnicom CFO Weisenburger for release of the funds. (LP Ex. 28 (Dep. Ex. 67), at OMC 0094855 (showing Seneca Escrow Account, BAM #10037; LP Ex. 29 (Dep. Ex. 189) (Tierney requesting funds form Pegasus Escrow account, BAM #10037); LP Ex. 30 (Dep. Ex. 376) at OMC 00113250; LP Ex. 31, SUBP\_00099729, 00099759; LP Ex. 32, Wilson Tr. 10/23/06 at 7:18-9:17, 24:19-25:2; 71:7-72:2, 79:17-19, 80:9-81:20)

316. Omnicom was the sole investor in Seneca. *See* ¶¶ 290-308 herein (explaining that because Pegasus contributed no capital to Seneca (other than a nominal payment of \$100) and had no obligation or commitment to do so)

317. Omnicom continued to treat Seneca administratively exactly as it had treated Communicade. Tierney and Neumann continued to submit expense reports to Omnicom Management, Inc. for reimbursement; Seneca is identified as a "Department" or (LP Ex. 213) Tierney and Neumann attended "Omnicom University" and were invoiced as Omnicom "Senior MNGMT" (LP Ex. 213, at SUBP\_00099400 & 99757)

318. Omnicom continued to use Omnicom Capital intercompany accounts for Seneca, including a “Seneca Escrow Account” and a “Communicade Debt” account, which were assessed interest. (LP Ex. 214 (SUBP\_00055858-67, SUBP\_00029417-26, SUBP\_00035604-14))

319. Omnicom continued to treat Seneca personnel as Omnicom employees:

- Omnicom provided Tierney and Neumann’s D&O insurance coverage based on Omnicom’s ownership of “92.3% of Seneca’s equity.” (LP Ex. 223, at OMC 0110715)
- Omnicom provided medical insurance under the group number as Omnicom. (LP Ex. 223, at SUBP\_00062401)
- All of Seneca’s employees were enrolled in the Omnicom Group Employee Stock Purchase Plan (LP Ex. 223)

320. Seneca personnel were listed in Omnicom’s corporate telephone directory. (LP Ex. 224) (July 2001 & June 2002 Phone Listings)

321. Even though Seneca was in frequent need of cash infusions and received them from Omnicom, Seneca never requested, and never considered requesting, any funds from Pegasus or Pegasus Holdings. Seneca depended completely on Omnicom for its funding requirements. (LP Ex. 29 (Dep. Ex. 189); LP Ex. 93 (Dep. Ex. 350); LP Ex. 118 (Dep. Ex. 303); Tierney Complaint ¶¶ 125, 198-206; LP Ex. 114; LP Ex. 36, Tierney Tr. 57:3-60:21) (explaining that Seneca sold Razorfish for liquidity, but never asked Pegasus for any money))

322. Pegasus had no management role and did virtually nothing with respect to Seneca. (LP Ex. 23 (Dep. Ex. 158), at OMC 0006055 (Pegasus’ fee was fully earned without doing anything); LP Ex. 4, Bursky Tr. 143:7-144:22, 157:5-17, 158:1-17; LP Ex. 129, LP Ex. 114, Neumann Tr. 32:20-35:12; LP Ex. 36, Tierney Tr. 36:8-24; Tierney Complaint ¶¶ 176-178, 180-181, 192)

323. Seneca never held a shareholders' meeting; no business was ever put to a vote. Pegasus never exercised its legal power to elect a board. (LP Ex. 23 (Dep. Ex. 158) at OMC 0006011; Tierney Complaint ¶¶ 172, 179; LP Ex. 114, Neumann Tr. 8:25-9:10)

324. Tierney and Neumann had been CEO and CFO, respectively, of Communicade immediately before their appointment as CEO and CFO, respectively, of Seneca. (LP Ex. 23 (Dep. Ex. 158), at OMC 0006011; Tierney Complaint ¶¶ 45-46, 245; LP Ex. 228; LP Ex. 114, Neumann Tr. 5:11-6:18, 7:11-8:1; LP Ex. 36, Tierney Tr. 7:24-8:22, 64:20-25; LP Ex. 186, Weisenburger Tr. 268:19-269:1; LP Ex. 25)

325. Tierney was the sole director of Seneca and was selected by Omnicom. (LP Ex. 23 (Dep. Ex. 158), at OMC 0006011; LP Ex. 114, Neumann Tr. 9:3-10)

326. Omnicom chose Tierney and Neumann to be Seneca's officers; Pegasus had no role in that selection. (Tierney Complaint ¶¶ 27-28, 46, 173)

327. While Tierney and Neumann were at Seneca, they were granted Omnicom stock. (LP Ex. 229; LP Ex. 114, Neumann Tr. 62:18-63:21; Tierney Complaint ¶¶ 64-65) In addition, Tierney and Neumann participated in Omnicom's employee stock purchase plan and Seneca participated in Omnicom's profit sharing plan. (LP Ex. 230)

328. After the formation of Seneca, Tierney and Neumann were in regular contact with Wren and Weisenburger and other Omnicom personnel regarding a host of matters concerning the companies in Seneca's portfolio, including the price for Seneca's acquisition of Agency and Organic public shares; the Agency and Organic management buyouts; Agency and Organic's performance and leases; the liquidations of Red Sky and Oyster Active, an Oyster Partners subsidiary; the prospects of Live Technology's "LiveWeb;" the condition of IPnetwork RePlayTV; Healthology Organic executive compensation; payments to Thomas Campbell's

AAAA Investments; the status of Razorfish; communications with Andersen; and the future of Seneca's personnel. In contrast, Tierney and Neumann were virtually never in contact with anyone at Pegasus; Tierney testified he spoke to Bursky only once. (LP Ex. 255; LP Ex. 114, Neumann Tr. 32:20-35:12; LP Ex. 36, Tierney Tr. 35:24-36:24)

329. In late January 2002, after Seneca's takeover of Organic was completed, Tierney wrote to Wren and Weisenburger seeking their endorsement of his proposed actions to curb or reduce the compensation of Organic's senior executives, but wanting to make sure he did not contradict anything either Wren or Weisenburger had discussed directly with Organic management. (LP Ex. 231 (Dep. Ex. 204)) Wren wrote back, asking to see the Organic 2002 plan so that he could give input, snubbing Tierney's idea of lowering the CEO's salary and suggesting that they could discuss it in the future. (LP Ex. 232 (Dep. Ex. 399))

330. Omnicom and Seneca considered Seneca to be an Omnicom subsidiary acting solely for Omnicom's benefit. (LP Ex. 233) For example, Tierney kept Wren, Weisenburger, and Profusek informed about the thinking of RedSky's management and investors (LP Ex. 234, OMC 0006538, SUBP\_00008331, SUBP\_00135979; SUBP\_00136722, OMC 0108272); Neumann carried out Weisenburger's request to have Jones Day examine Agency employment agreements (LP Ex. 235, SUBP\_00145407); Neumann and Tierney advised Weisenburger, Profusek, and Redditt about possible investments (LP Ex. 236, SUBP\_00084808, OMC 0088007, OMC 0104549); Neumann consulted with Weisenburger about Agency and Organic finances, especially as they affected the taking private transactions (LP Ex. 238, SUBP\_00026093; SUBP\_00025964; OMC 0093056, OMC 0108324, SUBP 00025751, OMC 0093055.1, SUBP\_00025729, SUBP\_00085328, SUBP\_00131553, SUBP\_00032565) Tierney also advised Wren and Weisenburger concerning which elements of Agency and Organic should

not be included in Omnicom's purchase of these companies from Seneca. (LP Ex. 239 (Dep. Ex. 401) at SUBP\_000811160 ("d") and ("a"))

331. Omnicom and Seneca considered Tierney and Neumann to be Omnicom employees and held them out as such. (LP Ex. 240; LP Ex. 237, Defendants' Response to Plaintiffs' Request for Admissions ¶¶ 83-85; Tierney Complaint ¶¶ 67-76, 249-254) Neumann continued to use his Omnicom AT&T wireless account (LP Ex. 216) Seneca personnel received Omnicom e-mail directed to corporate staff concerning benefits and other matters. (LP Ex. 241) Omnicom continued to require Omnicom employee performance evaluations for Seneca staff. (LP Ex. 242)

332. Third parties considered Seneca to be an Omnicom entity and considered Tierney and Neumann to be Omnicom employees or acting in the interest of Omnicom. (LP Ex. 243; LP Ex. 185, Campbell Tr. 31:12-18, 156:22-25; LP Ex. 97, Reuvers Tr. 45:2-46:4, 47:9-51:7, 62:8-63:15) For example, XEROX invoices were addressed to "Seneca Investments, Omnicom Group, 437 Madison Ave." (LP Ex. 217; *See also*, LP Ex. 244)

333. Tierney and Neumann were, or considered themselves to be, Omnicom employees or acting in the interest of Omnicom. For example, Neumann told various correspondents that he "will be doing the exact same thing" at Seneca as at Communicade, that "Seneca Investments is the latest incarnation of Omnicom's Investment fund," that Seneca was "moving into separate offices (in the same building) but the job is the same," and that he was "the MD of Seneca Investments, which you may remember better as Communicade, Omnicom's interactive investment arm." (LP Ex. 244)

334. Seneca personnel identified themselves as Omnicom employees or did not correct third parties who did not make a distinction between Omnicom and Seneca. (LP Ex. 245)

335. Omnicom personnel identified Seneca to third parties as an Omnicom division (LP Ex. 246)

336. Tierney regularly attended OMC staff meetings and the meetings of Omnicom's Diversified Agency Services ("DAS") division. (LP Ex. 247; Tierney Complaint ¶¶ 67, 182-83)

337. Omnicom began to carry out its plan to acquire Agency prior to the formation of Seneca. (LP Ex. 248 (Dep. Ex. 2) at 14; LP Ex. 168 (Dep. Ex. 315); LP Ex. 249 (Dep. Ex. 305); LP Ex. 36, Tierney Tr. 65:13-67:8 (began in January or February)) Dr. Jeffrey Rayport, an independent member of the Agency board prior to the Seneca takeover and a member of the two-person special committee that negotiated the public buyout with Seneca, testified that Omnicom had arranged to buy the shares of Agency management by mid-April 2001, thus virtually sealing an Omnicom takeover. (LP Ex. 103, Rayport Tr. 87:13-93:7; *see also* LP Ex. 101, Suh Tr. 119:22-122:5, 127:5-128:7; LP Ex. 104, Weisenburger Tr., 147:12-17)

338. Wren and Weisenburger, along with Omnicom executive vice-president Robert Profusek, continued to negotiate the Agency management buyout after Seneca's formation. (LP Ex. 36, Tierney Tr. at 65:13-67:8, 79:8-81:6; LP Ex. 77 (Dep. Ex. 186); LP Ex. 250 (emails showing Wren's and Weisenburger's involvement); LP Ex. 101, Suh Dep. at 128:8-132:16) Omnicom personnel, notably Weisenburger and Profusek, were heavily involved with the planning, carrying out, and negotiating of the transactions which resulted in Seneca's 100% ownership of Agency, as well as the shareholder lawsuits that arose concerning the amount of the public offer. (LP Ex. 251 (documents showing extensive involvement of Wren and Weisenburger in Agency taking-private); Tierney Complaint ¶ 190-92; LP Ex. 103, Rayport Tr. 143:2-17, 156:21-161:17)

339. Omnicom had a pre-existing plan to acquire Agency from Seneca after a relatively short period. (LP Ex. 252, SUBP\_00134616-17; LP Ex. 253 (Dep. Ex. 400), LP Ex. 239 (Dep. Ex.401) at SUBP00081160)

340. Omnicom began to carry out its plan to acquire Organic prior to the formation of Seneca; as with Agency, Omnicom began with a management buyout. Wren and Weisenburger, as well as Profusek, negotiated with Jonathan Nelson, Organic's chairman and controlling shareholder, as well as other Organic management, to purchase the shares they held through Organic Holdings. (LP Ex. 208 (Dep. Ex. 19, Schedule TO at OMC 0061096-97); LP Ex. 254 (email showing Wren, Weisenburger and Profusek involved in Organic management buyout); LP Ex. 104, Weisenburger Tr. 285:16-288:16)

341. As with the Agency transaction, Wren, Weisenburger, and Profusek continued to negotiate the management buyout after Seneca's formation. In fact, immediately after the formation of Seneca, Weisenburger and Profusek discussed the problem of having to have the Organic special committee, which was handling the overall negotiations on behalf of the Organic board, deal with Seneca's Tierney for appearance's sake when "[t]o try and filter all this through Michael [Tierney] will likely both delay the process and create a lot of tension. How about, for acquisition related matters, we direct them to talk with either you or I [sic] (maybe we could be Seneca's M&A advisors)" (LP Ex. 256 at OMC 0005690.1; LP Ex. 36, Tierney Tr. 65:13-67:8; LP Ex. 104, Weisenburger Tr. 288:21-290:8; LP Ex. 77 (Dep. Ex.186); Tierney Complaint ¶¶ 184-192) When, in November 2001, Seneca proposed to amend drastically the terms of the original September 2001 management share purchase agreement, Nelson appealed to Wren, not to Tierney or Neumann. (LP Ex. 258 (Dep. Ex. 314); LP Ex. 208 (Dep. Ex.19), at OMC 0061097)

342. After Seneca's formation, Omnicom personnel, notably Weisenburger and Profusek, were heavily involved – the latter virtually on a daily basis – with the planning, negotiating, and carrying out of the transactions that resulted in Seneca's 100% ownership of Organic ("Project O"), including the management buyout, (LP Ex. 259) renegotiation of Organic's San Francisco lease, part of closing the deal (*see* LP Ex. 208 (Dep. Ex.19) at OMC 0061097), and the management buyout of Organic (LP Ex. 260) W.F. Realty, the entity that handled Omnicom's real estate matters (and was listed on Omnicom's corporate phone directory (*see* LP Ex. 224) was also directly involved with the San Francisco lease negotiations. Specifically through Howard Wendy and Lee Feld. The vast majority of Omnicom's communications were with Marita Scarfi, Organic Vice President for Operations and Finance, who handled the deal for Organic. (LP Ex. 102 (Kingdon Tr. 289:21-290:8; LP Ex. 114, Neumann Tr. 36:3-37:19; LP Ex. 115, Profusek Tr. 36:18-37:22, 41:3-10; LP Ex, Verga Tr. 148:21-149:6; LP Ex. 186, Weisenburger Tr. 285:3-15, 287:15-288:20, 288:21-290.8; LP Ex. 259; LP Ex. 260; *see also* LP Ex. 25, Devor Report ¶¶ 199-214) At the close of the transaction, Organic CEO Mark Kingdon thanked Weisenburger "for seeing us through this deal." (LP Ex. 261, OMC 0005730)

343. Omnicom had a pre-existing plan to acquire Organic from Seneca after a relatively short period. (LP Ex. 262 (Misc. documents and Dep. Ex. 401))

344. Omnicom decided to sell all of Communicade/Seneca's 11,916,666 Razorfish shares and approved such sale before the formation of Seneca. Profusek signed an authorization for the sale on May 1, 2001. (LP Ex. 26 (Dep. Ex. 327) (granting "Preferred Approval" for sale); LP Ex. 23 (Dep. Ex. 158) at OMC 0006009) Omnicom and Seneca took the first step to carry out the sale on May 4, 2001 when Neumann and Profusek signed, for Seneca and Omnicom,

respectively, an Officers' Certificate appended to a Jones Day opinion letter, advising that the shares were freely transferable. (LP Ex. 263, JD\_051331-36) On May 9, 2001, Seneca began actual sales of Razorfish shares. (LP Ex. 264, JD 051267, 051269-71) Seneca sold the remainder of its Razorfish shares by August 30, 2001 for a total of \$3.5 million. (LP Ex. 41 (Dep. Ex. 236), at SUBP\_00099426; LP Ex. 66, at SUBP\_00025829-30) (transaction history) Three months earlier, on the date of Seneca's formation, Omnicom had listed the value of Razorfish as over \$27 million. (LP Ex. 56 (Dep. Ex.180) at OMC 0001033)

345. As of November 8, 2001, Omnicom personnel had negotiated for Seneca to purchase a license from Live Technology for \$500,000 but then manipulated Seneca's balance sheet by engaging in a bogus purchase of the same license (dubbed "Live Web") from Seneca for \$75 million. (*See* Section I. J., *infra*)

346. Notwithstanding the representation that Omnicom was not obligated to advance funds or capital to Seneca either directly or pursuant to a guarantee made in a certificate signed by Weisenburger attached to a February 2002 Jones Day opinion letter (*see* LP Ex. 266 (Dep. Ex.106) at OMC 0001020 ("G")), Omnicom did provide several guarantees involving Agency and Organic leases, Organic Online, and the "Live Web" Joint Development Agreement between Seneca subsidiary LT/OM, Inc. and Live Technology Holdings, Inc. (LP Ex. 267)

347. Omnicom formed Seneca as an "off balance sheet entity" that, at all relevant times, Omnicom controlled. (Tierney Complaint, ¶¶ 20-29, 122-129) In this connection, "Omnicom made or approved all major decisions, and handled all negotiations, regarding the principle assets of Seneca. The substantive relationship between Seneca and Omnicom was little changed from that between Communicade and Omnicom." (*Id.* at ¶ 124) Although [Tierney]

was at all times the [CEO] and sole director of Seneca, Omnicom often made major decisions regarding Seneca and its assets without informing [Tierney].” (*Id.* at ¶ 189)

348. Tierney worked for Omnicom at all relevant times. (Tierney Complaint, ¶¶ 40-76) He always considered himself to be an agent of Omnicom, and he reported directly to Defendants Wren and Weisenburger. (*Id.* at ¶¶ 46, 67, 156, 182) Throughout his tenure as the “CEO of Seneca,” he maintained all of his benefits as an Omnicom employee (including car and health benefits); he received W-2’s listing Omnicom as his employer, and he routinely attended Omnicom management meetings and seminars, which were only open to executives of Omnicom and its subsidiaries. (*Id.* at ¶¶ 69-76) The only reason Omnicom terminated its relationship with Tierney in March 2004 was because it understood that his “continued work for Omnicom in any capacity would support Plaintiffs’ contention [in this Action] that Seneca was and had been under Omnicom’s control.” (*Id.* at ¶¶ 79-81)

349. Defendants orchestrated the Seneca transaction so as to ensure that Omnicom would always bear all of the risk and rewards in the new entity, and that it always maintained complete control over Seneca and its assets. (Tierney Complaint, ¶¶ 130-69, 208) Defendants hand-selected the “common shareholders” of Seneca, who operated as “agents” of Omnicom (*Id.* at ¶¶ 132-33); Pegasus, the first common shareholder of Seneca, “was an agent of Omnicom” and “contributed nothing, and was required to contribute nothing” to Seneca. (*Id.* ¶¶ 135-37) In addition, Pegasus was completely indemnified by Omnicom, (*Id.* ¶¶ 215-219), and Omnicom paid Pegasus \$6 million in “management fees,” which “had no relationship to performance, and were funded by Omnicom.” (*Id.* ¶¶ 132-139) Pegasus played absolutely no role with respect to Seneca – indeed, Tierney stated that he met a Pegasus representative only once, and that nothing substantive was discussed. (*Id.* ¶ 177)

350. “Seneca relied completely on Omnicom for funding,” as well as for its employees, insurance, space, administrative services, and other operational functions. (Tierney Complaint, ¶¶ 55, 57-58) In order to infuse Seneca with additional capital, Omnicom purchased assets from Seneca on commercially unreasonable terms. (*Id.* at ¶ 205) “When Seneca sold Agency.com, Organic and LiveWeb to [Omnicom], there were no negotiations between [Omnicom] and Seneca, no other bidders, nor attempts to find other bidders.” (*Id.* at ¶ 193) “Omnicom selected the valuation groups used to justify the amounts paid by Omnicom for such companies” and “[t]hose valuation groups reported to Omnicom.” (*Id.* at ¶ 194-95) At all relevant times, Seneca was “deeply underwater,” and Seneca’s common stock had no value whatsoever. (*Id.* at ¶¶ 213, 216-38)

351. Two transactions purportedly conducted by Seneca to take Agency and Organic private were designed as three-part transactions intended to give Omnicom total control over those companies. (Tierney Complaint ¶ 186) “Omnicom and Omnicom’s outside counsel prepared all the term sheets and legal documentation for these and other significant Seneca transactions,” often “without Plaintiffs instructions, or even knowledge.” (*Id.* at ¶¶ 187-88) Omnicom “handled all substantive negotiations with the management of Agency and Organic regarding the purchase by Seneca of their shares in such companies,” and “Defendant and their counsel were actively involved in the Agency.com and Organic going-private transactions....” Pegasus “had no involvement in any aspect of any of these transactions....” (*Id.* at ¶¶ 190-92)

352. Omnicom used additional off-balance sheet agents to buy, hold and sell Digital Investments and other assets. (Tierney Complaint ¶¶ 158-160. These included AAAA Investment Co., Forrest Packaging Paper, Chaucer, AH One, The Altus One Fund, WA One, Delta Ventures and others. (*Id.* at ¶¶ 158-60)

**F. Omnicom’s Accounting for the Seneca Transaction**

353. In Answering the Complaint, Defendants *denied* that the Seneca preferred stock was a beneficial interest. (LP Ex. 275, Answer ¶ 172)

354. In their motion to dismiss, Defendants represented to the Court that they accounted for the Seneca Transaction pursuant to ¶ 11 of FAS 140 (sale accounting) (LP Ex. 196, Defendants’ Motion to Dismiss, July 30, 2003 at pp. 15-17) They also represented to the Court that this was an exchange of non-monetary assets. (LP Ex. 87, Defendants’ November 14, 2003 Reply Memorandum in Support of Motion to Dismiss, at p. 7)

355. At the time of the transaction and throughout the Class Period, Defendants stated on numerous occasions that the Seneca Transaction was a non-monetary exchange. For example:

- Omnicom’s May 3, 2001 Form 4’s for Agency.com, Organic and Razorfish reported that Omnicom’s stock in those three companies was “[t]ransferred in a non-monetary transaction pursuant to a contribution of the capital stock of Communicade Inc., a wholly owned subsidiary of Omnicom, to Seneca Investments LLC in exchange for equity interests therein.” (LP Ex. 268 (Dep. Ex. 535), LP Ex. 269 (Dep. Ex. 536), LP Ex. 270 (Dep. Ex. 537))
- An Omnicom memo dated Jan. 24, 2002, stated that “the relevant accounting literature with respect to this transaction [is] . . . APB 29 – non monetary transactions” and that “*APB 29 is an appropriate reference for this transaction.*” (LP Ex. 62 (Dep. Ex. 175) at OMC 0035688-89) (emphasis supplied) It also identifies EITF 98-3 and 00-5, which apply to non-monetary exchanges – as relevant accounting literature and considers their application to the Seneca transaction. *Id.*
- Andersen’s Feb. 5, 2002 memo describing the accounting for the Seneca Transaction applied EITF 98-3. The memo explained that this was the proper guidance to evaluate “whether a business has been received in a nonmonetary exchange.” (LP Ex. 88 (Dep. Ex. 129) at AA 0016733)
- A one-page summary of “Seneca Accounting” that was reviewed and apparently approved by KPMG, also applied EITF 98-3 to Seneca. (LP Ex. 271, KPMG 00060)

- KPMG’s Chronological History of Transactions Regarding Seneca Investments, dated March 2003, applied EITF 98-3 to Seneca without questioning its applicability. (LP Ex. 69 (Dep. Ex. 90) at KPMG 00007) A later version of this document, dated March 2004, applies EITF 98-3 in the same manner. (LP Ex. 272, KPMG 02472-85 at 02475.)
- On May 30, 2002, a special joint meeting of Omnicom’s Audit and Finance Committees was held to review the propriety of the Seneca Transaction. One topic discussed was “assuring that the transaction was properly accounted for as a non-monetary exchange in which no gain or loss was to be recognized.” (LP Ex. 91 (Dep. Ex. 255) at OMC 0091576)
- A draft version of these minutes – which contained the same language about Seneca being “properly accounted for as a non-monetary exchange” – was given to the SEC on June 17, 2002, in the course of the informal inquiry. (LP Ex. 273, OMC 000002-05 at 03; LP Ex. 274 (Dep. Ex. 538) OMC 0000818-21 at 820)
- A sheet labeled “Seneca Investments LLC” and dated June 13, 2002 said “we accounted for the formation of Seneca as an exchange of nonmonetary assets under specific accounting guidelines, which was specifically reviewed with our outside auditors before Seneca was formed and in last year’s audit.” (LP Ex. 276, OMC 0013503-04) This memo is one of several brief memos on issues raised in *The Wall Street Journal* that Patty Koedatich, Wren’s secretary, e-mailed to Francesca Leonardi and Bruce Redditt on June 14, 2002. (LP Ex. 276, OMC 0013492-508)
- Wren told *The Wall Street Journal* that “Omnicom didn’t record a loss or gain because the transfer was ‘non-monetary’ and conducted at ‘fair value.’” (LP Ex. 3 (Dep. Ex. 385) at p. 5)
- Angelastro and Castellaneta both said they considered APB 29 in determining how to account for the Seneca transaction. (LP Ex. 84, Angelastro Tr. 378:9-380:22; LP Ex. 63, Castellaneta Tr. 125:23-128:22, 137:8-18) Neither said that they thought APB 29 was inapplicable because the Seneca deal was a monetary transaction

356. Defendants repeatedly represented that they accounted for the Seneca Transaction at fair value. For example, in *The Wall Street Journal* article, Wren indicated that the transaction was “non-monetary” and accounted for at “fair value:”

“[Wren] says Omnicom didn’t record a loss or gain because the transfer was ‘non-monetary’ and conducted at ‘fair value.’”

(LP Ex. 3 (Dep. Ex. 385) at p. 5)

357. Wren & Weisenburger's memorandum to Vanessa O'Connell, author of the *WSJ* article, made a similar statement:

“At the time of Seneca's formation, the value Omnicom received in the preferred stock of Seneca approximated the carrying value of the Communicade subsidiary.”

(LP Ex. 277 (Dep. Ex. 389) at OMC 0032289)

358. Jones Day's May 21, 2002 response to the SEC comment letter states that the value of Omnicom's preferred stock in Seneca approximated the carrying value of Communicade at the time of the transfer:

At the time of Seneca's formation, Omnicom determined that the value it received in the preferred stock of Seneca approximated the carrying value of the Communicade subsidiary, which included Omnicom's cost basis in Agency.com and the other investments described above. As previously noted, the valuation assessment performed at the end of 2001 buttresses this conclusion.

(LP Ex. 139 (Dep. Ex. 282) at OMC 0001563)

359. An Andersen Feb. 5, 2002 memo states that Omnicom and Pegasus represented that the that fair value of preferred was equal to Omnicom's basis in assets, as follows:

We note that Pegasus and Omnicom agreed the fair value of the preferred stock received in exchange by Omnicom was equal to Omnicom's basis in the assets contributed.

(LP Ex. 88 (Dep. Ex. 129) at AA 0016733)

360. Two KPMG memos include the identical language stating that that the fair value of the Seneca preferred stock was equal to book value of the assets contributed, and that the Seneca Transaction was negotiated in arms-length transaction, as follows:

The fair value of the preferred stock received in exchange was equal to the net book value of the assets contributed as negotiated in an arms length transaction between independent third parties.

(LP Ex. 69 (Dep. Ex. 90), Guarneri memo, at KPMG 0007; LP Ex. 89 (Dep Ex. 97), Background of Transaction memo at KPMG 00016)

361. Omnicom's memos on accounting for the Seneca Transaction state that Pegasus's cash contribution provided third-party support for the fair value of the Seneca Transaction:

- Two Omnicom memos state that “this transaction provides third party support for the fair value of the investments as a third party has agreed to contribute \$25 million to [Seneca], which results in an implied value that is in excess of our book value.” (LP Ex. 51 (Dep. Ex. 126), e-Services Investments memo, at OMC 0005979-80; LP Ex. 62 (Dep. Ex. 175), Castellaneta e-mail with e-Services Investments memo, at OMC 0035690)
- The two memos also state, “the fair value of the assets received are not less than carrying value.” (LP Ex. 51, at OMC 0005981; LP Ex. 62, at OMC 0035691)
- LP Ex. 62 (Dep. Ex. 175) further states, “We believe the appropriate accounting for this transaction is carry-over basis, which approximates market” and “the fair value approximated book value at the time of the formation of [Seneca].” (at OMC 0035688, 89)

362. Angelastro & Castellaneta's Recap Memo, which was provided to KPMG, also states that the fair value of the Seneca preferred stock approximated the carrying value of Communicade at the time of the transfer:

Our objective was not to conclude on an opinion of value but to support the reasonableness of our conclusion that the book value of our investments in these companies approximated its fair value upon contribution to Seneca.

(LP Ex. 56 (Dep. Ex. 180), OMC 0001030-31)

363. Omnicom Journal Entries and related documentation also state that the Seneca Transaction was at fair value:

- The summary of Omnicom's Journal Entries Relating to the Seneca Investment states that Omnicom “record[ed] book value which equaled fair value.” (LP Ex. 85 (Dep. Ex. 61) at OMC 0001459)
- A June 25, 2002 Castellaneta memo to Angelastro entitled “Closeout of Communicade” was more explicit, stating that Omnicom wrote up the values of Organic to make them equal their [alleged] fair value. (LP Ex. 86 (Dep. Ex. 536) at OMC 0035711) The memo includes the following statements:

“[T]he public investments in Communicade, which were carried at fair value with unrealized gains included in accumulated comprehensive

income were reinstated to their book values – to reflect the fair value upon contribution to Seneca Investments LLC.” (OMC 0035711, top of page)

“To reverse the unrealized loss in market value and reflect the following investments at their fair value which equaled book value, upon contribution to Seneca.” (OMC 0035711, bottom of page)

364. Paragraph 11 of FAS 140 (sale accounting) is the only provision of FAS 140 that requires a deal be conducted at “fair value.” Def. Ex. W2 (FAS 140)

365. On December 1, 2005, Defendants represented to the Court that: “Upon completion of the contribution of Communicade in accordance with Paragraph 11 of FAS 140, Omnicom de-recognized the assets sold (the Communicade business and its assets), recognized the assets obtained (the Seneca preferred stock), and because the fair value of the preferred stock approximated the carrying value of Communicade, there was no gain or loss to record.” Further, Defendants stated that “Omnicom accounted for the contribution as a sale because it satisfied the conditions under Paragraph 9 of FAS 140. (LP Ex. 195, Defendants’ Letter to the Court dated December 1, 2005, at pp. 2-3)

366. Andersen analyzed the Seneca Transaction in connection with its year-end audit. (LP Ex. 88 (Dep. Ex. 129), Andersen Feb. 5, 2002 memo to files)

367. The Andersen audit partner responsible for the audit testified that he viewed the Seneca transaction as a sale/transfer of assets. (LP Ex. 55, Benedik Tr. 147, 147:9, 148:1, 189:2-18, 214:10-22, 252:5-253:7)

368. Before it was willing to sign off on the Seneca Transaction, Andersen’s Benedik required Omnicom to provide evidence demonstrating that Seneca was a *bona fide* transaction and that its Seneca preferred stock was properly valued. (LP Ex. 88 (Dep. Ex. 129), February 5, 2002 Andersen memo to files, AA 0016732-35)

369. This evidence included, *inter alia*, management representations that Pegasus had actually paid money to Seneca (LP Ex. 95 (Dep. Ex. 130) Item 14.c, at AA 0002274); management representations that Omnicom did not control Seneca (LP Ex. 95 (Dep. Ex. 130), Item 14.1, at AA 0002274); true sale opinions (LP Ex. 279 (Dep. Ex. 107) at OMC 0000990-0002); and a third-party valuation demonstrating that the preferred stock was worth what Omnicom claimed on December 31, 2001 (LP Ex. 280 (Dep. Ex. 133) at MD 06444-06646)

370. If all the allegations in Michael Tierney's Amended Complaint against Omnicom, filed February 16, 2007 (LP Ex. 281 (Dep. Ex. 540)), were true, the level of control described would be sufficient to require Omnicom to consolidate Seneca. (LP Ex. 100, Holder Tr. at 316:6-317:24)

371. William W. Holder, defendants' accounting expert, testified as follows:

- a. If the evidence shows that Omnicom misled its auditors with respect to its handling of its Internet investments, that could change his opinions, which he based on the fact that the auditors issued clean opinions on Omnicom's financial statements (LP Ex. 100, Holder Tr. 46:19-48:13);
- b. If Omnicom purposefully misled its auditors regarding Pegasus' cash contribution to Seneca, it would raise serious questions (*Id.* at 52:15-53:14);
- c. If Arthur Andersen had discovered Omnicom had deliberately misled it regarding Pegasus' cash contribution to Seneca, Andersen would be obligated to bring the matter before Omnicom's board of directors or audit committee (*Id.* at 53:17-55:6);
- d. If the Omnicom board found that Omnicom personnel had deliberately misled Andersen and had discharged that person or persons and the audit had been redone, Andersen could remain as Omnicom's auditor and render a clean audit opinion (*Id.* at 55:12-57:10);
- e. If Omnicom misrepresented facts relating to Seneca's independence and Omnicom's ability to control Seneca to Jones Day and Arthur Andersen, that could affect his opinions and conclusions (*Id.* at 60:19-61:10);

- f. If Omnicom did not believe the Internet assets would recover in value at December 31, 2000 or March 31, 2001, it would affect his opinions (*Id.* at 62:7-63:21);
- g. If Seneca was not an arm's length transaction it would affect his opinion as to the appropriateness of the accounting for the transaction (*Id.* at 105:20-106:24);
- h. Pegasus could not lose the \$12.5 million placed in Pegasus Holdings unless "the monies were deployed on specific behalf of Seneca" (*Id.* at 122:2-14);
- i. If the Murray Devine valuation of the Seneca preferred was based on false assumptions, it might change his opinions (*Id.* at 130:17-131:3);
- j. If Omnicom paid off Pegasus with \$6 million to lend its name to the Seneca transaction to avoid recognizing losses, it would be a "major factor" he would consider (*Id.* at 138:17-139:18);
- k. If Omnicom applied FAS 140 ¶ 11, sale accounting, to the Seneca transaction, GAAP would require that a loss be taken if fair value was less than the carrying amount of the assets given as consideration (*Id.* at 244:6-25);
- l. If Omnicom had accounted for the Seneca transaction under APB 29 as a nonmonetary exchange at fair value, and a loss was indicated by the evidence, Omnicom would be required to record a loss (*Id.* at 294:11-21);
- m. If, in substance, Omnicom controlled Seneca and all of the rights and privileges associated with the common stock except for voting rights, Omnicom would have to consolidate Seneca (*Id.* at 308:15-310:6)

**G. Misrepresentations in Management Rep Letters**

372. Omnicom sent a letter to Andersen dated February 18, 2002 in connection with Andersen's audit of Omnicom's financial statements for 2001 (the "Feb. 18 Mgmt. Rep. Ltr.") The letter contained a number of representations from Omnicom to Andersen regarding Omnicom's business, financial condition and financial results. The letter was signed by Wren, Weisenburger, and Angelastro. (LP Ex. 95 (Dep. Ex. 130))

373. The Feb. 18 Mgmt. Rep. Ltr. stated, *inter alia*

With respect to Seneca Investments LLC (“Seneca”) organized by Omnicom and Pegasus Partners II, L.P. (“Pegasus”) and its wholly-owned subsidiary Pegasus Partners (“Partners”), we make the following representations:

- a) Pegasus and Partners are unrelated entities with respect to Omnicom and its subsidiaries and affiliates
- b) Neither Omnicom nor its management or employees have a financial interest in Pegasus or Partners
- c) Pegasus through Partners has made an equity investment in Seneca as the 100% owner of Seneca’s common stock for \$12.5 million with a call on a further \$12.5 million. Such equity is at risk and not guaranteed by Omnicom.
- d) The Relevant Documents referred to in the Jones Day letter of February 6, 2002 with respect to Seneca constitute the complete terms and relationship between Omnicom, Pegasus, Partners and Seneca. There are no side agreements or other letters of understanding
- e) The Certificate of Omnicom Group Inc (Exhibit A-2 to the Jones Day letter of February 6, 2002) is incorporated by reference into this general representation letter.

(LP Ex. 95 (Dep. Ex. 130))

374. With regard to the representation made in subparagraph c) in the Feb. 13 Mgmt. Rep. Ltr., Pegasus and Partners did not make an equity investment in Seneca for \$12.5 million with a call on a further \$12.5 million, and such equity was not at risk. (*See* section I.D. *supra*)

375. With regard to the representation made in subparagraph d) in the Feb. 13 Mgmt. Rep. Ltr., the “Relevant Documents” referred to therein did not constitute the complete terms and relationship between Omnicom, Pegasus, Partners and Seneca because, among other things, Omnicom controlled or significantly influenced Seneca. (*See* section I.E. *supra* herein)

376. With regard to the representation made in subparagraph e) in the Feb. 13 Mgmt. Rep. Ltr., by incorporating the Certificate of Omnicom Group Inc. referred to therein, Defendants repeated to Andersen all the material misrepresentations in that Certificate. Said material misrepresentations are set forth in section I.N. *supra* herein.

377. Andersen relied on the Feb. 13 Mgmt. Rep. Ltr. when it signed the audit opinion on Omnicom's financial statements for 2001. (LP Ex. 55; Benedik Tr. 234:8-17; 236:1-8)

378. At the time of Omnicom's first quarter press release and throughout 2001, when it was auditing Omnicom's 2001 financial statements, and when it met with KPMG during the transition from Andersen to KPMG as Omnicom's auditor, Andersen always believed that Pegasus had actually invested \$12.5 million in Seneca and that another \$12.5 million was on call by Seneca. Andersen also believed that Pegasus's investment in Seneca provided independent support for Omnicom's representation that the fair value of Omnicom's preferred stock interest in Seneca was equal to Omnicom's cost of the assets transferred. (LP Ex. 51 (Dep. Ex. 126), LP Ex. 88 (Dep. Ex. 129); LP Ex. 55, Benedik Tr. 156:4-14; 160:17-161:1; 195:18-196:11, 210:25-211:22; 222:5-18; 332:13-17)

379. At the time of the Seneca Transaction and when it was auditing Omnicom's 2001 financial statements, Andersen believed that Omnicom did not control Seneca. (LP Ex. 55, Benedik Tr. 258:14-259:15) Andersen did not know many of the facts showing Omnicom's control of Seneca. In particular, Andersen did not know that Omnicom had veto power over disposition of Seneca's assets or that Omnicom had the right to select Seneca's management. Omnicom's representations convinced Andersen that Omnicom did not control Seneca. (LP Ex. 55, Benedik Tr. 256:7- 258:4; 260:10-261:8)

380. Andersen did not know any details about, and did not review, the LiveWeb transaction (as detailed below) In particular, Andersen did not know that the asset for which Omnicom paid \$75 million to Seneca had been obtained by Seneca from LiveTech the day before for \$500,000. (LP Ex. 55, Benedik Tr. 264:3-267:19)

## H. Misrepresentations in Jones Day Letters and Certificates

381. During the course of 2001, Red Sky declared bankruptcy and Dash.com, Ntercept, Caresoft and IPNetwork's businesses failed and the companies were liquidated. (LP Ex. 41 (Dep. Ex. 236), Seneca financials, at SUBP 00099426) At the time of the contribution to Seneca, Omnicom had valued those five assets at \$55 million. (LP Ex. 56 (Dep. Ex. 180), at OMC 0001033-34)

382. Jones Day wrote an opinion letter to Omnicom dated February 6, 2002 ("Feb. 6 Opinion Ltr.") The letter addressed the question of whether, in the event Omnicom became a debtor under U.S. bankruptcy law, a bankruptcy court would order disregard the "separate existence" of Seneca and order its assets consolidated with Omnicom's. (LP Ex. 266 (Dep. Ex. 106))

383. The Feb. 6 Opinion Ltr. contained the following misrepresentations:

- *That "the representations and statements of the Company [i.e. Seneca] and Omnicom set forth in the Opinion Certificates are, and will continue to be, accurate, true and correct."* (*Id.*) (emphasis supplied) This was materially false and misleading for the reasons set forth below with respect to the Certificate of Omnicom Group Inc.
- *That "the parties have complied with the 'Separateness Covenant'"* (*Id.*, assumption 6) (emphasis supplied) This was materially false and misleading for the reasons set forth below with respect to the "Separateness Covenant".
- That *"The Company [i.e. Seneca], since its formation on May 2, 2001, has:...*
  - "...1. Maintained its books, records and bank accounts separate from those of any other person or entity."* (LP Ex. 266 (Dep. Ex. 106), Certificate of Seneca Investments LLC, at OMC 0001018) (Emphasis supplied) This was materially false and misleading because, in fact, Omnicom controlled its \$47.5 million "contribution" to Seneca for several months after May 2, 2001. (*See* ¶ 315 *supra*)
  - "... 5. Paid its liabilities and expenses, including salaries of its employees, only out of its funds."* (*Id.*) (Emphasis supplied) This was materially false and misleading because, in fact, Omnicom paid the salaries of Seneca's employees. (*See* ¶ 348 *supra*)

“... 7. *Maintained an arm’s-length relationship with other persons and entities and entered into transactions with other persons and entities only on a commercially reasonable basis.*” (*Id.*) (Emphasis supplied) This was materially false and misleading, because, in fact, Seneca did not maintain an arm’s-length relationship with Omnicom, but rather controlled or significantly influenced Seneca. (*See* section I.E. *supra*)

“... 12. *Used separate stationery, invoices, checks and other business forms bearing the Company’s name and not the name of any other person or entity; not used a mailing address, e-mail address or telephone number of any other person or entity; and not identified itself as a division of any other person or entity.*” (*Id.*) (Emphasis supplied) This was materially false and misleading because, in fact, Seneca used Omnicom e-mail addresses and telephone numbers and Omnicom letterhead. (*See* ¶ 331 herein)

“... 13. *Maintained adequate capital in light of its contemplated business operations.*” (*Id.*) (Emphasis supplied) This was materially false and misleading, because, in fact, Seneca was routinely short of operating cash and utterly dependent on Omnicom’s largesse and, later in 2001, on a fraudulent “sale” of LiveWeb to Omnicom for its operating cash needs. (*See* ¶¶ 312, 313, 321, 331 *supra*)

“... 15. *Not knowingly engaged in conduct that could reasonably be expected to compromise its status as an entity separate and distinct from Omnicom or any other person or entity.*” (*Id.*) (Emphasis supplied) This was materially false and misleading because, in fact, Omnicom and Seneca routinely engaged in conduct that compromised Seneca’s status as an entity separate and distinct from Omnicom. (*See* section I.E. *supra*)

384. Weisenburger and Angelastro received and reviewed drafts of the Jones Day opinion letters and the Certificate of Omnicom Group Inc. attached thereto, and they were responsible for sending Omnicom information to Jones Day for the purpose of the Jones Day opinion letters. Profusek also spoke to Weisenburger and Angelastro and/or sent them drafts of the certificate in the course of preparing the Certificate of Omnicom Group Inc. Weisenburger and Angelastro also received drafts of the amendment of the Certificate of Incorporation of Seneca, which contained the “Separateness Covenants” and discussed it with Profusek. (LP Ex. 115, Profusek Tr. 25:23-48:4; 58:9-59:19; 79:19-80:22; 83:4-84:13)

385. Annexed to the Feb. 6 Opinion Ltr. was a “Certificate of Omnicom Group Inc.,”

signed by Weisenburger, which contained the following misrepresentations:

- That “*Omnicom has not taken, and will not take, any action inconsistent with the maintenance of the Company as a separate legal entity.*” (LP Ex. 266, Certificate of Omnicom Group Inc., at OMC 0001021, ¶ I) (Emphasis supplied) This representation was materially false and misleading for the reasons set forth below with respect to individual representations in the certifications.
- That “*Omnicom has, and will continue to: ...*

“... (i) *hold the Company [i.e. Seneca] out to third parties as an entity with assets and liabilities distinct from Omnicom and Omnicom’s subsidiaries.*” (*Id.*) (Emphasis supplied) This was materially false and misleading because, in fact, Omnicom controlled its \$47.5 million “contribution” to Seneca for several months after May 2, 2001. (See ¶¶ 315 herein)

“... (iii) *prepare financial statements for Omnicom relating to its ownership interest in the Company in accordance with GAAP.*” (*Id.*) (Emphasis supplied) This was materially false and misleading because Seneca was a sham transaction and therefore did not and could not comply with GAAP with respect to its ownership interest in Seneca. The grounds for this are set forth throughout this document.

“... 1 *Maintain bank accounts ... separate from and independent of, the bank accounts ... of the Company.*” (*Id.*) (Emphasis supplied) This was materially false and misleading because, in fact, Omnicom controlled its \$47.5 million “contribution” to Seneca for several months after May 2, 2001. (See ¶¶ 315 herein)

“... 3. *Maintain an arms-length relationship with the Company.*” (*Id.*) (Emphasis supplied) This was materially false and misleading because, in fact, Omnicom controlled or significantly influenced Seneca. (See section I.E. herein)

“... 4. *Keep its assets and its liabilities wholly separate from those of the Company, and not commingle its assets with those of the Company.*” (*Id.*) (Emphasis supplied) This was materially false and misleading because, in fact, Omnicom controlled its \$47.5 million “contribution” to Seneca for several months after May 2, 2001. Moreover, Omnicom remained in control of Seneca’s cash needs long after the \$47.5 million was transferred to a Seneca account. (See ¶ 315 herein)

“... 5. *Not mislead third parties by conducting or appearing to conduct business on behalf of the Company or expressly or impliedly representing or*

*suggesting that Omnicom is liable or responsible for any indebtedness or other liabilities of the Company of that the assets or Omnicom are available to pay the creditors of the Company.” (Id.) (Emphasis supplied) This was materially false and misleading because, in fact, Omnicom personnel routinely negotiated major transactions on Seneca’s behalf and because third parties routinely identified Seneca with Omnicom. (See section I.E. supra)*

*“... 7. Use at all times stationery and other business forms and a mailing address, e-mail address and telephone number separate from those of the Company.” (Id. at OMC 0001022) (Emphasis supplied) This was materially false and misleading because, in fact, Seneca used Omnicom e-mail addresses and telephone numbers and Omnicom letterhead. (See ¶¶ 331 herein)*

*“... 12. Not make loans to the Company, nor guarantee or become obligated for the debts of the Company.” (Id.) (Emphasis supplied) This was materially false and misleading because, in fact, Omnicom loaned Seneca money and guaranteed Seneca’s obligations. (See ¶ 346 herein)*

*“... 16. Not identify the Company as a division of Omnicom” (Id.) (Emphasis supplied) This was materially false and misleading because, in fact, Omnicom routinely identified the Company as a division or subsidiary of Omnicom, and third parties understood it to be so. In addition, Michael Tierney alleges that Seneca was, in fact, a subsidiary of Omnicom. See ¶ 335 supra.*

386. Andersen relied on the Feb. 6 Opinion Ltr. in rendering its audit opinion for Omnicom’s financial statements for the year ended December 31, 2001. See section I.H. supra

387. Jones Day sent another opinion letter to Omnicom dated February 18, 2002 (the “Feb. 18 Opinion Ltr.”) The letter addressed the issue of whether, in the event that Omnicom became a debtor under U.S. bankruptcy law, a bankruptcy court would consider Omnicom’s contribution to Seneca to be a true transfer or rather a secured borrowing. If the latter, the assets transferred to Seneca would be considered the property of the estate of Omnicom. (LP Ex. 279 (Dep. Ex. 107))

388. The Feb. 18 Opinion Ltr. contained the same misrepresentations as those set forth in paragraphs 383-385, supra. (LP Ex. 279 (Dep. Ex. 107))

389. The Feb. 18 Opinion Ltr. referred to and incorporated the Omnicom Group Inc. Certification attached to the February 6 opinion letter. (LP Ex. 279 (Dep. Ex. 107))

390. The Feb. 18 Opinion Ltr. also contained the following assumption:

*Adequacy of Consideration. In rendering this opinion letter, we have assumed that the purchase price paid by the Company for the Contributed Property is approximately equal to the amount that generally could have been obtained by Omnicom in the marketplace in comparable transactions. Such fair market value purchase price paid by the Company for the Contributed Property purchased from Omnicom is an additional factor that we believe indicates a transfer rather than the pledge of the Contributed Property by Omnicom”.*

“Contributed Property” referred to the assets contributed by Omnicom to Seneca. (LP Ex. 279 (Dep. Ex. 107))

391. The foregoing assumption was materially false and misleading because, in fact, the fair market value of the assets contributed to Seneca was far below the purchase “price” paid for those assets by Seneca to Omnicom and because, in fact, the fair market value of the private assets was also far below the purchase price “paid” by Seneca for the Contributed Property for the reasons set forth throughout herein.

392. In addition, identical or similar provisions in the “Separateness Covenants” in the Seneca Charter Amendment were also materially false and misleading for the reasons set forth above. (LP Ex. 305, Amendment to Charter, JD 050499-504)

393. Andersen relied on the Feb. 18 Opinion Ltr. in rendering its audit opinion for Omnicom’s financial statements for the year ended December 31, 2001. (LP Ex. 55, Benedik Tr. 241:3-251:12, 242:17-21, 245:22-25, 251:17-21)

394. In connection with KPMG’s subsequent review of Seneca, Jones Day wrote an opinion letter dated July 8, 2002 to Omnicom (the “July 8 Opinion Ltr.”), relied on by KPMG, which was virtually identical to, and contained the same misrepresentations as, the Feb. 6 Opinion Ltr. Attached to the July 8 Opinion Ltr. was a Certification of Omnicom Group Inc.,

dated July 8, 2002, signed by Weisenburger, which was virtually identical to, and contained the same misrepresentations as, the Certification attached to the Feb. 6 Opinion Ltr.. (LP Ex. 282 (Dep. Ex. 104), LP Ex. 266 (Dep. Ex. 106))

**I. Misrepresentations to Murray Devine**

395. During the course of 2001, Red Sky declared bankruptcy and Dash.com, Ntercept, Caresoft and IPNetwork's businesses failed and the companies were liquidated. (LP Ex. 41 (Dep. Ex. 236), Seneca financials, at SUBP 00099426) At the time of the contribution to Seneca, Omnicom had valued those five assets at \$55 million. (LP Ex. 56 (Dep. Ex. 180) at OMC 0001033-34)

396. As part of its year-end 2001 audit of Omnicom, Andersen requested that Omnicom obtain an independent valuation of the Seneca preferred stock. (LP Ex. 55, Benedik Tr. 192:21-192:18)

397. Omnicom retained Murray Devine & Co. to do the valuation. (LP Ex. 285 (Dep. Ex. 134))

398. Murray Devine valued the Seneca preferred stock at \$280-298.7 million. (LP Ex. 280 (Dep. Ex. 133) at MD 06446, 71)

399. Murray Devine was told that Pegasus had actually invested \$25 million in Seneca. Murray Devine included in its valuation of Seneca \$25 million that Pegasus had not invested in Seneca. (LP Ex. 280 (Dep. Ex. 133) at MD 06423; LP Ex. 284, DiDomenico Tr. 259:7-24)

400. Murray Devine also incorporated the results of the LiveWeb transaction (discussed in ¶¶ 412-437, *infra*) in its valuation of the Seneca preferred stock. (LP Ex. 280 (Dep. Ex. 133))

401. As part of its valuation process, Murray Devine performed valuations of each of the E-Services companies in the Seneca portfolio except for Caresoft and IPNetworks. (LP Ex. 280 (Dep. Ex. 133) at MD 06452; LP Ex. 286, SUBP 00032590-91, at 90)

402. Among the valuations conducted by Murray Devine was a valuation of Agency.com. (LP Ex. 280 (Dep. Ex. 133) at MD 06455, 73, 75-95)

403. Included in Murray Devine's valuation of Agency.com was a value of \$15,561,089 assigned to a company called Red Sky. \$15 million of that value was the face amount of a Red Sky note held by Agency.com. Red Sky was an internet company whose assets had been consolidated into Agency.com's assets. Murray Devine did not separately value Red Sky and assumed that the value assigned to the Red Sky assets by Seneca was correct. (LP Ex. 280 (Dep. Ex. 133) at MD 06483, 95)

404. The \$15 million Red Sky note was worthless or nearly worthless because Red Sky was insolvent, entering bankruptcy, and Seneca had offered to forgive the note. (LP Ex. 283 (Dep. Ex. 137) at 06655-57; LP Ex. 287 at SUBP 00110582-84)

405. Murray Devine was not told that the \$15 million Red Sky note was worthless or nearly worthless, and in performing its valuation of Agency.com as part of its valuation of the Seneca preferred stock had assumed that it was worth its face value. (LP Ex. 284, DiDomenico Tr. 136:15-138:1, 138:11-22)

406. Also included in Murray Devine's valuation of Agency.com was a \$2.5 million value assigned to Ntercept, an internet company which had been consolidated into Agency.com's assets. Murray Devine did not separately value Ntercept and assumed that the value of \$2.5 million assigned to it by Seneca was correct. (LP Ex. 280 (Dep. Ex. 133) at MD at 06483, 95)

407. At the time pertinent to Murray Devine's valuation of Agency.com, Ntercept was worthless or nearly so because it was insolvent. (LP Ex. 283 (Dep. Ex. 137) at MD 06657; LP Ex. 56 (Dep. Ex. 180) at OMC 0001139)

408. In August 2001, Agency.com planned to take a goodwill writedown of \$80-100 million. (LP Ex. 288 (Dep. Ex. 226))

409. Murray Devine was not informed of Agency.com's plan to take a goodwill writedown of \$80 million, and its valuation of Agency.com did not take this fact into account. (LP Ex. 289 (Dep. Ex. 225)).

410. A later valuation of Agency.com by Murray Devine did take the writedown into account. As a result, Agency.com's operating loss for 2001 was approximately \$97 million *less* in the 2001 valuation than in Murray Devine's 2002 valuation of the Seneca preferred. (LP Ex. 290 (Dep. Ex. 136) at MD 09073 compared with LP Ex. 280 (Dep. Ex. 133) at MD 06485)

411. Andersen relied on the Murray Devine valuation in performing its audit of Omnicom for year-end 2001. Specifically, Andersen relied on the Murray Devine valuation when determining whether the Seneca preferred was being carried at an appropriate amount on Omnicom's books. (LP Ex. 55, Benedik Tr. 202:13-205:15, and 205:7-15 in particular)

**J. The LiveWeb Transaction**

412. Omnicom transferred its investment in Live Technology Holdings, Inc. ("LiveTech") to Seneca at its formation. (LP Ex. 23 (Dep. Ex. 158), at OMC 0006009) Omnicom's basis in LiveTech was \$12.5MM. (LP Ex. 51 (Dep. Ex. 126) at OMC 0005983)

413. Sometime before November 9, 2001, Andersen informed Omnicom that it would require a third party valuation of the Seneca preferred stock. (LP Ex. 291 (Dep. Ex. 127); LP Ex. 55, Benedik Tr. 161:16-162:19)

414. Omnicom did not want such an analysis performed. (LP Ex. 292 (Dep. Ex. 323))

415. Around this same time, Omnicom was negotiating with LiveTech for a software license. (LP Ex. 293 (Dep. Ex. 371); LP Ex. 294 (Dep. Ex. 344); LP Ex. 97, Reuvers Tr. 41:13-42:10)

416. Omnicom was negotiating a deal to purchase this license for \$500,000. (LP Ex. 294 (Dep. Ex. 344) at OMC 0005702)

417. Ultimately, Omnicom, LiveTech and Seneca negotiated and completed the so-called LiveWeb Transaction in November 2001. The LiveWeb Transaction consisted of two agreements described below.

418. The first agreement, executed on November 12, 2001 but backdated to July 1, 2001, was a “Joint Development Agreement” between Seneca and LiveTech in which a Seneca subsidiary called LT/OM Inc. purchased a license from LiveTech to use certain LiveTech technology in connection with services provided to Omnicom clients. The purchase price was \$500,000. In addition, Seneca agreed to pay LiveTech \$1.5 million in development expenses. \$1 million of that was for expenses previously incurred by LiveTech. (LP Ex. 295 (Dep. Ex. 233) at OMC 0036291, 295-96, 321); LP Ex. 293 (Dep. Exhibit 371); LP Ex. 97 Reuvers Tr. 57:20-58:19, 67:13-68:3.) In addition, Omnicom guaranteed the payments due from Seneca to LiveTech in an agreement signed by Profusek. (LP Ex. 295 (Dep. Ex. 233) at OMC 0036347)

419. The second agreement, executed the next day, was an agreement between Omnicom and Seneca in which Omnicom, through its wholly-owned subsidiary DAS Holdings, purchased an entity called LiveWeb from Seneca for \$75,000,000, consisting of a redemption of \$45 million in face amount of Seneca preferred stock and \$30,000,000 in cash. The sole asset of LiveWeb was the license purchased by Seneca from LiveTech. The agreement was signed on

behalf of Omnicom by Weisenburger. (LP Ex. 297 (Dep. Ex. 234); LP Ex. 237, Defendants' Responses to Plaintiffs' Requests to Admit, at ¶¶ 46-49)

420. Weisenburger, Profusek and Neumann negotiated the Joint Development Agreement with Wayne Reuvers, LiveTech's CEO. (LP Ex. 298 (Dep. Ex. 199); LP Ex. 114, Neumann Tr. 51:9-52:4; 222:14-223:4; LP Ex. 97, Reuvers Tr. 36:3-25; LP Ex. 186, Weisenburger Tr. 213:17-21)

421. An October 24, 2001 draft of the Joint Development Agreement shows that the deal was originally conceived to be between an Omnicom subsidiary called Omnicom LT Sub and Livetech. (LP Ex. 294 (Dep. Ex. 344) at OMC 0005698)

422. Reuvers did not know why the purchaser of the license was changed from an Omnicom subsidiary to a Seneca subsidiary. To Reuvers, it made no difference who the purchaser was. (LP Ex. 97, Reuvers Tr. 47:19-51:7)

423. Reuvers considered Seneca to be a subsidiary of Omnicom. (LP Ex. 97, Reuvers dep. 45:8-17)

424. Profusek and Weisenburger negotiated with LiveTech during the time that the purchaser was contemplated to be Omnicom LT Sub, and Profusek continued the negotiations when the purchaser was contemplated to be a subsidiary of Seneca. (LP Ex. 97, Reuvers Tr. 35:9-36:25, 39:18-40:9; 48:6-51:7)

425. An October 30, 2001 handwritten change to an October 26, 2001 draft LiveTechnology Holdings, Inc. Joint Development Agreement replaced the description of Omnisub LT Inc as being "organized by" Seneca Investments LLC to a description of Omnisub LT as "a wholly-owned subsidiary of" Seneca Investments LLC. (LP Ex. 299 (Dep. Ex. 369) at LIVETECH 00821)

426. By the summer of 2001, Seneca was low on cash. Neumann told this to Weisenburger. The cost of managing the sixteen internet businesses was greater than had been projected, primarily due to higher than anticipated costs in taking Agency.com Ltd and Organic, Inc. private. As a result, Seneca and Omnicom Group Inc. began considering ways to meet these funding needs. No one at Omnicom Group Inc. or Seneca asked Pegasus or its subsidiary, Pegasus Holdings for any money. (LP Ex. 93 (Dep. Ex. 350); LP Ex. 300, at SUBP 00125221; LP Ex. 226, at SUBP 00125272)

427. In addition to providing Seneca with cash, the Live Web Transaction allowed Seneca to book a \$74.5 million gain, representing the difference between what Seneca paid to LiveTechnology Holdings, Inc. and what it received from Omnicom Group Inc. for the license. This gain almost exactly offset Seneca's realized losses for 2001, as is shown by a Seneca financial statement drafted by Neumann. (LP Ex. 295 (Dep. Ex. 233); LP Ex. 297 (Dep. Ex. 234); LP Ex. 41 (Dep. Ex. 236 at SUBP 00099426); LP Ex. 283 at MD 06657; LP Ex. 296 at SUBP\_00107880; LP Ex. 114, Neumann Tr. 216:5-218:12)

428. On October 29, 2001, Profusek inquired if Seneca's gain from the sale of Live Web to OMC would be offset by Seneca's losses. (LP Ex. 301 (Dep. Ex. 349))

429. Neumann stated that he drafted the Seneca financial statement for the period ended December 31, 2001 sometime in the beginning of 2002 for Omnicom and Pegasus. (LP Ex. 114, Neumann Tr. 215:22-216:7) The financial statement shows a basis of \$500,522 for Live Web, the cash Seneca had invested to date and a realized gain of \$74,499,448 in Live Web for Seneca in 2001. (LP Ex. 41 (Dep. Ex. 236) at SUBP 00099426)

430. A November 25, 2001 email exchange between Reuvers and Neumann indicated that both had been working directly with Weisenburger on both LiveTechnology Holdings, Inc. and the Live Web valuation. (LP Ex. 298 at SUBP\_00027786)

431. Reuvers stated he learned several months after executing the joint development agreement with LT/OM Inc that LT/OM Inc had been renamed Live Web and moved to a new division of Omnicom. “It was owned before by Omnicom and it moved to a new division in Omnicom” (LP Ex. 97, Reuvers Tr. 62:8-63:15)

432. The Live Web Transaction had no commercial purpose and made no commercial sense. Assets were transferred at inflated values in order to help earnings (LP Ex. 24, Atkins Report, Exhibit C - Enron) and valuations were performed that did not determine fair market value to justify certain accounting treatment (LP Ex. 24, Atkins Report, Exhibit C - Enron) (LP Ex. 24, Atkins Report, at p. 33)

433. The \$30 million in cash and the \$45 million in Preferred Stock that Omnicom paid Seneca for Live Web should have been accounted for as an additional capital contribution by Omnicom to Seneca. As a result, Omnicom’s total investment in Seneca would have been \$400 million before reductions caused by Seneca’s losses. Even accepting the Murray Devine valuation of Seneca at \$318.3 million as of December 31, 2001 – which did not take into account write-downs arising from Seneca’s losses – this is significantly less than \$400 million and should have resulted in a reduction of Omnicom’s earnings. (LP Ex. 304 at OMC 0031501; LP Ex. 24, Atkins Report, at p. 33-34)

434. KPMG did not review the LiveWeb transaction or discuss it with Omnicom management. (LP Ex. 71, Verga Tr. 235:16-237:3)

435. Andersen was not aware that Seneca had paid \$500,000 to LiveTechnology Holdings, Inc. for rights to the software. (LP Ex. 55, Benedik Tr. 265:22-266:11)

436. Andersen did not review the transaction between LiveTechnology Holdings, Inc. and Seneca; Omnicom accounted for the Live Web transaction as an acquisition. (LP Ex. 55, Benedik Tr. 266:12-267:19)

437. The true purpose of the Live Web Transaction was to (a) transfer \$30 million in funds into Seneca because no money was forthcoming from Pegasus; and (b) avoid a writedown of the preferred stock, which would have reduced Omnicom's earnings. (LP Ex. 24, Atkins Report, at p. 34)

## **II. THE VALUE OF E-SERVICES ASSETS – YEAR-END 2000**

438. Beginning in 1996 and continuing throughout the late 1990s and early 2000, Omnicom made significant investments in internet advertising and marketing companies, including Agency.com, Organic, Razorfish, Answerthink and Netcentives. (Def. Ex. B1, Omnicom 1996 Annual Report & 10-K, at OMC 0027790, 0027797; LP Ex. 56 (Dep. Ex. 180), Angelastro/Castellaneta memo, at OMC 0001025; Neumann email with Communicade Overview, OMC 0033650-66)

439. Omnicom touted the success of these investments and its internet investment strategy as a whole. For example, Defendant Wren focused on the internet investments in the first paragraphs of his 1999 letter to shareholders, proclaiming that Omnicom “moved early and quickly to build significant positions in over 20 companies involved in digital interactive marketing[, which] now represent substantial shareholder value.” (LP Ex. 306 (Dep. Ex. 247), Omnicom 1999 Annual Report, at OMC 0027928)

440. The financial press shared Wren's enthusiasm, lauding his decision to link Omnicom's fortunes, at least to some degree, to the internet explosion. A December 15, 1999

article on TheStreet.com applauded Omnicom for “acting like a whip-smart strategic investor” and stated that “[t]hanks to the company’s solid fundamentals – and perhaps more importantly, its growing portfolio of internet service firm investments – Omnicom shares this year are up 72%.” (LP Ex. 307, Spencer E. Ante, “At Omnicom, an Ad Shop Turned Venture Capitalist,” The Street.com, Dec. 15, 1999)

441. However, starting in March 2000, things took a turn for the worse. The internet bubble burst and the business of the internet services firms that Omnicom had invested in quickly began to evaporate. (LP Ex. 24, Atkins Report at p. 27)

442. As a result of the dramatic decline in the market values of internet companies and the greatly diminished demand for the types of services provided by the e-Service Assets, Omnicom was aware that it faced significant valuation impairment issues with respect to both its public and private investments at year-end 2000. Nonetheless, in violation of Generally Accepted Accounting Principles (“GAAP”), Omnicom conducted no documented analysis of the potential impairment of its cost-method investments as of December 31, 2000. (LP Ex. 25, Devor Report ¶¶ 40-52)

**A. GAAP Requires Periodic Testing of Cost-Method Investments for Impairment**

443. GAAP requires an enterprise to monitor its investments in equity securities to determine whether a decline in the fair value of an investment below its recorded book value is other than temporary. The obligation to monitor for other-than-temporary impairment applies to both investments accounted for using the equity method under APB 18 and to cost-method investments under FAS 115. (Def. Ex. F2 (Dep. Ex. 523), Accounting Principles Board Opinion No. 18, *The Equity Method of Accounting for Investments in Common Stock* (“APB 18”) ¶¶ 6(b),

19(h); Def. Ex. E2 (Dep. Ex. 292), FAS 115, *Accounting for Certain Investments in Debt and Equity Securities* (“FAS 115”) ¶ 13; LP Ex. 25 (Devor Report) ¶ 28)

444. FAS 115 establishes the standards of financial accounting and reporting for investments in equity securities with readily determinable fair values. (Def. Ex. E2, FAS 115 ¶ 3) If a security is classified as “available-for-sale,” FAS 115 requires that temporary changes in the fair value of the investment be excluded from earnings and recorded as a separate component of shareholders’ equity. (Def. Ex. E2, FAS 115 ¶ 13) Thus, temporary changes in the fair value of an available-for-sale investment are not recognized on the investor’s income statement. (Def. Ex. E2, FAS 115 ¶ 13; LP Ex. 25, Devor Report ¶ 28)

445. However, FAS 115 mandates that other-than-temporary declines in value be recognized. It states that “an enterprise shall determine whether a decline in fair value below the amortized cost basis is other than temporary.” If the decline in fair value is judged to be “other than temporary,” the cost basis of the individual security must be written-down to fair value and the amount of the write-down is included as a charge to earnings. (Def. Ex. E2, FAS 115 ¶ 16; LP Ex. 25, Devor Report ¶¶ 41, 55) The SEC addressed the meaning of “other than temporary” in Staff Accounting Bulletin No. 59, *Other than Temporary Impairment of Certain Investments in Debt and Equity Securities* (“SAB 59”), and concluded that “other-than-temporary” impairment is not the same as permanent impairment. (Def. Ex. H2, SAB 59)

446. According to SAB 59, market price declines resulting from either “general market conditions” or “specific information pertaining to an industry or an individual company” require further investigation by management. “Acting upon the premise that a write-down may be required, management should consider all available evidence to evaluate the realizable value of its investment.” After management conducts this review, “[u]nless evidence exists to support a

realizable value equal to or greater than the carrying value of the investment, a write-down to fair value accounted for as a realized loss should be recorded.” (Def. Ex. H2, SAB 59.) Thus, SAB 59 mandates an investigation into potential other-than-temporary impairment when a security falls below its carrying value and requires the existence of specific evidence to support a finding that a security’s realizable value is equal to or greater than the carrying value. (Def. Ex. H2, SAB 59; LP Ex. 45 (Dep. Ex. 217), Hot Topic Released by Arthur Andersen, at OMC 0094597-98; LP Ex. 25, Devor Report ¶¶ 43-45)

447. SAB 59 also lists some of the factors that management should consider in its analysis of whether such an impairment is temporary or not:

- a. The length of the time and the extent to which the market value has been less than cost;
- b. The financial condition and near-term prospects of the issuer, including any specific events which may influence the operations of the issuer such as changes in technology that may impair the earnings potential of the investment or the discontinuance of a segment of the business that may affect the future earnings potential; or
- c. The intent and ability of the holder to retain its investment in the issuer for a period of time sufficient to allow for any anticipated recovery in market value.

(Def. Ex. H2, SAB 59)

448. With respect to the time and the extent to which the market value has been less than cost, the SEC staff has established no formal guidelines, but has said that there is a “strong indication” of other-than-temporary impairment when the value of the security is less than its carrying value for a period of six to nine months. (Def. Ex. I2, Minutes of the June 6, 1991 Meeting of the AICPA SEC Regulations Committee)

449. The SEC has stated that one factor to consider is the “intent . . . of the holder to retain its investment in the issuer for a period of time sufficient to allow for any anticipated

recovery in market value.” (Def. Ex. H2, SAB 59.) Accordingly, if a company has decided to sell an available-for-sale security whose fair value is below its carrying value, the inquiry to determine if other-than-temporary impairment has occurred is narrowed to whether the value of the security can be expected to recover prior to the expected time of sale. If “the entity does not expect the fair value of the security to recover prior to the expected time of sale, a write-down for other-than-temporary impairment should be recognized in earnings in the period in which the decision to sell is made.” (LP Ex. 68, Emerging Issues Task Force (“EITF”), Appendix D – Other Technical Matters, No. 44, *Recognition of Other-Than-Temporary Impairment upon the Planned Sale of a Security Whose Cost Exceeds Fair Value* (“EITF D-44”); LP Ex. 25, Devor Report ¶¶ 57, 94)

450. The SEC believes that, in determining the realizable value of a publicly traded security, registrants should begin with its contemporaneous market price as that price reflects the market’s evaluation of the total mix of information. Objective evidence is required to support a realizable value in excess of the contemporaneous market price. (LP Ex. 45, Hot Topic Released by Arthur Andersen, at OMC 0094598; LP Ex. 25, Devor Report ¶ 46) The SEC also requires that a company, making its quarterly determinations pursuant to SAB 59, employ a systematic methodology that includes documentation of the factors considered and the specific rationales and objective evidence supporting the realizable values of securities. (LP Ex. 45, Hot Topic Released by Arthur Andersen, at OMC 0094598; LP Ex. 25, Devor Report ¶ 46)

**B. Omnicom Told Investors That It Monitored its Investments for Other-Than-Temporary Impairment**

451. Defendants repeatedly represented to the public that Omnicom monitored its investments for other-than-temporary impairment on a regular basis as required by GAAP. In its annual report for the year ended December 31, 2000, Omnicom stated that it “periodically

evaluated” its long-term investments in both public and non-public companies “to determine if there have been any non-temporary declines below book value.” (Def. Ex. F1 (Dep. Ex. 244), Omnicom 2000 Form 10-K, at pp. F-7, F-8) Omnicom specifically represented that it had conducted such an evaluation of its investments in Agency.com and the publicly traded companies it recorded on the cost method as of December 31, 2000 and had concluded that there was no other-than-temporary decline in their fair values. (Def. Ex. F1 (Dep. Ex. 244), Omnicom 2000 Form 10-K, at pp. F-14, F-15; Def. Ex. A1 (Dep. Ex. 245), Omnicom 2001 Form 10-K, at p. F-14)

452. In its report for the first quarter of 2001, Omnicom told the public it “continually monitors the value of [its long-term] investments to determine whether an other than temporary impairment has occurred.” (LP Ex. 198 (Dep. Ex. 289), Omnicom 1Q 2001 Form 10-Q, at JD 033922)

453. In its annual report for 2001, Omnicom again stated that it “continually monitors the value of its investments to determine whether an other than temporary impairment has occurred.” (Def. Ex. A1 (Dep. Ex. 245), Omnicom 2001 Form 10-K, at p. 9) Omnicom specified that it “periodically evaluated” its long-term investments in public companies and its cost-based investments in non-public companies to determine if there have been any non-temporary declines below book value. (*Id.* at p. F-7)

**C. Defendants Were Aware That the Value of Omnicom’s E-Service Assets Had Dropped Dramatically by Year-End 2000**

454. At year-end 2000, Omnicom held at least nineteen investments in its Communicade subsidiary. (LP Ex. 59 (Dep. Ex. 177), Jan. 8, 2001 Neumann email with Communicade Portfolio, at OMC 0032987) Included among those assets were at least five

public companies: Agency.com, Organic, Inc., Razorfish Inc., Netcentives Inc., and Answerthink Inc. (*Id.*)

455. As of December 31, 2001, Omnicom carried the E-Service Assets that would later be contributed to Seneca on its books at \$272.5 million. The true value of the assets on that date was approximately \$163 million, resulting in a valuation overstatement of \$109.5 million. (LP Ex. 42, May Report at pp. I-4, I-5, II-10, II-11, VIII-63)

456. The majority of this overstatement in value resulted from the inflated values attributed to the publicly-traded E-Service Assets. The fair value of all of these companies had fallen far below Omnicom's adjusted cost basis. The following chart compares book value and market value of Omnicom's public company investments at year-end 2000:

<b>Company</b>	<b>Omnicom's Book Value</b>	<b>Market Value on 12/29/2000</b>	<b>Amount of Impairment (%)</b>
Agency	\$74,087,278	\$57,196,077	\$16,891,201 (23%)
Organic	\$38,359,000	\$12,417,520	\$25,941,480 (68%)
Razorfish	\$27,040,402	\$19,364,582	\$7,675,820 (28%)
Answerthink	\$17,239,681	\$3,002,707	\$14,236,974 (83%)
Netcentives	\$10,987,732	\$1,831,289	\$9,156,443 (83%)
L90	\$1,882,827	\$1,675,044	\$207,783 (11%)
<b>Total</b>	<b>\$169,596,920</b>	<b>\$95,487,219</b>	<b>\$74,109,701 (44%)</b>

All values shown above for Omnicom's book value and the investments' market value, with the exception of the book value for Organic, are taken from a contemporaneous record of Communicade's portfolio prepared by Jerry Neumann, the CFO of Communicade, and sent to Defendant Angelastro. (LP Ex. 59 (Dep. Ex. 177), Communicade Portfolio as of Dec. 29, 2000, at OMC 0032987)

457. The same or similar values also appear in a version of the Communicade portfolio provided to Arthur Andersen in February 2001 (LP Ex. 136 (Dep. Ex. 169), at AA 0016760) and

on an Omnicom spreadsheet labeled “Unrealized Gain/Loss on Available-for-Sale Securities – Quarter Ended Dec. 31, 2000” (LP Ex. 53, OMC 0093047-48)

458. At year-end 2000, Omnicom’s investments in Netcentives Inc. and Answerthink Inc. were severely impaired. The investments had been trading below Omnicom’s cost basis since April 2000. They had lost \$23 million in value, or 80 percent of their cost. The loss on the Answerthink investment was \$14.2 million and the loss on the Netcentives investment was \$9.2 million. (LP Ex. 59 (Dep. Ex. 177) at OMC 0032987; LP Ex. 308 (Dep. Ex. 322); LP Ex. 2 (Dep. Ex. 170) at OMC 0087786, 90; LP Ex. 63, Castellaneta Tr. 51:7-54:1)

459. Defendants closely monitored the market prices and general financial conditions of the public E-Service Assets and were aware of these impairments. Angelastro received numerous, regularly updated portfolios showing the cost basis and market value of Communicade’s public companies. (LP Ex. 83 (Dep. Ex. 176), Communicade Portfolio as of March 27, 2000, at OMC 0033263; LP Ex. 309, Collection of Feb. and March 2001 Communicade Portfolios, Dep. Exs. 219, 220, 221, 222, 223, & 81)

460. Wren was generally aware of the stock price trends of the public E-Service Assets. (LP Ex. 143, Wren Tr. 201:11-23)

461. A January 4, 2001 memo to Weisenburger and Profusek refers to “recent discussions that we have had” regarding accounting for declines in the fair value of investments classified as available-for-sale that are ‘other than temporary.’” (LP Ex. 310 (Dep. Ex. 263) at OMC 0107530)

462. Weisenburger as CFO and Angelastro as Controller were principally responsible for Omnicom’s financial reporting.

463. In February 2001, Andersen noted Wren's "unusual" interest in determining Omnicom's accounting methods and his participation in all significant financial and accounting meetings between Weisenburger and Andersen. (LP Ex. 311 (Dep. Ex. 120), Andersen Memo to Files, dated December 1, 2000 and updated February 14, 2001, at AA 0016668)

464. Omnicom also owned stock in a number of privately-held E-Services companies at year-end 2000. Among Communicade's private E-Services Assets were holdings in Dash.com, ReplayTV and LiveTech. Omnicom's cost bases for these assets were \$15.2 million for Dash, \$3.1 million for ReplayTV, and \$12.5 million for LiveTech – a total of \$30.8 million. (LP Ex. 42, Revised May Expert Report, at p. I-4)

465. On November 17, 2000, Weisenburger received materials from Dash.com CEO Daniel Kaufman which contemplated a major restructuring. (LP Ex.. 312 (Dep. Ex. 449)) The restructuring was apparently a matter of some urgency. Weisenburger wrote Neumann: "Let's discuss this ASAP. They want to do something this week." (*Id.* at OMC 0066722) A few days later, in a November 21 email, Kaufman told Weisenburger: "Time is of the essence since we are burning \$50,000 per day currently!" (LP Ex.. 313 at OMC 0090381) Weisenburger received board materials for a December 11, 2000 Dash.com board meeting which stated that "Dash's key markets" have "deteriorated significantly in the past few months," raised doubts about Dash.com's ability to raise additional capital, and proposed plans to lay off either 57 percent or 70 percent of the company's employees. (LP Ex. 314, email with Dash Board of Directors materials, OMC 0090336-42 at 38, 40-42) By January 2001, Weisenburger was aware that Dash was considering liquidation due to its existing contingent liabilities. (LP Ex. 160, OMC 0005130-31, at 30; LP Ex. 180, OMC 0005108-11, at 10)

466. On November 17, 2000, Neumann received an email from Craig Dougherty, ReplayTV CFO, attaching ReplayTV's third quarter 2000 financial statements. (LP Ex. 315, OMC 0066711-13, at 11) ReplayTV's Statement of Operations showed a net loss of over \$45 million. (*Id.* at OMC 0066712) By November 27, Neumann also knew, from speaking to Dougherty, that ReplayTV was attempting to sell the company after failing to raise financing, and he so informed Weisenburger, Angelastro, Profusek and Redditt, as well as attorneys at Jones Day. (LP Ex. 316, OMC 0089199-200) Further, Omnicom was aware that the company would not likely sell for an amount that would allow Omnicom to recover its \$3 million investment. (*Id.* at OMC 0089199 (on November 17, Neumann is "hopeful" ReplayTV can sell itself for more than \$187 million, which would give Omnicom its investment back as liquidation preference); LP Ex. 317, OMC 0089201 (on November 28, Neumann revised that figure to \$172 million, but also advised Weisenburger, Angelastro, Profusek and Redditt that the company would lay off half its workforce and had only enough cash to "get them to early March"); LP Ex. 138, JD 013966-67 (Jones Day received information that a prospective buyer valued the company at "between 120 million and \$135 million"))

467. On October 11, 2000, Weisenburger and Profusek, as well as Allen Chi, who worked for Weisenburger, received word from LiveTech that, "as a heads up to the board," October expenses had used up "the first transfer of money" and "the next injection of funds will be necessary to cover the November expenses." (LP Ex. 319, OMC 0092596-98, at 97; LP Ex. 114, Neumann Tr. 89:2-16 (identifying Chi)) Two days later, after getting more information from LiveTech, Chi told Weisenburger that the company was "out of money." (LP Ex. 319, OMC 0092596-98, at 96) On November 16, 2000, Neumann told Castellaneta: "I think Live Tech will result in a loss for us . . . ." (LP Ex. 320, OMC 0062446-47 at 46 (email string

concerning “Communicade Transfers”)) On December 19, 2000, Chi received financial projections for year-end 2000 from Live Technology, which showed a negative EBITDA of over \$428,000 for the fiscal year. (LP Ex. 321, OMC 0090246-274, at 48, 50) By January 14, 2001, Weisenburger was telling a Live Technology creditor that “[t]he company is fighting to stay a live [sic].” (LP Ex. 178, OMC 0104465)

468. Despite Defendants’ knowledge of the above facts regarding Dash.com, ReplayTV, and LiveTech, they refused to perform an adequate and documented analysis of whether any of the private E-Services Assets were other-than-temporarily impaired.

469. There is no evidence that Defendants told Andersen any of the facts set forth in ¶¶ 433-436, *supra*.

### **III. THE CHAUCER TRANSACTION**

470. SEC guidelines indicate that, if an asset has been substantially below cost for six to nine months, that is a strong indication that the asset is other than temporarily impaired and should be written down to its fair market value. (LP Ex. 45 (Dep. Ex. 217) at OMC 0094594) At year-end 2000, Netcentives and Answerthink had been impaired for nine months. (*See* ¶ 421, *supra*)

471. Omnicom was required to write down Answerthink and Netcentives to their fair market value. (LP Ex. 25, Devor Report ¶¶ 59-62) By year-end 2000, Answerthink and Netcentives had lost 80% of their value to Omnicom. (LP Ex. 2 (Dep. Ex. 170), Trading price chart, at OMC 0087784-86, 0087788-90; LP Ex. 59 (Dep. Ex. 177), Communicade portfolio spreadsheet, at OMC 0032987; LP Ex. 308 (Dep. Ex. 322), February 15, 2001 Andersen memo; LP Ex. 63, Castellaneta Tr. 51:7-54:1)

472. If Omnicom had recorded the “other than temporary” impairment expense of \$23 million for Answerthink and Netcentives, Omnicom’s net income and Diluted EPS for the year

ended December 31, 2000 would have been reduced, respectively, by \$13.9 million (2.8%) and \$0.07 per share (2.6%) (LP Ex. 25, Devor Report ¶ 62; LP Ex. 308 (Dep. Ex. 322)) Because Omnicom's announced results exceeded Wall Street consensus expectations by only \$0.02 per share, this would have caused Omnicom to miss the consensus Wall Street estimate. (LP Ex. 322 (Dep. Ex. 395), Merrill Lynch Feb. 20, 2001 analyst report; LP Ex. 323 (Dep. Ex. 397), SSB Feb. 20, 2001 analyst report)

473. At the time, missing Wall Street earnings expectations could be expected to cause a significant drop in a company's stock price. For example, when Omnicom's fellow advertising conglomerate, the Interpublic Group, took a \$160.1 million writedown of an interactive investment in the first quarter of 2001, *Advertising Age* reported as follows: "Wall Street moved quickly to punish Interpublic. Several analysts cut their earnings estimates for the year. Interpublic stock dropped April 27; at mid-afternoon, it traded at \$32.50, down 10% and near its 52-week low." (LP Ex. 324, *Advertising Age*, April 30, 2001)

474. A write-down of Dash.com, ReplayTV, and LiveTech would have resulted in an additional loss of up to \$30.750 million. (LP Ex. 59 (Dep. Ex. 177))

475. In order to avoid recording the losses resulting from a write-down of Netcentives and Answerthink, as well as Dash.com, ReplayTV, and LiveTech, and the consequent hit to Omnicom's year-end 2000 earnings, Omnicom dumped Netcentives and Answerthink into a separate entity called Chaucer Investments LLC ("Chaucer") by means of a fraudulent "sale" of those assets to Chaucer, as described below.

476. Omnicom entered into an agreement dated December 29, 2000 – the last business day of the year – to sell Chaucer its interests in Netcentives, Answerthink, L90 (another publicly-held asset in Communicade), Dash.com, ReplayTV, LiveTech and Headhunter, an investment

held by an Omnicom subsidiary, Bernard Hodes Group. (LP Ex. 325 (Dep. Ex. 272)) The agreement, however, would not be finalized and executed until February 2001, although the securities transfer agreement remained dated December 29, 2000. (*See* ¶ 488 *et seq.*, *infra*)

477. Chaucer's president, Thomas Campbell, and Weisenburger had worked together at the investment bank Wasserstein Perella. (LP Ex. 185, Campbell Tr. 26:15-27:8; LP Ex. 186, Weisenburger Tr. 25:2-26:10) Campbell participated in numerous transactions with Omnicom. LP Ex. 326 (Dep. Ex. 325); LP Ex. 186, Weisenburger Tr. 28:2-12, 34:4-15, 35:8-38:15, 38:23-39:5, 40:3-8; LP Ex. 185, Campbell Tr. 22:17-23, 23:10-21, 137:13-25, 144:7-146:19, 155:19-158:20; 163:10-165:2 179:2-180:8; LP Ex. 327 (Dep. Ex. 326)) Andersen identified Chaucer as an "associate" of Weisenburger. (LP Ex. 412 (Dep. Ex. 122) at AA 0019038)

478. Chaucer, a subsidiary of Highland Investments LLC, was controlled by Campbell, as were all the Highland entities. Campbell employed an assistant, Carol Hall. The law firm Jones Day filed formation papers for Chaucer, then known as BVI Investment Holdings, in May, 2000, and changed the name to Chaucer shortly thereafter. (LP Ex. 326 (Dep. Ex. 325); LP Ex. 330 (Dep. Ex. 473) at ML 001702, 001710, 001712, 001714; LP Ex. 185, Campbell Tr. 25:13-21)

479. Chaucer established a Merrill Lynch brokerage account in July 2000. (LP Ex. 328 (Dep. Ex. 435) (showing July 11, 2000 tracking date))

480. Also in July 2000, Omnicom received 5,827,400 shares of Headhunter stock as a result of a merger between Headhunter and Career Mosaic, an Omnicom investment. (LP Ex. 331 (Dep. Ex. 442) at JD 050865-66)

481. In July 2000, Chaucer began to engage in short sale transactions in the shares of Headhunter. Omnicom's Communicade subsidiary kept a spreadsheet record of these

transactions. On at least one occasion, Weisenburger received a copy of this spreadsheet from Communicade CFO Jerry Neumann and sent it on to Campbell's assistant, Carol Hall. (LP Ex. 332 (Dep. Ex. 242))

482. In or around fall 2000, Weisenburger and Campbell began to negotiate the sale of several internet investments from Omnicom to Chaucer, which became known as the Chaucer "basket sale." (LP Ex. 185, Campbell Tr. 47:14-48:12; LP Ex. 104, Weisenburger Tr. 55:16-56:5; LP Ex. 333 (Dep. Ex. 168))

483. In the original basket sale agreement, Omnicom, through its wholly-owned subsidiary Communicade, would sell a "basket" of seven internet assets to Chaucer for \$85.6 million, which was approximately Omnicom's book basis for the assets. The assets included were Omnicom's stakes in four publicly traded companies: Headhunter (the 5,827,400 shares received in July), Netcentives, Answerthink, and L90, and Omnicom's preferred stock interests in three private companies: Dash.com, Live Technology, and ReplayTV, representing nearly \$30.8 million of the purchase price. All but the Headhunter stake were held by the Communicade Investment Company of Nevada ("CICN") (LP Ex. 325 (Dep. Ex. 272) at JD\_050602, 611-13; LP Ex. 334, at JD\_038211; LP Ex. 59 (Dep. Ex. 177) at OMC 0032987); LP Ex. 308 (Dep. Ex. 322); LP Ex. 2 (Dep. Ex. 170) at OMC 0087786, 0087790; LP 63, Castellaneta Tr. 46-49, 51-54)

484. The agreement, dated December 29, 2000, the last business day of the year, was executed by Campbell for Chaucer, by Neumann for CICN, a subsidiary of Communicade, and, for the Headhunter shares, by Weisenburger on behalf of Bernard Hodes Group ("BHG") (LP Ex. 325 (Dep. Ex. 272) at JD 050602, 11-12; LP Ex. 186, Weisenburger Tr. 59:7-21); LP Ex. 114, Neumann Tr. 233:11-16; LP Ex. 185, Campbell Tr. 43:8-11; LP Ex. 84)

485. Tierney knew nothing about CICN other than that it existed. (LP Ex. 36, Tierney Tr. 101:16-104:1)

486. Neumann executed the basket sale agreement without the knowledge of Tierney. (LP Ex. 36, Tierney Tr. 150:2-13, 151:7-24; LP Ex. 114, Neumann Tr. 233:11-16)

487. On the same day, December 29, 2000, Weisenburger, on behalf of Omnicom, removed the BHG board of directors, named himself sole director and appointed himself executive vice president. He then executed the basket sale agreement on behalf of BHG. He then immediately fired himself as executive vice president, removed himself as director, and reinstated the BHG board. (LP Ex. 331 (Dep. Ex. 442) at JD\_050888-892; LP Ex. 325 (Dep. Ex. 272, at JD 050612))

488. The terms of the basket sale were changed on or about February 9, 2001, removing the private companies from the sale, calling for staggered sales of the Headhunter shares, and reducing the total price to \$52.4 million. (LP Ex. 335 (Dep. Ex. 434); LP Ex. 308 (Dep. Ex. 322)) Chaucer agreed to pay a total of \$31.1 million for Netcentives, Answerthink and L90, and the first portion of Headhunter stock. \$4.4 million of the purchase price was allocated to the Headhunter shares, leaving \$26.6 million to be allocated to the Communicade assets. (LP Ex. 336 (Dep. Ex. 268), Communicade basket sale charts, dated February 9, 2001)

489. The final amended agreement, however, was backdated to December 29, 2000. (LP Ex. 337, (Dep. Ex. 273))

490. A memo by Communicade CFO Jerry Neumann and Omnicom assistant controller Andrew Castellaneta stated that the transaction was expected to close mid-February, 2001. In fact, as discussed in ¶ 442, *supra*, Chaucer began selling shares of Headhunter in July, 2000, long before the purported February 2001 closing date. (LP Ex. 333 (Dep. Ex. 168); LP

Ex. 44 (Dep. Ex.262); LP Ex. 339 (Dep. Ex. 265); LP Ex. 52 (Dep. Ex. 320); LP Ex. 340 (Dep. Ex. 321))

491. Omnicom represented to Arthur Andersen that the removal of the private companies from the “basket” was the result of due diligence. However, the original December 29, 2000 agreement contained an explicit representation that Chaucer had already performed all the due diligence it required. (LP Ex. 325 (Dep. Ex. 272) at JD\_050605; LP Exs. 333 (Dep. Exs. 168))

492. Another reason Omnicom cited for the revised basket sale agreement involved restrictions on its ability to sell Headhunter shares, which would be triggered under a shareholders’ rights plan if it sold more than 15% of the shares to a third party. Omnicom had disclosed its desire to sell its Headhunter stake in July, 2000, after Omnicom received the shares in a merger. As discussed in paragraph 444, *supra*, Chaucer began to conduct transactions in Headhunter at this time. (LP Ex. 333 (Dep. Ex. 168); LP Ex. 143, Wren Tr. 222:8-223:17; LP Ex.331 (Dep. Ex. 442, Headhunter 13-D, dated 7/19/00)

493. Simultaneously with the amendment of the agreement, is the first mention of an option. The option agreement provided that Chaucer would pay \$4 million for the right to purchase 4 million Omnicom shares, approximately 2.3 percent of Omnicom’s outstanding shares, at \$82.00 per share, the purported closing price of Omnicom shares on December 29, 2000. (LP Ex. 343 (Dep. Ex. 241))

494. However, the option agreement was backdated to December 29, 2000. An analysis of the computer metadata for the document shows that it was produced on the computer of Sandy Feuchtwanger, assistant to Profusek, and that it was created on February 5, 2001 and printed on February 9, 2001. (LP Ex. 344 (Dep. Ex. 432); LP Ex. 345 (Dep. Ex. 433); LP Ex.

347, (Dep. Ex. 501), Expert Report of John B. McElhatton ¶¶ 15-19 Exs. 3-5) In addition, the option is not referenced in the original basket sale agreement dated December 29 and does not appear in the closing binder for same. (LP Ex. 325 (Dep. Ex. 272); LP Ex. 331 (Dep. Ex. 442)) Moreover, a memo by Castellaneta and Neumann concerning the deal does not mention the option's appearance until February 8. (LP Ex. 333 (Dep. Ex.168)), and Andersen does not mention the option until after receiving that memo. (LP Ex. 338 (Dep. Ex. 124))

495. On February 8, 2001, Omnicom's share price was \$89.66 per share. (LP Ex. 120 (Dep. Ex. 269)) This gave the option an immediate "in the money" value of \$26.6 million, net of the \$4 million cost of the option. Chaucer had agreed to pay Omnicom \$26.6 million for Netcentives, Answerthink and L90. (See ¶ 451, *supra*) Thus, Omnicom actually suffered a loss of \$30.1 million, the combined book value of the three assets, as a result of the transaction. (LP Ex. 336 (Dep. Ex. 268), Communicade basket sale charts, dated February 9, 2001)

496. The option, by its terms, was not exercisable until an "Initial Closing." The Initial Closing was defined in the basket sale agreement as a \$31.1 million payment by Chaucer and Omnicom's delivery to Chaucer of 1 million Headhunter shares and the shares of the other three companies. (LP Ex. 343 (Dep. Ex. 241) at AA 0027852; LP Ex. 337 (Dep. Ex. 273) at JD 050589-90, 050592-93; LP Ex. 348 at OMC 0113801; LP Ex. 336 (Dep. Ex. 268)

497. The stock transfers took place between February 21 and March 13, 2001. (LP Ex. 349 (Dep. Ex. 437))

498. The Initial Closing did not take place until March 20, 2001, when Chaucer made the required payment of \$31.1 million. (LP Ex. 237, Defendants' Responses to Plaintiffs' Requests for Admissions ¶ 30; LP Ex. 350 (Dep. Ex. 439) at ML 0000514) That was the day the option was first exercisable. However, the option exercise was dated – *i.e.*, backdated – to

February 22, 2001 at the February 21, 2001 closing price of \$94.30 per share. A March 16, 2001 memo from Profusek to Angelastro transmitted the option exercise, purportedly dated February 22, 2001. (LP Ex. 351 (Dep. Ex. 440)) Notification did not occur until March 20, 2001. (LP Ex. 361, OMC 0113742) On February 20, 2001, Omnicom announced its fourth quarter and year-end 2000 results, including an 18 percent increase in earnings per share of \$0.78 per share in 2000 from \$0.66 per share in 1999, beating Wall Street's expectations by two cents per share. (LP Ex. 352, Omnicom Press Release dated February 20, 2001, OMC 0032150-53); LP Ex. 322 (Dep. Ex. 395), Merrill Lynch February 20, 2001 analyst report; LP Ex. 323 (Dep. Ex. 397, SSB February 20, 2001 analyst report)) The announcement marked Omnicom's twenty-sixth consecutive earnings surprise (LP Ex. 322 (Dep. Ex. 395); LP Ex. 323, (Dep. Ex. 397)) and its thirty-eighth consecutive quarter of year-over-year growth in revenue and earnings. (LP Ex. 353, "Omnicom Group Announces Fourth Quarter Results," *Business Wire*, February 20, 2001)

499. The purported date of Chaucer's option exercise – February 22, 2001 – came two days after Omnicom issued a positive earnings release that drove the stock price from \$88.75 to \$94.510. Omnicom, paid Chaucer an amount, \$49.2 million, predicated on Omnicom's February 21, 2001 stock price of \$94.30. Chaucer, therefore, received value on the option from Omnicom in the amount of \$49.2 million, giving Chaucer a \$45.2 million profit, net of the \$4 million option purchase price. Omnicom's \$49.2 million payment was exchanged simultaneously with Chaucer's \$31.1 million initial payment on March 20, 2001. LP Ex. 120 (Dep. Ex. 269); LP Ex. 327 (Dep. Ex. 326) at OMC 0005739; LP Ex. 350 (Dep. Ex. 439) at ML 0000495, 0000514; LP Ex. 351 (Dep. Ex. 440); LP Ex. 237, Defendants' Responses to Plaintiff's Requests for Admissions ¶ 31; LP Ex. 352, OMC 0032150-53)

500. On April 2, 2001, Chaucer received one million Headhunter shares. (LP Ex. 354, ML 0000521-604 at 543, 578)

501. On April 20, 2001, Chaucer received 721,343 shares of L90. (LP Ex. 354, ML 0000521-604, at 562, 592)

502. On May 1, 2001, Chaucer wired Omnicom the \$4 million payment for the option. (LP Ex. 355, ML 0000605-742, at 693, 695; LP Ex. 356, OMC 0113704-08)

503. On May 2, 2001, Omnicom transferred another 2 million Headhunter shares to Chaucer pursuant to the basket sale agreement. (LP Ex. 357 (Dep. Ex. 441))

504. Also on May 2, 2001, Chaucer paid \$2 million to Omnicom to extend the termination date of the “basket sale” agreement from June 30, 2001 to December 31, 2001, thereby giving Chaucer additional time to purchase the remaining Headhunter shares. (LP Ex. 357 (Dep. Ex. 441) at p. 3; LP Ex. 358 (Dep. Ex. 443) at OMC 0113795) However, Chaucer received nothing for its \$2 million, because Omnicom sold the shares to another buyer. (LP Ex. 359, Headhunter Schedule 14D-9, filed August 24, 2001)

505. Also on May 2, 2001, Omnicom disclosed that it had sold 1 million Headhunter shares to a “third party” other than Chaucer, but did not disclose that the third party was the Altus One Fund, Inc., a purportedly charitable organization controlled by Omnicom CFO Weisenburger. An additional 1 million Headhunter shares were sold to an unnamed buyer other than Chaucer in June 2001, leaving Omnicom with 928,500 Headhunter shares. (LP Ex. 237, Defendants’ Admissions ¶¶ 19-20; LP Ex. 357 (Dep. Ex. 441) at 3; LP Ex. 358 (Dep. Ex. 443), OMC 0113794; LP Ex. 104, Weisenburger Tr. 12:8-16)

506. Omnicom's failure to properly account for and disclose the Chaucer transaction rendered its financial statements for the year-ended 2000 and for the first quarter ended March 31, 2001, materially false and misleading. (LP Ex. 25, Devor Report ¶¶ 53, 76-78)

507. As it had planned, Omnicom reported a \$3.5 million loss on the Chaucer transaction in its Schedule 10-Q for the first quarter of 2001, ended March 31, 2001. The first quarter 10-Q was filed on May 14, 2001. (LP Ex. 333 (Dep. Ex. 168) at AA 0031954; LP Ex. 198 (Dep. Ex. 289) at JD 033916) Since Omnicom effectively paid Chaucer \$45.2 million for the option (see ¶ 462, *supra*), it actually sustained a loss of \$48.7 million.

508. Since Omnicom had the "intent to sell" certain of its internet assets, some of which had suffered declines below Omnicom's book value on or before the December 29, 2000 date of the Chaucer securities transfer agreement, Omnicom was required to write down those assets' value at December 31, 2000 in accordance with GAAP. (LP Ex. 25, Devor Report ¶¶ 54-61; LP Ex. 337 (Dep. Ex. 237), Castellaneta Tr. 22:25-23:14, 40:3-21; LP Ex. 2 (Dep. Ex. 170), at OMC 0087784-91; LP Ex. 308 (Dep. Ex. 322))

509. By backdating an option, Omnicom arranged to give Chaucer the money to purchase the assets. (LP Ex. 24, Atkins Report at p. 24)

510. Because Defendants knew the option was priced too low and was already worth \$26.6 million, Omnicom was required to take a loss on the transaction. Had it done so, Omnicom's first quarter 2001 reported net income and Diluted EPS would have been reduced by \$20.1 million, or \$0.11 (21.2%) per share, respectively, solely with respect to the option grant. (LP Ex. 25, Devor Report ¶¶ 74-75)

511. Omnicom did not account for the option in its earnings, but rather simply showed it as a reduction in shareholders' equity in Omnicom's 2001 Form 10-K, without disclosing the

reason for the reduction. Weisenburger signed that Form 10-K. LP Ex. 362 (Dep. Ex. 245) at OMC 0011040, 0011044; LP Ex. 25, Devor Report ¶ 72; LP Ex. 186, Weisenburger Tr. 82:11-83:13)

512. By engaging in the Chaucer transaction, and failing to properly account for or disclose its losses, Omnicom was able to exceed Wall Street earnings per share estimates by 2 cents per share at year-end 2000 and by 1 cent per share for the first quarter of 2001. (LP Ex. 322, Merrill Lynch report, dated 2/20/01; LP Ex. 363, Merrill Lynch report, dated 4/24/01; LP Ex. 24, Atkins Report at p. 26)

513. The Chaucer transaction was not commercially reasonable or negotiated at arms length. (LP Ex. 24, Atkins Report at pp. 26-27; LP Ex. 25, Devor Report ¶¶ 79-84)

514. Campbell and Weisenburger shared confidential internal information concerning their transactions, including the Chaucer basket sale and option. Communicade/Seneca kept a spreadsheet recording Chaucer transactions in Headhunter stock. Neither then-Communicade CFO Neumann nor Weisenburger was able to recall the purpose of the spreadsheet.

Weisenburger claimed not to remember why he would have received the “expense summary/cash statement 7/31/02” from Campbell’s assistant Carol Hall on August 2, 2002. However, that chart showed him that Omnicom paid Chaucer \$49.2 million for the option. (LP Ex. 332 (Dep. Ex. 242); LP Ex. 327 (Dep. Ex. 326); LP Ex. 114 Neumann Dep. at 237:9-238:2; LP Ex. 186, Weisenburger Tr. 43:25-44:25, 98:24-101:17)

515. Both Weisenburger and Angelastro, the two Omnicom officers primarily responsible for reporting Omnicom’s financial results, testified they could not recall what Omnicom’s motivation was for the Chaucer transaction. (LP Ex. 186, Weisenburger Tr. 55:15-56:5, 87:18-22; LP Ex. 84, Angelastro Tr. 37:10-12; LP Ex. 185, Campbell Tr. 47:22-48:2)

516. The Omnicom Board of Directors did not approve the Chaucer transaction although Board approval was required for any divestiture over \$50 million and neither Weisenburger, nor any other single Omnicom officer, had the authority to issue an option with a value in excess of \$10 million without Board approval. Board chairman Bruce Crawford testified he was not aware of the Chaucer entity, the sale of securities to Chaucer, or the option agreement. Omnicom Audit Committee Chairman Robert Callander testified he had never heard of the Chaucer entity and did not recall being informed of the sale of securities to Chaucer in early 2001. (LP Ex. 104, Weisenburger Tr. 258:8-10; LP Ex. 192, Crawford Tr. 80:21-25, 82:10-20, 86:19-25, 161:22-162:19; LP Ex. 130, Callander Tr. 167:22-168:11; LP Ex. 364 (Dep. Ex. 398) at OMC 0113808)

517. In the end, Chaucer agreed to pay Omnicom \$31.1 million for assets worth much less. He was more than compensated by the option, however. Chaucer reaped a \$28 million profit on the deal. (LP Ex. 349 (Dep. Ex. 437); LP Ex. 2 (Dep. Ex. 170) at OMC 0087786, 0087790; LP Ex. 120 (Dep. Ex. 269); LP Ex. 185, Campbell Tr. 58:5-18; LP Ex. 24, Atkins Report at p. 26)

518. It is also unusual that Campbell did not have independent legal representation for the Chaucer transaction despite it being a \$54 million deal. Instead, he orally agreed to a deal and let Jones Day -- Omnicom's counsel -- **[fill in the specifics]**. (LP Ex. 185, Campbell Tr. 16:13-17:7, 180:19-181:20; LP Ex. 365 (Dep. Ex. 482); LP Ex. 366, Hall Tr. 17:24-18:9; 68:22-69:6; LP Ex. 367 at TC 000001; LP Ex. 330 (Dep. Ex. 473) at ML 0001702, 001710, 001712, 001714)

519. On June 12, 2002, Merrill Lynch issued a report which stated that the June 12, 2002 Wall Street Journal article about Omnicom suggested that Seneca was formed to avoid a

write-down, “though OMC did capture losses of at least \$3.5MM in the first six months of 2001 associated with these results.” (LP Ex. 368 (Dep. Ex. 405) at p. 1)

520. On June 19, 2002, Merrill Lynch issued a report about a dinner Merrill Lynch hosted for Omnicom management and investors which stated, in the middle of a long paragraph about an “at length” discussion of Seneca, that “[s]ome of the businesses in which OMC had stakes did not want to be part of Seneca and as such OMC sold those stakes taking a \$3.5MM charge in Q1’01.” (LP Ex. 369, OMC 0089693-94, at 693) There is no evidence that any of the businesses referred to ever said to anyone that they “did not want to be a part of Seneca.”

#### **IV. THE ORGANIC STOCK PARKING ARRANGEMENT**

521. The Organic Parking Transaction involved the undisclosed transfer of a significant portion of Omnicom’s investment in Organic to entities controlled by Defendants Weisenburger and Wren, allowing Omnicom to claim its ownership of Organic was below the 20% threshold for equity method accounting. This arrangement allowed Omnicom to avoid reporting its share of the substantial losses incurred by Organic in 2000 and early 2001. (LP Ex. 24, Atkins Report, at pp. 15-19; LP Ex. 25, Devor Report ¶¶ 24-33)

##### **B. Use of Cost or Equity Accounting Under GAAP**

522. Under GAAP, if Omnicom could exercise “significant control” over the operating and financial policies of Organic, Omnicom would have had to account for Organic under the equity method. This means Omnicom would have to take its proportional share of Organic’s earnings or losses into its own income statement. (Def. Ex. F2 (Dep. Ex. 523), Accounting Principles Board Opinion No. 18, *The Equity Method of Accounting for Investments in Common Stock* (“APB 18”), ¶¶ 6, 10, 17; LP. Ex. 25, Devor Report ¶¶ 25-28.) Investors who own more than 20% of the voting stock of a company are presumed to exercise “significant influence” and

required to account for the investment under the equity method. (Def. Ex. F2, APB 18 ¶ 17; LP Ex. 25, Devor Report ¶ 25; LP Ex. 82, Holder Report ¶¶ 77, 89)

523. If Omnicom could not exercise “significant control” over the operating and financial policies of Organic, then Omnicom would not have to include any of Organic’s earnings or losses into its own income statement. Instead, Omnicom could carry the investment as a cost-based investment. (Def. Ex. F2, APB 18 ¶¶ 6(a), 7; Def. Ex. E2 (Dep. Ex. 292), FAS 115, *Accounting for Certain Investments in Debt and Equity Securities* (“FAS 115”) ¶ 13; LP Ex. 25, Devor Report ¶ 28)

524. The general rule requiring equity accounting for 20% investments is a presumption that can be overcome in either direction. The equity method should be used even when an investor does not own 20% of the voting stock of an investee, if the investor can exercise significant influence over the operating and financial policies of the investee through other means. (Def. Ex. F2, APB 18 ¶ 17; LP Ex. 25, Devor Report ¶ 25; LP Ex. 138 (Dep. Ex. 123), Haverty-Stacke memo re cost or equity accounting, at AA 0019095)

525. The presumption that 20% ownership requires equity accounting may be overcome, but stands unless there is “predominant evidence to the contrary.” (LP Ex. 375, Financial Accounting Standards Board Interpretation No. 35, *Criteria for Applying the Equity Method of Accounting for Investments in Common Stock* (“FIN 35”) ¶ 3; LP Ex. 25, Devor Report ¶ 25.)

526. Defendants and other Omnicom officers were aware of the rule that 20% ownership would trigger a presumption of significant influence and were conscious its effect on equity or cost accounting. (LP Ex. 370, Collection of emails on 20% rule, SUBP 00109647, SUBP 00043684-86, SUBP 00083435, SUBP 00043639-41)

527. Defendant Angelastro, Omnicom's chief accounting officer, paid attention to ownership percentages to ensure Omnicom remained under the 20% presumption threshold; and Communicade CFO Gerald Neumann referred to him as "Phil '19.8%' Angelastro" for his close attention to this issue. (LP Ex. 371, Emails re Ntercept, OMC 0062469; LP Ex. 372 (Dep. Ex. 391), Emails re Oyster Equity Method, at OMC 0093546)

528. Andersen noted this was an issue with Omnicom and made numerous inquiries to determine whether Omnicom was correctly accounting for its E-Service Assets under the cost or equity methods. (LP Ex. 373 (Dep. Ex. 319), June 30, 2000 Press Release Sign Off Meeting, at AA 0008286; LP Ex. 374, Collection of Haverty-Stacke memos re Accounting for Equity Investments, OMC 0110288-90, OMC 0110322-25; LP Ex. 138 (Dep. Ex. 123), Haverty-Stacke memo re Cost or Equity Accounting, at AA 0019095; LP Ex. 340 (Dep. Ex. 321), Andersen Full Scope Audit of Communicade, at AA 0022770, 72-73; LP Ex. 44, Def. Ex. 44 (Dep. Ex. 262), Communicade 2000 Internal Audit Review, at AA 0018533, 35)

529. With respect to several of the private E-Service Assets, Omnicom sought to limit its rights through amendments of the respective shareholder agreements so that they would no longer possess voting power or board representation greater than 20%. (Def. Ex. M2 (Dep. Ex. 262), Communicade 2000 Internal Audit Review, at AA 0018533, 35)

530. In the case of Oyster Partners, Omnicom pushed through an amendment to the stockholders agreement on the last day of 2000, making any stock it owned above 18% nonvoting. (LP Ex. 376, Neumann email re Oyster Equity Method, OMC 0093552; LP Ex. 372 (Dep. Ex. 391), emails re Oyster Equity Method, at OMC 0093546) This amendment to its voting rights came just after Omnicom was informed that Oyster had lost its largest client and would likely report a loss for the quarter. (LP Ex. 377, Emails re Oyster Urgent Business

Update, OMC 0067264-65; LP Ex. 376, Neumann email re Oyster Equity Method, OMC 0093552; LP Ex. 372 (Dep. Ex. 391), emails re Oyster Equity Method, at OMC 0093546)

531. In late 2000, Omnicom also reduced its contractual rights to board representation in several other cost investments – Healthology, e-Medicine, and MediaSpace – to avoid holding more than 20% of the board votes. (LP Ex. 378, Collection of Amendments to Stockholder Agreements, OMC 0093887-92, SUBP 00130031, SUBP 00092859.)

532. In late 2000, Healthology, e-Medicine and MediaSpace were each losing money. (LP Ex. 379, Healthology Statement of Operations for year ended Dec. 31, 2000, MD 03614; LP Ex. 157, Minutes of Jan. 24, 2001 Healthology board meeting; LP Ex. 380, E-Medicine Income Statement for 9 months ended Dec. 31, 2000, SUBP 00103140; LP Ex. 381, MediaSpace Statement of Operations as Nov. 30, 2000, MS 0626; LP Ex. 382, Media Space Statement of Operations for year ended Dec. 31, 2000, MD 03103)

**C. Omnicom Transfers Organic Shares to Weisenburger and Wren**

533. Organic was a private company prior to its February 9, 2000 initial public offering. (LP Ex.383, Organic Prospectus, dated Feb. 9, 2000)

534. As of late 1999 and early 2000, Organic had a history of significant losses, which was specifically identified as a risk factor in the disclosures for its Initial Public Offering. (LP Ex.383, Organic Prospectus, dated Feb. 9, 2000, MD 01032-01134, at 1042)

535. In October 1999, Omnicom sold 1.6 million shares of Organic preferred stock to Delta Holdings Ventures LLC (“DHV”), an entity Defendant Weisenburger has admitted to controlling. Weisenburger’s home address was used as DHV’s business address. (LP Ex. 186, Weisenburger Tr. 7:16 – 8:2, 11:9-24, 175:22-25, 196:17-18; LP Ex. 237, Defendants’ Admissions ¶¶ 61, 70; LP Ex. 384 (Dep. Ex. 336), DHV’s Banc of America statements, at OMC 0106972-76; LP Ex. 385, SUBP 00107965)

536. These preferred shares had a provision whereby they would be exchanged for 4.8 million common shares if and when Organic had an IPO. (LP Ex. 141, Defendants' Supplemental Objections and Responses to Plaintiff's Requests for Admissions ("Defendants' Supp. Admissions") ¶ 59; LP Ex. 383, Organic Prospectus, at MD 01100)

537. DHV paid Omnicom \$6,496,000 for the Organic preferred shares, a price which was exactly equal to Omnicom's cost basis in the shares, and the purchase was financed through a loan from Omnicom. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038917; LP Ex. 237, Defendants' Admissions ¶ 57; LP Ex. 186, Weisenburger Tr. 160:16-20.)

538. The next month, Organic filed its first registration statement for its initial public offering. (LP Ex. 388, Organic, Inc. Form S-1, filed November 24, 1999)

539. On January 11, 2000, Organic filed an updated preliminary prospectus. (LP Ex. 389, January 11, 2000 Organic Form S-1) It showed that based on the number of shares then contemplated to be offered, Omnicom would own 24.7% of Organic common stock directly after the offering. (*Id.* at pp. 4, 68)

540. Later in January, DHV sold half of its 1.6 million preferred shares to an entity called MC Development LLC ("MCD"), an entity controlled by Defendant Wren. (LP Ex. 237, Defendants' Admissions ¶ 63; LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038917; LP Ex. 186, Weisenburger Tr. 162:6-21; 158:20-23; LP Ex. 143, Wren Tr. 168:5-16)

541. On February 10, 2000, Organic filed its final prospectus. (LP Ex. 390, Organic Form 424B4, filed February 10, 2000; LP Ex. 383, Organic Prospectus, dated Feb. 9, 2000, at p. 68) The prospectus showed that Omnicom would own 18.7% of Organic immediately following the offering. (*Id.* at pp. 4, 5, 18, 68)

542. Immediately after the IPO, DHV (Weisenburger) and MCD (Wren) each owned 2.4 million shares of Organic stock. (LP Ex. 237, Def. Admissions ¶¶ 60, 65; LP Ex. 386 (Dep. Ex. 431) DHV and MCD, at JD 038917; LP Ex. 387, Aug. 23, 2000 Organic letter, JD 045955)

543. The 4.8 million shares (as converted) represented the difference between the 24.7% ownership stake reported in the January 11 preliminary prospectus and the 18.7% stake reported in the final prospectus filed a month later. (*Compare* LP Ex. 389, Jan. 11, 2000 Organic Form S-1, at p. 68 *with* LP Ex. 383, Organic Prospectus dated Feb. 9, 2000, at p. 68) The 6% stake DHV would have held had it not divided its shares with MCD would have triggered the reporting requirements of Section 13(d) of the Exchange Act of 1934, 15 U.S.C. § 78m(d), and Regulation 13D, 17 CFR § 240.13d-1, promulgated thereunder.

**D. The Transfer Dropped Omnicom's Reported Ownership of Organic Below 20%**

544. As a result of this transaction, Omnicom reported beneficial ownership of shares representing only 18.5% of Organic's common stock after Organic's IPO.<sup>2</sup> (LP Ex. 391, Schedule 13D for Organic, dated Feb. 22, 2000, JD 034271-75, at 272)

545. Thereafter, Omnicom claimed ownership of approximately 17% of Organic's common stock at dates later in 2000, in early 2001, and at the time of the Seneca Transaction in May 2001. (LP Ex. 392, Schedule 13G/A for Organic, dated Dec. 31, 2000, JD 033901-08; LP Ex. 393, Organic capitalization table as of Feb. 28, 2001, SUBP 00102903; LP Ex. 394 (Dep. Ex. 334), Cap tables for Agency.com and Organic, at OMC 0014894; LP Ex. 395, Schedule 13D for Organic, dated May 14, 2001, OMC 0000020-33, at 024)

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<sup>2</sup> The difference between the predicted 18.7% stake used in the Prospectus and the actual reported number of 18.5% in Omnicom's Schedule 13D is the result of the underwriter's over-allotment election.

546. As a result of the sale to DHV, Omnicom reported its Organic investment on the cost method, rather than the equity method. It did not take its proportionate share of Organic's losses. (LP Ex. 139 (Dep. Ex. 282), Jones Day May 21, 2002 letter to SEC, at OMC 0001559-63, 72; LP Ex. 374, Collection of Haverty-Stacke memos re Accounting for Equity Investments, OMC 0110288-90, OMC 0110322-25; LP Ex. 138 (Dep. Ex. 123), Haverty-Stacke memo re Cost or Equity Accounting, at AA 0019096; LP Ex. 340 (Dep. Ex. 321), AA Full Scope Audit of Communicade, at AA 0022770; *see also* Def. Ex. F1 (Dep. Ex. 244), Omnicom 2000 10-K, at JD 033807, 811; LP Ex. 198 (Dep. Ex. 289), Omnicom 1Q 2001 10-Q, at JD 033922)

547. Throughout the year 2000 and during the first quarter of 2001, Omnicom classified its interest in Organic as a long-term investment "available for sale" under FAS 115 and accounted for it under the cost method. (LP Ex. 139 (Ex. 282), Jones Day May 21, 2002 letter to SEC, at OMC 0001559-63, 72; LP Ex. 374, Collection of Haverty-Stacke memos re Accounting for Equity Investments, OMC 0110288-90, OMC 0110322-25; LP Ex. 138 (Dep. Ex. 123), Haverty-Stacke memo re Cost or Equity Accounting, at AA 0019096; LP Ex. 340 (Dep. Ex. 321), AA Full Scope Audit of Communicade, at AA 0022770; *see also* Def. Ex. F1 (Dep. Ex. 244), Omnicom 2000 10-K, at JD 033807, 11; LP Ex. 198 (Dep. Ex. 289), Omnicom 1Q 2001 10-Q, at JD 033922)

548. The 4.8 million shares held by DHV and MCD were equal to an additional 5.5% of Organic's common stock immediately after the IPO. DHV and MCD together continued to own over 5% of the company throughout the period following Organic's IPO and prior to the Seneca Transaction. (LP Ex. 396, Organic's 1999 Form 10-K, at MD 00952; showing that an owner of 4.8 million shares held 5.5% LP Ex. 393, Organic capitalization table as of Feb. 28, 2001, SUBP 00102903; LP Ex. 394 (Dep. Ex. 334), Cap tables for Agency.com and Organic, at

OMC 0014894) At year-end 2000, DHV and MCD each controlled about 2.75 of Organic's common stock. (LP Ex. 393, SUBP 00102903; LP Ex. 394 (Dep. Ex. 334), at OMC 0014894)

549. Therefore, if Omnicom had not transferred the shares to Delta, Omnicom would have owned approximately 22% of Organic's outstanding common stock during this entire time period. (LP Ex. 396, Organic's 1999 Form 10-K, at MD 00952; LP Ex. 393, Organic capitalization table as of Feb. 28, 2001, SUBP 00102903; LP Ex. 394 (Dep. Ex. 334), Cap tables for Agency.com and Organic, at OMC 0014894)

550. If it were not for this transaction, Omnicom would have owned more than 20% of Organic at all times between Organic's IPO and the transfer to Seneca and would have been required to account for Organic on the equity method. (Def. Ex. F2, APB 18 ¶ 17; Devor Report ¶ 33)

**E. Other Omnicom Executives, Including the Other Defendants, Participated in the Scheme**

551. Defendants Wren and Wiesenburger testified that their acquisition of the Organic shares from Omnicom was for the purpose of creating an executive retention program that would allow Omnicom executives to invest in Organic stock. They testified that two companies, DHV and MCD, were used rather than one because the executives participating in the plans would come from competing agencies. (LP Ex. 186, Weisenburger Tr. 8:17 – 9:19, 157:3-18, 166:19-24, 173:13-21; LP Ex. 143, Wren Tr. 164:7-17; 167:11-25)

552. Defendants claim that the Omnicom's Board of Directors was aware of the alleged executive retention plan. However, there are no board minutes containing any discussion of any such plan. Robert Callander, who was an Omnicom board member and member of the compensation committee when the plan was purportedly created, had never heard of either DHV or MCD and was not aware that Wren and Wiesenburger had controlled significant stakes of

Organic during 2000 and 2001. (LP Ex. 186, Weisenburger Tr. 162:22-163:12, 173:22-174:20 ; LP Ex. 143, Wren Tr. 166:14-167:1; LP Ex. 192, Crawford Tr. 133:25-135:3, 143:24-144:6; LP Ex. 130, Callander Tr. 13:12-20, 170:13-175:13)

553. Defendants admit that there are no written documents setting out the terms of these alleged plans (LP Ex. 237, Def. Admissions ¶¶ 67, 68), and no public filing by Omnicom has ever disclosed any such employee retention or incentive plan involving shares of Organic stock.

554. A small percentage of the Organic shares held by DHV were acquired by senior officers of Omnicom. Seven Omnicom executives, including Communicade's CFO, Jerry Neumann, and Defendants Angelastro and Crawford, became "members" of DHV and were given the opportunity to purchase 17.5% of DHV's shares prior to Organic's IPO. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038919, 22; LP Ex. 186, Weisenburger Tr. 165:3-168:15) The participants were allowed to buy the stock for \$1.37 per share – which was approximately DHV's purchase price and Omnicom's original cost basis – even though at the time they purchased the shares Organic had a Form S-1 on file showing an expected IPO price of \$12 to \$14 per share. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038917, 19, 22; LP Ex. 389, Organic, Inc. Form S-1 filed Jan. 11, 2000, at pp. 1-2; LP Ex. 24, Atkins Report, at p. 16)

555. Defendant Crawford purchased 255,000 pre-IPO shares for \$348,000, after Wren personally invited him to participate in DHV. Defendant Angelastro bought 15,000 shares for \$25,000. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038919, 22; LP Ex. 192, Crawford Tr. 112:17-114:7, 117:1-118:17, 136:9-137:7; LP Ex. 84, Angelastro Tr. 143:3-146:2)

556. Only a small percentage of the shares held by DHV were ever distributed to participating executives. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038922) MCD

never set up any such plan or provided shares to any executives. (LP Ex. 186, Weisenburger Tr. 158:17-19, 160:3-12; LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038917) Weisenburger and Wren testified that the alleged executive retention plan was quickly abandoned due to lack of interest and the remaining Organic stock became a personal investment of Defendant Weisenburger. (LP Ex. 186, Weisenburger Tr. 9:20-10:4, 159:3-160:2, 167:10-17.)

557. After Organic's IPO, restrictions on trading DHV and MCD's shares were removed. (LP Ex. 387, Aug. 23, 2000 Organic letter, JD 045955) Nonetheless, neither Wren, Weisenburger, nor any of the other executives participating in Delta sold any shares at that time, despite the fact that Organic shares were trading at more than \$20 per share in the month after the IPO or in the ensuing months as the internet decline worsened. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038919; LP Ex. 2, Organic stock prices; (LP Ex. 397, John Gantz, "Don't Expect Quick Comeback for Net Stocks," *Computerworld*, Dec. 18, 2000; LP Ex. 398, Evelyn Iritani, "Top 10 Stories in 2000," *Los Angeles Times*, Dec. 24, 2000)

558. DHV and MCD held onto the Organic shares as the stock price declined precipitously throughout most of 2000. DHV began selling some shares in late 2000, selling a total of 310,000 shares from November 2000 through February 2001 at prices ranging between \$1.25 to \$2. (LP Ex. 384 (Dep. Ex. 336), DHV's Banc of America statements, at OMC 0106972, 74; LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038919-20)

559. In March 2001, shortly before Seneca was established and when Weisenburger and Wren were already negotiating Organic's going-private transaction on Omnicom's behalf, DHV reversed its course and began buying Organic shares. These public purchases were made at prices between \$0.50 and \$0.75 per share. (LP 208 (Dep. Ex. 19), Organic Schedule TO, at OMC 0061096; LP Ex. 153, (Dep. Ex. 17), Kingdon email to Weisenburger, at OMC 0089803;

LP Ex. 152 (Dep. Ex. 35), Nelson email to Wren, at OMC 0006531; LP Ex. 384 (Dep. Ex. 336), DHV's Banc of America statements, at OMC 0106974; LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038917, 20)

560. The other Omnicom executives also held all their shares throughout Organic's long price decline in 2000 and early 2001. After Seneca was created, Weisenburger reacquired their shares so he could sell them to Seneca and assist Omnicom and Seneca in their efforts to take Organic private. During the summer of 2001, DHV purchased the shares owned by the seven executives for \$2.00 per share, which was far in excess of the \$0.30 to \$0.45 per share prices prevailing in the market. DHV paid a total of \$841,000 to repurchase the executive's shares. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038917, 20, 22; LP Ex. 2, Organic stock prices; LP Ex. 186, Weisenburger Tr. 179:12-180:13.)

561. Defendant Crawford sold his shares back to DHV in June 2001 for \$510,000, a profit of \$162,000. Defendant Angelastro also sold his shares in June or July 2001 and received \$30,000, for a profit of \$5,000. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038920; LP Ex. 192, Crawford Tr. 119:22-120:12, 138:10-143:5, 146:15-147:8; LP Ex. 84, Angelastro Tr. 143:3-146:18; LP Ex. 399 (Dep. Ex. 251), Crawford letter to Salomon Smith Barney, at OMC 0106977; LP Ex. 400, Angelastro's Charles Schwab records, at OMC 0106978, OMC 0106981)

562. Omnicom's annual proxy statements, which describe the compensation and incentive plans provided to Omnicom's executive officers and detail the precise compensation provided to Defendant Wren as Omnicom's CEO, made no mention of the distribution of Organic shares to Wren, Weisenburger or any other executives. There was no disclosure made in the proxy for the year 1999, when Weisenburger originally received the shares (LP Ex. 401, Omnicom Proxy Statement dated April 11, 2000, at pp. 6-11), no disclosure for 2000 when the

other executives were permitted to buy shares (LP Ex. 402 (Dep. Ex. 68), Omnicom Proxy Statement dated April 11, 2001, at OMNRIB 0009-13), and no disclosure in 2001 when the executives received from four to seven times the market price for their shares (LP Ex. 403, Omnicom Proxy Statement dated April 15, 2002, at OMNRJC 0063-67)

563. Tom Harrison was a member of DHV, who also was a highly paid executive whose compensation was disclosed in Omnicom's Proxy Statements. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038922; LP Ex. 402 (Dep. Ex. 68), Omnicom Proxy Statement dated April 11, 2001, at OMNRIB 0009-11; LP Ex. 403, Omnicom Proxy Statement dated April 15, 2002, at OMNRJC 0063-65)

564. Although Harrison purchased shares for \$1.37 per share in 2000 that were being offered for \$20, no compensation from the purported "retention plan" was reported as compensation in Omnicom's 2000 Proxy Statement. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038919, 22; LP Ex. 402 (Dep. Ex. 68), Omnicom Proxy Statement dated April 11, 2001, at OMNRIB 0009-11)

565. Although Harrison received \$2.00 per share in 2001 when Organic's shares were trading for less than \$0.50, no compensation from the purported "retention plan" was reported as compensation in Omnicom's 2001 Proxy Statement. LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038920; LP Ex. 403, Omnicom Proxy Statement dated April 15, 2002, at OMNRJC 0063-65)

**F. Weisenburger & Wren Held the Organic Shares on Omnicom's Behalf and Then Sold Them to Seneca**

566. Defendants Wren and Weisenburger always held the Organic stock in DHV and MCD on Omnicom's behalf. Defendants admit that neither DHV nor MCD was ever under the control of anyone other than an Omnicom employee (LP Ex. 237, Def. Admissions ¶¶ 73, 74),

and that, at least initially, these entities were executive retention plans that were operated for the benefit of Omnicom. (LP Ex. 186, Weisenburger Tr. 169:7-14; LP Ex. 143, Wren Tr. 164:12-17)

567. Wren and Weisenburger at all times held the stock in a manner inconsistent with personal ownership of the shares. Wren never did anything with his shares. Weisenburger never sold any of the millions of shares he controlled in DHV after Organic's IPO or throughout the long decline of its stock price in 2000, whereas, in his personal account, he bought and sold ("flipped") more than 7,000 Organic shares in the 24-hour period following the IPO for a profit of more than \$170,000. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038921; LP Ex. 186, Weisenburger Tr. 164:5-20)

568. When Omnicom began negotiating to purchase a majority of Organic's shares from Organic's executives in March 2001, Weisenburger, through DHV, bought additional Organic shares in the market and repurchased the other executives' shares at prices far exceeding their market value. (LP 208 (Dep. Ex. 19), Organic Schedule TO, at OMC 0061096; LP Ex. 153, (Dep. Ex. 17), Kingdon email to Weisenburger, at OMC 0089803; LP Ex. 152 (Dep. Ex. 35), Nelson email to Wren, at OMC 0006531; LP Ex. 384 (Dep. Ex. 336), DHV's Banc of America statements, at OMC 0106974; LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038917, 20; LP Ex. 2, Organic share prices)

569. On August 3, 2001, MCD sold 1,745,000 of its Organic shares to DHV. (LP Ex. 404 (Dep. Ex. 338), Agreement between DHV & MCD, at JD 038120; LP Ex. 405 (Dep. Ex. 337), Organic transfer letters, at JD 022360-61; LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038917; LP Ex. 186, Weisenburger Tr. 189:12-191:3)

570. The same day, DHV combined the shares from MCD with a portion of its own Organic shares and sold 4,365,000 shares to Seneca. (LP Ex. 405 (Dep. Ex. 337), Organic transfer letters, at JD 022360, 62; LP Ex. 406 (Dep. Ex. 343), Share Purchase Agreement, at JD 038121; LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038920; LP Ex. 186, Weisenburger Tr. 186:22-187:20)

571. The shares DHV sold to Seneca represented 4.9% of Organic's outstanding common stock, which was just below the 5% disclosure threshold of the securities laws. (LP Ex. 24, Atkins Report, at p. 17; LP Ex. 407 (Dep. Ex. 340), Jones Day Jan. 8, 2002 letter to SEC, at JD 000607)

572. Seneca paid \$841,000, or approximately \$0.19 per share, plus an earn-out right that was contingent on Organic's future performance. MCD received a proportional share of the purchase price that DHV received based on the number of shares it contributed. (LP Ex. 406 (Dep. Ex. 343), Share Purchase Agreement, at JD 038121-22; LP Ex. 404 (Dep. Ex. 338), Agreement between DHV & MCD, at JD 038120; LP Ex. 186, Weisenburger Tr. 187:25-188:11, 195:3 – 196:4) The earn-out right that DHV and MCD received was modeled after the earn-out provided to Organic executives in the going-private transaction negotiated by Defendant Weisenburger. (Def. Ex. Z3, Jones Day's July 12, 2002 letter to SEC, at JD 049203)

573. The initial cash payment for the shares, \$841,000, effectively reimbursed Defendant Weisenburger for the amount he spent reacquiring the other executives' shares. The sale to Seneca occurred only weeks after purchasing those shares and was at a price 1/10th what he paid to the executives. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038917, 20; LP Ex. 186, Weisenburger Tr. 196:2-197:22.)

574. Seneca reported its purchase of the 4,365,000 shares from DHV to the SEC in a filing dated August 6, 2001. (LP Ex. 141, Def. Supp. Admissions ¶ 71) Despite the fact that Omnicom was one of the “reporting parties” on the Aug. 6, 2001 filing and that Weisenburger signed the disclosure on Omnicom’s behalf, the filing did not disclose that Seneca bought the shares from entities controlled by the CEO and CFO of Omnicom. Instead, it stated only that the shares were purchased “in a privately negotiated transaction.” (LP Ex. 408 (Dep. Ex. 339), Schedule 13 D/A for Organic, at JD 053261-67; LP Ex. 186, Weisenburger Tr. 194:2-195:2.)

575. In December 2001, MCD and DHV merged and MCD transferred its remaining shares to DHV. In January 2002, DHV sold its remaining shares in the Organic tender offer. (LP Ex. 386 (Dep. Ex. 431), DHV and MCD, at JD 038917-18; LP Ex. 186, Weisenburger Tr. 181:1-9; 191:4-8; 206:24 – 207:2; LP Ex. 237, Def. Admissions ¶ 72.)

576. During the SEC’s informal investigation into the Seneca Transaction, the SEC inquired about Omnicom executives’ personal ownership of the Seneca Entities, including Organic. Defendants Wren and Weisenburger disclosed that they still had a right to a contingent earnout payment from Organic. But instead of referring the SEC to the relevant August 6, 2001 disclosure – which would have revealed that Omnicom and its executives had always owned more than 20% of Organic – Omnicom instead cited a December 2001 filing that made no mention of the shares that Wren and Weisenburger sold to Seneca, but concerned a share purchase agreement between Seneca and Organic’s executives. (Def. Ex. Z3, Jones Day’s July 12, 2002 letter to SEC, at JD 049203; LP Ex. 409 (Dep. Ex. 342), Omnicom Group Third Response to SEC, July 12, 2002, at OMC 0001407-14) No mention was made of shares sold in the Organic tender offer. (*Id.*)

**G. The Organic Parking Transaction was not Disclosed to Omnicom's Board of Directors, Auditors, Investors, or the SEC**

577. Omnicom's board of directors never approved or was even made aware of Omnicom's sale of Organic stock to the entities controlled by Defendants Wren and Weisenburger. The board was not told that these entities played a role in the Organic going-private transaction and tender offer. (LP Ex. 130, Callander Tr. 170:13-175:6; LP Ex. 192, Crawford Tr. 134:5-135:3, 143:24-144:6; LP Ex. 186, Weisenburger Tr. 162:22-163:12, 179:2-4, 181:21-23, 188:25-189:3; LP Ex. 143, Wren Tr. 166:14-167:1; LP Ex. 84, Angelastro Tr. 150:9-13)

578. Indeed, it appears that Omnicom's board conducted an inquiry or investigation into the Organic Parking Transaction during 2006, presumably after it was brought to their attention through discovery in this litigation. Michael Tierney, President of Communicade, testified at his deposition that he had never heard of DHV. (LP Ex. 36, Tierney Tr. 99:20-100:17; 161:7-11) In his errata sheet, Tierney supplemented his answers to state that he had recently been questioned about DHV in the course of the board's investigation. He said, "I was also asked several months ago by Kramer Levin, a law firm who said they were representing the Omnicom board of directors, whether I had heard of Delta. I said then as well that I had not heard of that company." (LP Ex. 410, Tierney errata sheet dated July 20, 2006)

579. None of the Defendants informed Andersen of any of the transactions involving Organic stock, DHV and MCD or their involvement in them. (LP Ex. 186, Weisenburger Tr. 174:21-175:10, 178:23-179:1, 181:24-182:1, 188:15-18, 210:7-212:9; LP Ex. 143, Wren Tr. 189:4-10; LP Ex. 192, Crawford Tr. 135:15-21, 147:17-22; LP Ex. 84, Angelastro Tr. 150:14-16)

580. Dylan Haverty-Stacke, the auditor from Arthur Andersen who was primarily responsible for determining whether the Communicade investments should be accounted for

under the equity or cost method, testified that he had never heard of DHV or MCD and had never known that entities controlled by Defendants Wren and Weisenburger had owned significant portions of Organic stock. Haverty-Stacke testified that he would have wanted to know that information and that it could have affected his judgment on whether Organic could be accounted for under the cost or equity method. (LP Ex. 138 (Dep. Ex. 123), Haverty-Stacke memo re Cost or Equity Accounting, at AA 0019096; LP Ex. 43, Haverty-Stacke Tr. 154:9-160:3, 161:17-162:5.)

581. Jack Benedik, the engagement partner on Arthur Andersen's 2001 audit of Omnicom, also testified that he had never heard of DHV or MCD. (LP Ex. 53, Benedik Tr. 8:16-19; 98:1-8)

582. The sale of \$6.5 million in stock by Omnicom to its own CFO and CEO was not mentioned in Arthur Andersen's annual reviews of Omnicom's potential Related Party Transactions. (LP Ex. 411 (Dep. Ex. 246), AA Memo re: Related Party Transactions, dated Dec. 20, 2000, AA 0017386-87; LP Ex. 412 (Dep. Ex. 122), AA Memo re: Related Party Transactions, dated Feb. 14, 2002, AA 0019037-39)

583. In October 2000, Arthur Andersen inquired as to whether Omnicom had the ability to exercise significant influence over Organic despite its ownership of only 17% of its common stock, a finding which would have required Omnicom to account for Organic on the equity method. When Defendant Angelastro replied to Andersen's inquiry, he justified the use of the cost method and described Omnicom's investment in Organic, but omitted any mention of the fact that an additional 5.5% of the company was controlled by Omnicom's CEO and CFO. (LP Ex. 413 (Dep. Ex. 277), Angelastro Oct. 16, 2000 email, at OMC 0062273)

**H. Omnicom Avoided Reporting Losses Through the Organic Parking Transaction**

584. If Omnicom had not engaged in these transactions or if they disclosed the transactions to Andersen, Omnicom would have been deemed to have a greater than 20% interest would have been required to account for Organic using the equity method. (LP Ex. 25, Devor Report ¶ 33)

585. For the fourth quarter of 2000, Omnicom announced earnings results that exceeded Wall Street consensus earnings expectations by \$0.02 per share, extending Omnicom's streak of twenty-six consecutive quarters of exceeding analysts' expectations. (LP Ex. 322 (Dep. Ex. 395), Merrill Lynch Feb. 20, 2001 analyst report; LP Ex. 327 (Dep. Ex. 397), SSB Feb. 20, 2001 analyst report)

586. If Omnicom had accounted for Organic under the equity method and taken its 22% share of Organic's earnings, it would have been required to record a loss of \$5.8 million in the fourth quarter of 2000, which would have reduced Omnicom's diluted earnings for the quarter by \$0.03 per share. (LP Ex. 25, Devor Report ¶ 33)

587. In the first quarter of 2001, Omnicom's earnings per share exceeded Wall Street's consensus earnings expectations by \$0.01, which extended Omnicom's streak of exceeding expectations yet another quarter. (LP 363, Merrill Lynch April 24, 2001 analyst report)

588. If Omnicom had accounted for Organic under the equity method and taken its 22% share of Organic's earnings, it would have been required to record a loss of \$10.5 million in the period, which would have reduced Omnicom's diluted earnings for the quarter by \$0.06 per share. (LP Ex. 25, Devor Report ¶ 33)

589. Plaintiff's expert J.T. Atkins has concluded that the Organic Parking Transaction was a sham designed to allow Omnicom to hide its true ownership of Organic and to avoid

reporting losses so that it could meet Wall Street earnings forecasts and avoid any diminution in Omnicom stock price. (LP Ex. 24, Atkins Report, at pp. 15, 17-19)

## **V. THE AGENCY WARRANTS PARKING ARRANGEMENT**

590. In December 2000, Omnicom owned approximately 33% of Agency's common stock and six million warrants to purchase an additional 14% of the common stock. (LP Ex. 414 (Dep. Ex. 237), at JD 030062-63, JD 030065-75. Omnicom accounted for Agency on the equity method, so Omnicom took 33% of Agency's net income or loss into its own earnings. (*E.g.*, Def. Ex. F1 (Dep. Ex. 244), 2000 10-K, at F-14 (showing equity method))

591. Effective January 1, 2001, a new FASB rule would change how Omnicom had to account for the warrants. Instead of holding them at cost, the new FAS 133 would require derivative contracts (such as warrants) to be accounted for at fair value, with any changes in fair value reflected in earnings. Thus Omnicom's earnings would be susceptible to future gains or losses in Agency's stock price. (LP Ex. 25, Devor Report ¶ 158 & n.25; LP Ex. 362, Omnicom 2001 Form 10-K at F-20; LP Ex. 24, Atkins Report at p. 19)

592. Defendants were attuned to the issue. A November 29, 2000 email from Defendant Angelastro noted the need to make a proposal to Defendants Wren and Weisenburger on how to "deal with the SFAS 133 issue." The email suggested they should convert the warrants to common stock for two reasons: (1) "to avoid the Mark to Market (though P&L); and (2) that it appeared Agency would be profitable for Omnicom for the quarter, and an increased equity percentage would mean capturing more of those gains. (LP Ex. 415 at OMC 0067104) A week later, Angelastro sent an email to his Assistant Controller and Communicade's Jerry Neumann, informing them that he consulted with Weisenburger and they agreed to convert the warrants. (LP Ex. 416 at OMC 0067103)

593. Shortly thereafter, Omnicom learned that Agency would be taking restructuring charges and significant losses. Defendant Angelastro noted that instead of the gain from Agency's income, Omnicom in fact would be taking a loss. (LP Ex. 417 at OMC 0062507) These losses would increase if Omnicom owned an additional 14% of Agency through conversion of the warrants. (*See* ¶ 590, *supra*)

594. Defendants ultimately decided not convert all of the warrants, but kept them close by. Through a series of eleventh-hour transactions using both Andrew Bursky and Thomas Campbell, as detailed below, Omnicom "sold" the majority of the warrants in the process booking a \$6.7 million dollar after-tax gain. (LP Ex. 59 (Dep. Ex. 177), chart reflecting gain on sale/exercise of warrants))

595. To accomplish the sale, Omnicom transferred the warrants to a recently formed Communicade subsidiary called CICN, whose directors and executive officers were Defendant Wren (President), Defendant Weisenburger (Director), Jerry Neumann (Treasurer and Director) and Barry J. Wagner (Secretary) (LP Ex. 414 (Dep. Ex. 237), at JD 030072) CICN then formed two separate shell subsidiaries, A.H. One and W.A. One. (The complex flurry of transactions to accomplish the "sale" of the warrants at year-end is fully documented in Lead Plaintiff's Ex. 414 (Dep. Ex. 237))

596. On December 29, 2000, A.H. One and W.A. One each purchased a tranche of approximately 1.9 million Agency warrants from CICN. A.H. One and W.A. One paid for the warrants with separate loans totaling \$11.3 million from OMD Acquisition Co. ("OMD"), a company owned and controlled by Thomas Campbell (who also owned Chaucer and several other entities relevant to the E-Service Assets and Seneca) (LP Ex. 414 (Dep. Ex. 237)) The

loans were secured by the warrants themselves, and were non-recourse, meaning the owner of the warrants was not personally liable for repayment. (*Id.*; LP Ex. 24, Atkins Report ¶ 45)

597. Effective the same day, Omnicom transferred A.H. One and W.A. One to two companies owned by Andrew Bursky. Forest Fine Paper LLC bought A.H. One for \$1,000, and Forest Paper Packaging LLC bought W.A. One for \$1,000. (LP Ex. 414 (Dep. Ex. 237))

598. Mr. Bursky did not keep the warrants for very long. On March 23, 2001, A.H. One and W.A. One were sold to two entities controlled by Defendant Weisenburger: Delta Holding Ventures LLC “DHV” and The Altus One Fund, Inc., a 501(c)(3) charitable organization (“Altus”) Delta and Altus paid the same \$1,000 each for the transfer. (LP Ex. 414 (Dep. Ex. 237); LP Ex. 237, Defendant’s Supp Admissions, at ¶¶ 19, 52 (Weisenburger controlled both Delta and Altus)) Altus listed its \$1,000 payment as a charitable contribution to a qualifying 501(c)(3) organization: Forest Fine Paper. (LP Ex. 418, Altus Tax Return 2001; LP Ex. 237 at ¶ 22 (Weisenburger knew that Forest Fine Paper was not a 501(c)(3)))

599. The very same day, March 23, Weisenburger emailed Bursky a proposed term sheet for what would become Seneca. In the transmittal of these terms, Weisenburger wrote: “thank you for your assistance and your trust on this deal.” (LP Ex. 38 (Dep. Ex. 353), at OMC 0005596) This is also near the time John Wren met with Agency’s CEO Chan Suh to discuss the formation of Seneca. (LP Ex. 419 (Dep. Ex. 113), Agency Proxy, at p. 14 (noting they met in late March))

600. Again, the warrants did not stay with their new owner for long. On May 2, 2001, the day of Seneca’s formation, Weisenburger, through DHV and Altus, transferred A.H. One and W.A. One to Seneca for \$1,000 each. Jones Day included these transfer instruments in its “Formation of Seneca” binder. (LP Ex. 420, JD005648-6219 (excerpts) at 52)

601. These were not the only Agency warrants steered into Seneca. Another Thomas Campbell entity, DV2, purchased 1.4 million warrants from Omnicom in late October 1999, just prior to Agency's IPO for \$1.22 per warrant. (LP Ex. 385, SUBP\_00107965 (showing sale to DV2) Despite the fact that DV2 could have sold them for net sale proceeds of \$31.8 million, Campbell never converted a single warrant. (LP Ex. 24, Atkins Report ¶ 53) As detailed in the next section, Defendants used this strategy a second time in October 1999 with respect to Organic's IPO.

602. A May 22, 2001 letter from Neumann to AAAA Holdings (DV2's new name) notes a May 14 oral agreement whereby Seneca will purchase AAAA's warrants for \$4.2 million. The executed sale documents were made effective May 11, 2001. (LP Ex. 421, (Dep. Ex. 330))

603. On May 14, 2001, Seneca disclosed its acquisition of Omnicom's shares. After discussing Omnicom's shares, the filing states: "In addition, Seneca acquired beneficial ownership of warrants to purchase an additional 5,168,000 [Agency] common shares in privately negotiated transactions for a total price, including assumed debt, of \$15.5 million." (LP Ex. 212, SEC Form 13D, filed May 14)

604. The May 14 filing discloses nothing about the identity of the sellers, but is signed by Neumann (on behalf of Seneca), Bursky (on behalf of Pegasus) and Weisenburger (on behalf of Omnicom) These same three individuals are the signatories to every document executed in this parking scheme, with the exception of Campbell. Mr. Tierney, President of Communicade, was not even aware, much less that these warrants had been sold to Bursky, then to Weisenburger and then back to Communicade/Seneca. (LP Ex. 36, Tierney Tr. 154-56)

605. There are numerous indications this was a parking scheme and not an arms-length transaction. First, the fact that two separate entities were used. A.H. One and W.A. One collectively held warrants to purchase well in excess of 5% of Agency's shares. By splitting them, no public disclosure through Forms 13D would be required. (LP Ex. 24, Atkins Report p. 22)

606. The participants were passive. Mr. Bursky bought A.H. One and W.A. One, but testified the purchase "was not viewed as a financial transaction from my perspective." (Bursky Tr. 90:20-25) He was not aware of what OMD was, the entity to which he purportedly owed \$11.3 million. He only vaguely recalled transferring A.H. One and W.A. One to someone else, but had no recollection to whom. (LP Ex. 4, Bursky Tr. 90:10-25)

607. Omnicom understood it still owned the warrants. An email to Weisenburger contained capitalization tables for Agency, showing the cost of acquiring 100% of Agency shares at \$2.50 per share. The document lists the warrant holders as AAAA, Forest FinePaper and Forest Paper Packaging. It then sets out "Newco. Phase I Ownership," referring to Seneca, which has no associated costs. "Phase I" includes "Omnicom Contributed Shares" and "Other Contributed Shares/Warrants." The "Other" sets forth the exact number of warrants held by the three entities above. Thus Omnicom understood that these entities were holding the warrants for its benefit until it wanted them back. (LP Ex. 394, OMC 0014892-94, at 93)

608. The loans from OMD were on commercially unreasonable terms. The interest rate was below what any commercially reasonable lender would accept. (LP Ex. 24, Atkins Report ¶ 45) Moreover, OMD took no steps to secure its collateral, even when the value of the collateral declined below the loan amount. (*Id.* at ¶ 46) Campbell did not know what A.H. One or W.A. One were, even though he lent them \$11.3 million, nor did he know why he lent them

the money. (LP Ex. 185, Campbell Tr. 144-45, 153) In fact, Campbell thought he was making a loan to Omnicom and that A.H. One and W.A. One remained Omnicom entities. (*Id.* at 173-74) There is no explanation why Omnicom, a multi-billion dollar corporation, would need an \$11.3 million loan from Campbell. In addition, Campbell did not retain his own counsel in these transactions; he relied on Omnicom's counsel, Jones Day. (LP Ex. 185, Campbell Tr. 181)

609. Lead Plaintiff's expert J.T. Atkins has reviewed the Chaucer transaction and concluded that it had no reasonable commercial purpose and was fraudulent. (LP Ex. 24, Atkins Report at pp. 23-27) Lead Plaintiff's accounting expert Harris Devor has reviewed the Chaucer transaction and concluded that it was not an arms-length deal between Omnicom and Seneca. (LP Ex. 25, Devor Report, at pp. 19-31)

## **VI. CALLANDER RESIGNS – MAY 2002**

610. On February 10, 2002, Robert Callander, Chairman of the Audit Committee of Omnicom's Board of Directors, wrote Wren to say that the Audit Committee should engage an accounting firm other than Andersen to review certain accounting principles relevant to the committee's responsibilities, and in particular the Seneca transaction. (LP Ex. 422 (Dep. Ex. 77) at OMC 0007152) This suggestion was declined. (LP Ex. 423 (Dep. Ex. 78) at OMC 0007150)

611. In the weeks prior to the Audit Committee meeting discussed below, Callander remained concerned about the Seneca Transaction. Callander's handwritten notes on his copy of Omnicom's 2001 Form 10-K show that he was questioning the particulars of the deal, including notes saying "explain Seneca," "'parking' issue," "financial statements" (referring to Seneca), "totally arms length," "\$280m preferred," "Who is Pegasus? How do we know them?", "Who determined transaction values?", and "What are dollar amount? \$280m." (LP Ex. 424 (Dep. Ex. 79) at OMNRJC 00100031)

612. Callander asked Wren, Weisenburger and Omnicom counsel Barry Wagner for Seneca's financial statements, but never received them. (LP Ex. 130, Callander Tr. 250:2-18)

613. The Audit Committee, and particularly Callander, remained concerned over the Seneca Transaction into March 2002. (LP Ex. 425 (Dep. Ex. 80), Minutes of March 19, 2002 Audit Committee meeting, at JD 049126) At the same time, Callander received signals that his continued oversight on the Audit Committee was not welcome. Minutes of a May 23, 2002 board meeting contained expressions of concern over his behavior (LP Ex. 426 (Dep. Ex. 260) at OMC 0094815)

614. In May 2002, Callander was still so concerned about Seneca that he wrote to Professor David Beim, a professor at Columbia Business School, inquiring into his responsibilities vis-à-vis Seneca. (LP Ex. 130, Callander Tr. 277:21-278:24)

615. In a responding letter dated May 9, 2002, Professor Beim had the following to say about the "Seneca Investment":

It is harder to say anything definite about Seneca because there is very little disclosure about it. It is said to be owned by a single private equity firm. It acquired Communicade, the subsidiary consisting of Omnicom's earlier investments in the e-services industry, and gave to Omnicom in exchange a Seneca preferred stock. But most ventures into e-services during the late 1990s resulted in losses. If this is true of Communicade, it is not clear why any private investor would want a leveraged equity position in such businesses, nor is it clear how Omnicom could dispose of them without taking a loss.

The audit committee is not only within its rights to ask for information about Seneca, I think it has an obligation to do so. Legally, a management must give the audit committee all the information it wants about any subject whatever. More than that, if you feel the slightest concern about a transaction you do not understand, you have a positive obligation to find out what is going on. The American system depends on this – that is what audit committees are for. If you didn't take the trouble to investigate whatever looks significant or in need of explanation, you would not be doing your job.

All of this was true before the events of the past year, but now that there is such intense public focus on corporate accounting practices I think that more than

ever you owe it to your shareholders to clarify what Seneca is all about. At \$280mm, it is definitely material. Here is a list of possible questions:

1. Shareholders. Who is the shareholder? How much did the shareholder invest? Have there ever been others? Did management have, or does it have now, any ownership interest in Seneca or entities related to it? Are there any other parties to the transaction?

2. Documents. You should get a copy of all contracts and side agreements between Omnicom, Seneca, its shareholder and any other parties to the transaction. You should also get anything like an offering memorandum or a set of projections showing potential returns to the investor. You need to understand why Seneca was attractive to the investor.

3. Valuation. Footnote 6 says that management believes that the carrying value of Seneca's preferred \$280mm approximated fair value. What is the basis for this belief? You should obtain a copy of any valuation documents prepared by insiders or outsiders.

I have no idea where this may lead, but there seems to be a puzzle in need of explanation. A material set of businesses that were probably losing money has been disposed of without loss. There must be some additional source of value supporting them. For example, if Omnicom were obligated to issue shares of stock to keep Seneca or its investor whole, that could resolve the valuation mystery but would raise further questions about the likelihood and extent of such issuance.

(LP Ex. 131 (Dep. Ex. 82))

616. At his deposition, Callander was asked about the Beim letter and answered as follows:

Q. Last sentence [at first paragraph] says, "It is said to be owned by a single private equity firm. It acquired Communicade, the subsidiary consisting of Omnicom's earlier investments in the e-services industry, and gave to Omnicom in exchange a Seneca preferred stock. But most ventures into e-services during the late 1990s resulted in losses. If this is true of Communicade, it is not clear why any private investor would want a leveraged equity position in such businesses, nor is it clear how Omnicom could dispose of them without taking a loss."

Did these concerns raise any issues with you?

A. I was off the board eleven days later. This letter could have come on a Friday.

(LP Ex. 130, Callander Tr. 283:16-284:12)

617. On May 21, 2002, Callander questioned Weisenburger about Seneca at an Audit Committee meeting (LP Ex. 427 (Dep. Ex. 83) at OMC 0094819) The same day, Callander requested that the Audit Committee review the prospective Organic and Agency buybacks from Seneca (LP Ex. 428 (Dep. Ex. 258) at OMC 0091601) and that evening wrote Callander sent Wren an e-mail stating the Audit Committee “will retain a qualified professional” to review the Seneca Transaction. (LP Ex. 132 (Dep. Ex. 84) at OMC 0006563)

618. At a board meeting the next day on, Wren told the Board that a new “Finance Committee” had been formed LP Ex. 428 (Dep. Ex. 258 at OMC 0091597) and that it (not the Audit Committee) would review the buyback of Agency and Organic from Seneca. (LP Ex. 130 Callander Dep. 288:3-9) Callander responded by stating he “did not believe it was right for a newly formed finance committee to unilaterally approve the transaction and the audit committee should be involved jointly with the finance committee” and said he would dissent if any vote were taken. (LP Ex. 130, Callander Tr. 288:3-9)

619. Callander resigned later that same day of on May 22, 2002. (LP Ex. 429, OMC 0000828)

620. On May 30, 2002, at a special joint meeting of the Audit Committee and Finance Committee, the Seneca transaction and the events surrounding Callander’s resignation were discussed. (LP Ex. 91 (Dep. Ex. 255) at OMC 0091575-76) According to the minutes, Wren reviewed the history of the Seneca transaction. Following Wren’s presentation, a discussion ensued. Among the “topics discussed” were “assuring that the transaction *was properly accounted for as a non-monetary exchange.*” (LP Ex. 91 (Dep. Ex. 255) at OMC 0091576) (Emphasis supplied)

## **VII. JUNE 5 AND JUNE 12, 2002 DISCLOSURES**

### **A. The Disclosures**

621. Although Callander had cosigned on May 22, 2002, it was not until after the close of business on June 5, 2002, that Omnicom announced Callander's resignation. (LP Ex. 430; Omnicom 8-K, Item 5, filed June 5, 2002)

622. A UBS analyst report dated June 7, 2002 stated that "Attributing to share weakness yesterday was the resignation of and [sic] outside board member. We believe that the resignation has more to do with 'fit' than actual auditing improprieties, but note that the director who headed the audit committee has given fuel to concerns with auditing irregularity. Additional investor concerns seem to have centered on the industry practice of acquisition, and possible concerns around the companies auditing process." (LP Ex. 431)

623. Rumors hit the market that Callander's resignation was due to problems with Omnicom's accounting, and that *The Wall Street Journal* was working on a story in this regard. A Merrill Lynch report on June 10, 2002 attributed the price drop to these disclosures. (LP Ex. 432 (Dep. Ex. 381) at p. 1)

624. As a result of these disclosures, Omnicom's stock price dropped from \$80.37 on June 5, 2002 to \$72.69 on June 7, 2002. (LP Ex. 125, Hakala Report ¶ 71)

625. In response to these material developments, Omnicom issued a press release on June 7 denying knowledge of any recent events that could explain the price drop. (LP Ex. 433, June 7, 2002 Press Release)

626. On June 12, 2002, *The Wall Street Journal* published an article reporting that Callander had resigned because of "Omnicom's handling of its soured internet investments." The article also disclosed for the first time that (a) Wren had told the Journal that, Seneca had been formed to avoid a write-off; (b) it was doubtful that the fair value of the assets could

support the value of the preferred stock; and (c) Omnicom intended to buy back its interests in Agency and Organic. (LP Ex. 3 (Dep. Ex. 385) at pp. 1, 4-5)

627. On June 12, 2002, following *The Wall Street Journal* article, Wren and Weisenburger held a conference call with analysts. In that call, Wren confirmed that the *Journal*'s account of the reasons for Callander's resignation was correct, stating that "Mr. Callander's reasons were presented accurately as in 'The *Journal*' this morning." Wren also acknowledged that the *Journal* article raised market concerns about the integrity and credibility of management, asking "What will we do to restore and rebuilt confidence and trust?" and stating that "Our integrity...is paramount" and "We will do whatever we need to do going forward to rebuild whatever confidence is lost as a result of this article." (LP Ex. 133 (Dep. Ex. 387) at OMC 0000777, OMC 0000787)

**B. Analysts and Reporters Confirm that the Market was Concerned about Improper Accounting for E-Services Assets and the Resultant Decrease in Management Credibility**

628. The damage caused by *The Wall Street Journal* article and the delay in the Callander announcement caused Omnicom's share price to begin to trade "at a discount to its peers," according to a UBS Warburg analyst report on June 13, 2002. (LP Ex. 434, UBS Warburg Analyst report on Omnicom Group dated June 13, 2002, at p. 3)

629. Similar articles characterizing the *Journal*'s June 12, 2002 article as focusing on Mr. Callander's resignation and the Internet investment offloading appeared on June 13, 2002 in *The New York Times* ("Omnicom Shares Tumble 20%") and *the Financial Times* ("Omnicom Chief Faces Investors as Shares Fall: Advertising World's Number Three Tries to Limit Damages to Concern Over Accounting Practices") (LP Ex. 125, *Financial Times*, London Edition, at p. 30; LP Ex. 125 (The *New York Times* Late Edition, at p. 11; both noted in Hakala Report at ¶76, n.27)

630. An article on *TheStreet.com* on June 12, 2002 stated that “given the numerous cases over the past year when easily dismissed bad news has snowballed into financial crises for other companies—especially those that, like Omnicom, have made numerous acquisitions—Wren is fighting a difficult battle. ‘We’re in a zero-tolerance environment...’” (LP Ex. 125, Hakala Report ¶ 77)

631. A CNNfn report at 14:00pm on June 12, 2002 stated, “You had the news about Omnicom, about the potential accounting scandals. So once again you get that negative perception of what’s going on and you get this crisis of confidence and you get this lack of interest and people just saying you know something, I’m out.” (LP Ex. 125)

632. A Reuters report at 16:50pm on June 12, 2002, stated, “‘You’ve got a stock that has been trading 20 to 30 percent above its peer group because there was a lot of credibility for management,’ said SunTrust Robinson Humphrey analyst William Warmington. ‘Until they can regain that credibility on the issues raised in the *Journal*, they’ll probably trade in line with the group.’” (LP Ex. 125, Hakala Report ¶ 77)

633. Merrill Lynch’s report on June 12, 2002 disputed the “suggestion in the article that the partnership was formed to avoid a write-down though OMC did capture losses of at least \$3.5 MM in the first six months of 2001 associated with these assets.” LP Ex. 435 (Dep. Ex. 405) at p. 1)

634. On June 13, 2002, Omnicom’s share price fell further to \$54.62 (LP Ex. 120 (Dep. Ex. 269 at p. 8)

635. A June 13, 2002 *Chicago Tribune* article stated that Omnicom’s shares fell because of *The Wall Street Journal* article, noting the reasons for Mr. Callander’s resignation and stating that the “article focused on the disclosure of Omnicom’s investment in an Internet

holding company called Seneca set up to house more than a dozen of Omnicom's Internet acquisitions." The *Tribune* article repeated the *The Wall Street Journal's* assertion that the deal "allowed the company to avoid the possibility of writing down the value of its investments in some of the firms." (LP Ex. 125, Chicago Tribune, North Sport, Final Edition, at p. 3; (noted in Hakala Report at p. 92, n.27)

636. On June 13, 2002, a *CBS MarketWatch* article stated, "At issue is the company's creation of a separate entity to hold its investments in dozens of Web-based companies whose stock prices have collapsed. The article seemed to suggest that Omnicom was using the entity, called Seneca, to cushion itself from the losses related to those investments and avoid write-downs that could bring down its overall numbers." (LP Ex. 125, Market watch.com June 13, 2002 article, noted in Hakala Report at ¶ 78)

637. On June 13, 2002, Lehman Brothers said that the fact that Omnicom's calculation of organic growth was more aggressive than its rivals "was known" by the market. (LP Ex. 436, June 13, 2002 Lehman Bros. analyst report on Omnicom "Sifting through the issues")

638. On June 13, 2002, SunTrust Robinson Humphrey downgraded Omnicom's share price from outperform to neutral. Furthermore, Standard & Poor's revised its outlook on Omnicom's debt rating to "Negative" from "Stable" citing the uncertainty over "controversies that may affect business activities." (LP Ex. 125, Hakala Report at p. 78)

639. Also on June 13, 2002, a Lehman Brothers analyst said "Investors' concerns focus on whether or not the assets should have been written down at the time of the transaction or at the end of last year." (LP Ex. 436, June 13, 2002 Lehman Bros. analyst report, at p. 2)

640. A *Financial Times*, London Edition, article of June 14, 2002, p. 28, "Shares in Omnicom, the world's third-biggest advertising group, tumbled again yesterday as a New York

law firm [not Lead Counsel] launched a shareholder lawsuit against the company claiming it had violated federal securities laws.” (LP Ex. 125, *Financial Times*, London Edition, at p. 28; noted in Hakala Report at ¶ 78 n. 32)

641. A Deutsche Bank report on June 14, 2002 on accounting concerns with advertising agencies described the transfer of Internet investments by Omnicom as “financial engineering” and an accounting issue specific to that company. (LP Ex. 437, Deutsche Bank Analyst Report on Advertising Agencies dated June 14, 2002 at p. 1)

642. An article on the *Marketwatch.com* website on June 14, 2002 observed that “[a]t issue is the company’s creation of a separate entity to hold its investments in dozens of Web-based companies whose stock prices have collapsed. The article seemed to suggest that Omnicom was using the entity, called Seneca, to cushion itself from losses related to those investments and avoid write-downs that could bring down the overall numbers.” (LP Ex. 125, *Masrketwatch.com* June 14, 2002 article; noted in Hakala Report at p. 42, n.27)

643. An editorial entitled “Nothing to Hide” in *Advertising Age* on June 17, 2002, noted that Callander’s resignation “was material to investors” and criticized Omnicom for the delay in announcing his resignation and the reasons for his resignation so soon after the May 21, 2002 annual meeting. (LP Ex. 125, Hakala Report ¶ 77 n.28)

644. On June 18, 2002, a Bear Stearns report stated: “It is of no surprise that the SEC may have some questions for Omnicom given the enormous amount of press over the last few days and the meaningful decline in the stock price. (LP Ex. 476, Bear Stearns, “Meetings with Omnicom, Interpublic, and WPP Group,” June 18, 2002, at p. 27)

645. In a June 20, 2002 report on Omnicom, JP Morgan Securities, opined that “the WSJ revelations about the board members Callander and Beattie [were] the most disturbing of

the WSJ revelations.” (LP Ex.477, JP Morgan Analyst Report on Omnicom Group:

“Addressing the Liquidity Issue” Part 2 at p. 6; noted in Hakala Report, ¶ 82)

646. The analyst also stated: “We believe that their departures have unsettled investors during this skittish time.” (LP Ex.477, JP Morgan Analyst Report on Omnicom Group:

“Addressing the Liquidity Issue” Part 2 at p. 6; noted in Hakala Report, ¶ 82)

647. In its second quarter review of Omnicom in August 2002, Lehman Brothers reported that, “Investors are anxiously awaiting some insight into the progress of the SEC’s informal inquiry [into Seneca], and whether or not the agency would ‘take it to the next level.’” (LP Ex. 438, Aug. 16, 2002 Lehman Bros. analyst report on Omnicom Group “Second Quarter Review – Discussion on Outstanding Issues,” at p. 9)

648. Lehman Brothers’ August 2002 report also reported that some investors were concerned that the effect of the Seneca controversy on the reputation and credibility of Omnicom’s management could have a long-term impact on Omnicom’s performance.

Several investors have questioned whether recent controversies will negatively affect Omnicom’s ongoing business. Specifically, since Omnicom operates service businesses, the argument goes, its reputation, stability and people are key components to winning and maintaining new and existing client relationships. Clearly, confidence in management and business stability has underpinned Omnicom’s success in the past few years, particularly in winning new businesses and gaining market share.

(LP Ex. 438, Aug. 16, 2002 Lehman Bros. analyst report on Omnicom Group “Second Quarter Review – Discussion on Outstanding Issues”).

649. Investors continued to have concerns about Omnicom’s accounting and the credibility of Omnicom’s management. For example, in an August 12, 2002 ADWEEK article entitled “Road to recovery: KPMG OK bring Omnicom back from the brink,” it was stated that, “Despite Omnicom’s absolution by KPMG, the damage has not been completely undone. The WSJ is sticking to its original assertions. ‘We completely stand by our story,’ says WSJ

representative Richard Goldstein.” (LP Ex. 439, ADWEEK National Edition, August 12, 2002, at p. 5)

650. On June 24, 2002, Standard & Poor’s placed Omnicom’s debt on a Negative Credit Watch as “recent controversies linger” and their effect on Omnicom’s share price. Standard & Poor’s stated that it was “concerned about the recently filed shareholder lawsuits and the SEC’s request for information about two independent board members’ departures. . .” This was accompanied by news of additional shareholder lawsuits, contributing to a 1.8% relative share price decline. (LP Ex. 125, Hakala Report ¶ 83)

651. Following the Standard & Poor’s report, on June 25, 2002, Omnicom’s share price fell a relative 6.1% as a result of renewed focus on the accounting concerns and the resulting S&P watch. (LP Ex. 125, Hakala Report ¶ 83)

**C. Previous Articles Did Not Disclose the Facts  
Disclose in the June 5 and June 12, 2002 Disclosures**

652. The May 7, 2001 *Advertising Age* article cited in ¶ 202 of Defendants’ Statement of Undisputed Material Facts does not state or imply that (a) Omnicom’s accounting for its E-Services Assets was improper, (b) Callander had resigned over Omnicom’s handling of its soured internet investments, (c) it was unlikely that the value of the E-Services Assets could support the stated value of the preferred, or (d) Omnicom intended to buy back all of Agency and Organic from Seneca. (LP. Ex. 440 (Dep. Ex. 572)

653. The June 26, 2001 *InternetNews.com* article cited in ¶ 204 of Defendants’ Statement of Undisputed Material Facts does not state or imply that (a) Omnicom’s accounting for its E-Services Assets was improper, (b) Callander had resigned over Omnicom’s handling of its soured internet investments, (c) it was unlikely that the value of the E-Services Assets could

support the stated value of the preferred, or (d) Omnicom intended to buy back all of Agency and Organic from Seneca. (LP Ex. 441 (Dep. Ex. 4))

654. The September 17, 2001 *Fortune* article cited in ¶ 206 of Defendants' Statement of Undisputed Material Facts does not state or imply that (a) Omnicom's accounting for its E-Services Assets was improper, (b) Callander had resigned over Omnicom's handling of its soured internet investments, (c) it was unlikely that the value of the E-Services Assets could support the stated value of the preferred, or (d) Omnicom intended to buy back all of Agency and Organic from Seneca. (LP Ex. 442 (Dep. Ex. 573))

655. The May 2005 article cited in ¶ 209 of Defendants' Statement of Undisputed Material Facts does not state or imply that (a) Omnicom's accounting for its E-Services Assets was improper, (b) Callander had resigned over Omnicom's handling of its soured internet investments, (c) it was unlikely that the value of the E-Services Assets could support the stated value of the preferred, or (d) Omnicom intended to buy back all of Agency and Organic from Seneca. (LP Ex. 441 (Dep. Ex. 4)) Moreover, it contains several omissions and misrepresentations, including that Omnicom "was able to conclude that its ongoing investment in Seneca was sufficiently robust to avoid the need to make any provision for permanent diminution in value," and that Omnicom had disengaged from the management of the Seneca assets. (*Id.*) It also incorrectly implies that Pegasus (through Craig Cogut, its principal) had actually invested in Seneca and that Cogut was taking an active role in the management of Seneca. The article makes clear that the market always understood the Seneca transaction to be a "sale." (*Id.*)

#### **VIII. DEFENDANTS LIE TO KPMG**

656. On June 12, 2002, Omnicom's Board of Directors adopted the Audit Committee's recommendation to replace Andersen as auditor with KPMG, effective June 13, 2002. (LP Ex.

443, OMC 0091582; *see also* LP Ex. 444, Omnicom’s Form 8-K filed June 13, 2002 at OMC 0092081 (announcing the change))

657. The decision to select KPMG was apparently accelerated as a result of the scrutiny surrounding the Seneca Transaction. The minutes of the Omnicom May 21, 2002 board meeting state that the Audit Committee “was not able to find a date prior to June 14, 2002 that they [sic] could meet to hear the proposals of the candidate firms.” (LP Ex. 427 (Dep. Ex. 83) at OMC 0094819) The announcement of KPMG’s selection was prepared on June 12, 2002, indicating that the selection process changed or accelerated during a brief period during which Callander resigned and Seneca received impending press scrutiny. (LP Ex. 445, OMC 0054888 (Profusek June 12, 2002 email attaching draft press release and Form 8-K); LP Ex. 446, OMC 0035161-62 (Angelastro June 12, 2002 email attaching draft press release and Form 8-K))

658. KPMG undertook to determine whether there were any facts that would lead it to question whether Omnicom’s 2002 opening balance sheet would require revision. This required looking at Andersen’s 2001 work, including review (but not an audit) of the Seneca Transaction. (LP Ex. 81, Iannaconi Tr. 76:9-83:2, 86:2-91:6, 316:6-317:4; LP. Ex. 447 (Dep. Ex. 86) at KPMG 05473)

659. Despite KPMG’s recent appointment, Omnicom waited barely one day to begin drafting a series of prepared statements assuming that KPMG would bless its accounting for Seneca. A June 14, 2002 draft states: “Our new auditor, KPMG, has just completed a review of the structure of our Seneca transaction and has *confirmed* that it meets accepted standards” and “Our new auditors at KPMG have *confirmed*, after a *thorough review*, that our accounting standards are appropriate.” (LP Ex. 448, OMC 0017434 (emphasis supplied); *see also* LP Ex. 449 at OMC 0013302 (June 17, 2002 draft Audit Committee statement with substantially similar

language); LP Ex. 450 at OMC 0017549 (June 18, 2002 draft press release with the subtitle “KPMG Confirms That Company Acted Appropriately”) The falsehood is underscored by: (a) subsequent minutes of the Audit Committee’s June 28, 2002 meeting attributing to Weisenburger the statement that “KPMG has indicated *on a preliminary basis* that it *concurs* with the accounting for Seneca...” and further indicating that KPMG’s review would “hopefully be completed in early July [2002]” (LP Ex. 451, OMC 0094804 (emphasis supplied)); and (b) Omnicom’s July 12, 2002 correspondence to the SEC (through outside counsel Jones Day) indicating the “outcome of KPMG’s reviews” were expected to be reported to the Audit Committee within “the next week or two.” (LP Ex. 452 (Dep. Ex. 341), at JD\_049204)

660. In the course of KPMG’s work, Defendants sent KPMG a management rep letter (LP Ex. 94 (Dep. Ex. 91), August 12, 2002 letter, Item 28.c. at KPMG05497) which echoed the misrepresentations contained in the Andersen management representation letter (LP Ex. 95 (Dep. Ex. 130), Feb. 18 Mgmt. Rep. Ltr., Item 14.c, at AA 0002274), including, most importantly, the representation that Pegasus had invested \$12.5 million in Seneca with another \$12.5 million “on call” and the representations concerning control included in the Omnicom certification signed by Weisenburger. Moreover, Omnicom did not inform KPMG of the facts concerning Omnicom’s actual control of Seneca (see discussion on control of Seneca, Part I.E. *supra*), and submitted to KPMG a new Jones Day nonconsolidation opinion letter, dated July 8, 2002 (LP Ex. 282 (Dep. Ex. 104) at KPMG00037), repeating the misrepresentations in two earlier Jones Day opinion letters. (Feb. 6 Opinion Ltr. (LP Ex. 266 (Dep. Ex. 106) at OMC 0001003 *et seq.*, and Feb. 18 Opinion Ltr. (LP Ex. 279 (Dep. Ex. 107) at OMC 0000990 *et seq.*)

661. KPMG’s Iannaconi, testified that KPMG was not told until 2006 that Pegasus had never actually invested in Seneca. (Iannaconi Dep. 37:15-25) Nevertheless, it remained her

understanding as of the date of her 2006 deposition that Pegasus had “committed” the money to Seneca. She testified that, if Pegasus had never “legally committed” any money to Seneca, “we would be talking about a different transaction and I would have to go back and look at that one.” Further, when asked “What if Seneca had no right to get that money?” she testified: “As with all the hypotheticals we have talked about, I really need to look at the context of everything to determine whether or not it changes my view **and those are not the facts I was dealt.**” (LP Ex. 81, Iannaconi Tr. 340:3-344:16) (emphasis supplied) She also confirmed that the inquiry as to whether Pegasus had contributed money to Seneca was “relevant to our consideration as to whether or not Seneca was a substantial entity. Had it lacked substance it could have borne on our conclusion.” (LP Ex. 81, Iannaconi Tr. 330:9-331:9)

662. KPMG made clear that KPMG never “concurred” with Defendants’ accounting for Seneca. (LP Ex. 71 (Verga Tr.39:6-42:12) The only issue KPMG was concerned with was whether Omnicom’s opening balances on January 1, 2002 had to be restated. (LP Ex. 81 (Iannaconi Tr. 76:9-78:24)

#### **IX. DEFENDANTS’ MISREPRESENTATIONS TO THE SEC**

663. In May 2002, the SEC requested information about the values and cost bases of Omnicom’s “FAS 115” investments, including the four assets disposed of in the Chaucer Transaction. (LP Ex. 67 (Dep. Ex. 280) at OMC 0035107 (May 10, 2002 SEC comment letter) The SEC additionally requested an explanation how Omnicom determined the investments were not other-than-temporarily impaired. (*Id.*) (FAS 115 requires, among other things, that the enterprise determine whether a decline in value below cost of an investment in publicly-held stock is “other-than-temporary.”) (Def. Ex. E2 ¶ 16)

664. On May 13, Neumann provided historical cost basis figures for Communicade’s investments to Angelastro. (LP Ex. 1 (Dep. Ex. 279)) On May 21, 2002, Defendants submitted

to the SEC their response to the request for information about their FAS 115 investments. (LP Ex. 139 (Dep. Ex. 282))

665. In a series of emails, Angelastro and Weisenburger discussed and reviewed various ways to present this information to the SEC. (LP Ex. 453, OMC 0008427-8430 (May 14, 2002); LP Ex. 454, OMC 0008443-8453 (May 15, 2002); LP Ex. 455, OMC 0008457-8463 (May 16, 2002))

666. Ultimately, Defendants decided on a chart comparing the cost and market values of their investments, setting out only Organic and Razorfish separately and combining the other investments under the heading “other.” Their response explained that other than Organic and Razorfish, Omnicom had only four other FAS 115 investments, the largest of which was Headhunter. (LP Ex. 139 (Dep. Ex. 282) at OMC 001563) The other three publicly traded investments Omnicom had were AnswerThink, Netcentives and L90. (*See* discussion of Chaucer “basket”, *supra* (involving the other three publicly traded investments in Chaucer))

667. For year-end 2000, Omnicom listed the total cost basis of the four “others” as \$38,558,000. (LP Ex. 139 (Dep. Ex. 282) at OMC 0001572) This figure is different from the basis provided to Andersen in connection with the Chaucer Transaction, which showed a combined basis of \$55,897,604. (LP Ex. 308 (Dep. Ex. 322)) The Andersen figures are consistent with the historical figures provided by Neumann in his May 13 email. (*Compare* (LP Ex. 308 (Dep. Ex. 322) *with* LP Ex. 1 (Dep. Ex. 279)) If Defendants had used the correct \$55.9 million dollar figure in Annex 41, it would have shown that Omnicom’s other FAS 115 investments fell below their cost in March 2000, a period of more than nine months.

668. A review of the emails between Angelastro and Weisenburger shows how the change was made. The May 15 email contains a draft Annex 41 chart with the same categories

as what was finally submitted to the SEC. (LP Ex. 454, at OMC 0008452) This chart contains the correct figure for “other” investments at December 31, 2000 of \$55,897,604. However, the basis for Organic fluctuates by quarter, but is listed as \$21,018,000 at December 31, 2000. (*Id.*) The final Annex 41 has a consistent cost basis of \$38,359,000. (LP Ex. 139, Dep. Ex. 282 at OMC 0001572)

669. Comparison between the May 15 version and the final version shows how Defendants chose to make the change. The difference in cost basis as of December 31, 2000 between the May 15 version and the final version is:  $\$21,018,000 - \$38,359,000 = (\$17,341,000)$  The difference in cost basis for “other” investments as of December 31, 2000 is:  $\$55,897,000 - \$38,558,000 = \$17,341,000$ . In other words, Defendants lowered the reported cost basis for the “other” investments by shifting some of it to Organic’s cost basis. This is not coincidental. The same shift was done for each quarter of year 2000. (LP. Ex. 456 (Chart showing the differences in cost bases for Organic and “Other”))

670. The May 21, 2002 response letter also included the following representation to the SEC: “The market value of certain of Omnicom’s other SFAS 115 investments, which consisted of investments in four companies, the largest of which was headhunter.net, declined slightly below Omnicom’s cost basis individually, but not in the aggregate *for the first time* in June 2000.” (LP Ex. 139 (Dep. Ex. 282) at OMC 0001563) (Emphasis supplied) This was false. Omnicom’s investment in Answerthink first fell below Omnicom’s cost basis on April 4, 2000, and never rose above Omnicom’s cost basis after April 28, 2000. (LP Ex. 2 (Dep. Ex. 170) at OMC 0087784) Similarly, Omnicom’s investment in Netcentives first fell below Omnicom’s cost basis on April 5, 2000, and never rose above Omnicom’s cost basis after April 13, 2000. (*Id.* at OMC 0087784)

671. Following the June 12, 2002 disclosures to the market (described above) the SEC's Enforcement Division began an informal inquiry into Omnicom's handling of the E-Service Assets. (LP Ex. 457, June 14 Letter from SEC Enforcement Division, JD 037175-76)

672. In response to the June 14 SEC Enforcement Division Letter, Omnicom provided the SEC with numerous documents aimed at convincing the SEC that Defendants had done nothing wrong. (LP Ex. 119 (Dep. Ex. 333) at OMC 0000881 (June 27, 2002 Letter Response); LP Ex. 452 (Dep. Ex. 341) at JD\_049202 (July 12, 2002 Letter Response))

673. Defendants provided the SEC with Andersen's February 5, 2002 memorandum, which states that Andersen concurred with Omnicom's accounting for the Seneca transaction. (LP. Ex. 88 (Dep. Ex. 129) (included as exhibit to 6/27/02 Letter Response) Defendants knew this memo relied on false assumptions and false representations and omitted material information that would have provided the SEC with an accurate description of the circumstances surrounding the Seneca transaction, as detailed above at Paragraphs 19-26 (detailing Defendants' lies and misrepresentations to Andersen)

674. Defendants also provided the SEC with draft board minutes which indicated that KPMG "concurred" with Defendants' accounting for the Seneca Transaction. (LP. Ex. 458 (Dep. Ex. 252) (included as exhibit to 7/12/02 Letter Response at OMC 0094808) As noted above, however KPMG never "concurred" with Omnicom's accounting; their review was limited to reviewing the opinion balances on January 1, 2002, which were supported by the fraudulently procured Murray Devine valuation opinion. (See Part II *supra* (explaining false facts incorporated into Murray Devine's valuation))

675. This is not dispute over terminology. The SEC "passed" on this situation based on the fact that two auditors supposedly "concurred" with Omnicom's accounting. KPMG's Mr.

Verga, when asked if he had authorized Omnicom to say that KPMG had “concurred” with the Seneca accounting is clear: “No, we explained in great detail to management of Omnicom and the audit committee what our responsibilities were as successor auditor, and what our conclusions were with respect to those responsibilities.” (LP Ex. 71, Verga Tr. 31:15-19)

## **X. MOTIVE TO COMMIT FRAUD**

### **A. Omnicom’s Stock Price was Based on its Ability Consistently to Meet Earnings Expectations**

676. In Omnicom’s announcement of its year-end 1999 results, Wren boasted that Omnicom “posted the best financial performance in its history. It was our 13<sup>th</sup> consecutive record-breaking year. The fourth quarter was the 34<sup>th</sup> consecutive quarter of year-over-year growth in revenues and earnings.” (LP Ex. 306 (Dep. Ex. 247) at OMC 0027928)

677. Wren made similar boasts in announcing Omnicom’s year-end 2000 results, again bragging that the fourth quarter of 2000 was Omnicom’s “38<sup>th</sup> consecutive quarter of year-over-year growth in revenue and earnings. (LP Ex. 352, Omnicom Press Release, dated February 20, 2001, OMC 0032150-53 at 0032150)

678. Analysts’ reports from this period underscore the fact that Omnicom’s high stock price was based on its long record of meeting quarterly and annual earnings expectations. Examples of such reports follow.

679. A Salomon Smith Barney analyst stated, “As we watch more and more companies, we place a higher value on the security of numbers at OMC, and we believe the stock will outperform the market and its peer group over the coming quarters.” (LP Ex. 323 (Dep. Ex. 397), February 20, 2001 SSB analyst report, “OMC: Strong Numbers”, at pp 1-2; *see also* LP Ex. 125, Hakala Report ¶ 42)

680. A PNC Advisors analyst report on February 23, 2001 stated, “In a difficult environment, Omnicom continues to add to its luster with consistent earnings growth.... OMC reported its twenty-sixth consecutive positive earnings surprise in the fourth quarter and its seventh consecutive year of EPS growth over 20%.” The same analyst commented specifically on the role of Omnicom’s internet investments in maintaining quarterly earnings growth, stating : “Razorfish Gain is a Testament to Management” and reporting that the Razorfish sale “covered the cost of its dot.com investments.” (LP Ex. 125, Hakala Report ¶ 42)

681. Another analyst commented on the internet sector’s role in maintaining its streak of meeting or exceeding Wall Street expectations. An April 26, 2001 Deutsche Bank report noted that Omnicom’s “leadership extends across major advertising and marketing disciplines. ... Omnicom also boasts a robust portfolio of interactive marketing investments in the industry.” (LP Ex. 459, April 26, 2001 Deutsche Bank report, “Omnicom Group: Own for Market Leadership and EPS Consistency; 1Q01 Review” at p. 4)

682. Lehman Brothers reported in an April 24, 2001 report that the results allowed “the company to post its 31st consecutive quarter of meeting or exceeding Street expectations.” (LP Ex. 460, April 24, 2001 Lehman Bros. analyst report, “Omnicom Group: Solid 1Q01 Results, ‘Guarded’ Outlook” at p. 1)

683. A Credit Suisse/First Boston report of April 25, 2001, stated: “Skeptics are beginning to look to 2002 and wonder how Omnicom will sustain the momentum. We would point out that this argument has surfaced every year since we began following the company in 1997, and every year Omnicom has exceeded expectations.” (LP Ex. 461, April 25, 2001 Credit Suisse First Boston report, at p. 2; as mentioned in LP Ex. 125, Hakala Report ¶ 46)

684. A Merrill Lynch report of February 20, 2001 stated: “The fourth quarter continued OMC’s incredible track record of positive surprises... we remain confident that OMC is a solid, exciting investment both in the sector and the market at large. It is one of only 12 companies in the S&P that can claim a 5yr+ track record of over 15% top and bottom line growth.” (LP Ex. 322 (Dep. Ex. 395), February 20, 2001 Merrill Lynch analyst report, “Omnicom Group Inc.: 26th Consecutive Positive Surprise; 7th Year of 20% Growth,” at p. 2)

685. Thus, both Omnicom and “the Street” considered Omnicom’s ability consistently to meet or exceed expectation to be highly important in evaluating Omnicom’s management and pricing its stock. Largely because of these facts, Omnicom’s stock was priced at a premium to its competitors – *i.e.* its price/earnings ratio was higher than its competitors’ stocks. An analyst specifically noted this phenomenon in an April 9, 2001 Lehman Brothers report, stating: “Omnicom is the sector’s best performer and its valuation reflects it. On a P/E basis, the stock currently trades at more than a 40% premium to the market, toward the upper end of its historical range over the past five years and at a double-digit premium to its peers.” The same analyst specifically noted the risk that of Omnicom’s continued growth “slows materially, or falls back in line with that of its peers, the premium the stock enjoys would almost certainly deteriorate. That said, we reiterate our belief that Omnicom is well positioned to outperform its rivals in a more difficult environment and is experiencing the best momentum in the group thus far in 2001” (LP Ex. 462, April 9, 2001 Lehman Brothers analyst report, at p. 8; LP Ex. 125, Hakala Report ¶ 45)

686. Moreover, throughout this period, the market was punishing companies then failed to meet Wall Street’s earnings expectations. For example, when Omnicom’s competitor, Interpublic, took a writedown for a similar investment it had made in an internet company called

MarchFirst, *Advertising Age* reported that “Wall Street moved quickly to punish Interpublic. Several analysts cut their earnings estimates for the year. Interpublic stock dropped April 27; at mid-afternoon, it traded at \$32.50, down 10% and near its 52-week low.” (LP Ex. 324 (Dep. Ex. 72), “Agencies to See Slower Q1,” *Advertising Age*, April 30, 2001)

687. Omnicom’s high stock price thus depended on its ability to meet or exceed expectations. (See generally LP Ex. 125, Hakala Report at ¶¶ 46-48)

**B. Compensation**

688. Throughout the class period, Omnicom had several executive incentive plans in effect that tied management’s compensation directly to Omnicom’s reported financial performance or its stock price. These included cash bonuses based on performance goals such as earnings per share or net income; performance share units based on earnings-per-share growth; restricted stock awards; and stock option grants. (LP Ex. 402 (Dep. Ex. 68), Omnicom Proxy, dated April 11, 2001, at OMNRIB 0009-13; LP Ex. 424, Omnicom Proxy, dated April 15, 2002, OMNRJC 0056-83, at OMNRJC 0063-67; LP Ex. 464, Omnicom Proxy, dated April 22, 2003, JDP 000522-63, at JD 000531-35; LP Ex. 143, Wren Tr. 28:3–29:7, 40:2–41:3)

689. Andersen specifically noted the heightened fraud risk presented by the prevalence of compensation based on Omnicom’s financial performance and stock price. Andersen’s fraud risk memos for the 2000 and 2001 audits stated:

A significant amount of Company management’s compensation is contingent on the Company’s performance. Senior management receives substantially all of their compensation in the form of bonuses, stock options and restricted stock. Therefore, management has a vested interest in keeping the Company’s stock price high.

(LP Ex. \*COMP4 (Dep. Ex. 120), Analysis of AP-125 Fraud Risk Factors, dated Dec. 1, 2000 and updated Feb. 14, 2001; (LP Ex. 465 (Dep. Ex. 121), Analysis of AP-125 Fraud Risk Factors, dated Jan. 7, 2002, at AA 0019044; see also LP Ex. 466 (Dep. Ex. 118), Results of the 2000

Omnicom Risk Management Meeting, at AA 0017810; LP Ex. 467 (Dep. Ex. 119), Fraud Risk Practice Aid, at AA 0019056; LP Ex. 55, Benedik Tr. 46:24-47:9)

690. Wren received over \$6 million in cash compensation from 2000 through 2002. In each of these years, Wren received a base salary of \$875,000. (LP Ex. 464, Omnicom Proxy Statement, dated April 22, 2003, at JDP 000531; LP Ex. 143, Wren Dep. 30:13-31:1) In 2000, Wren also received a cash bonus of \$2.2 million, and the total compensation reported on his W-2 for that year was \$4,378,573. In 2001, Wren received a bonus of \$1.3 million and his total W-2 compensation was \$2,315,915. In 2002, Wren received no cash bonus and had total compensation of \$2,259,251 reported on his W-2. (LP Ex. 464, Omnicom Proxy Statement, dated April 22, 2003, at JDP 000531; LP Ex. 468, Compensation to Individ. Defs. from Omnicom Management, OMC 0070921; LP Ex. 143, Wren Tr. 31:2-32:24)

691. In addition to his salary and bonus compensation, Wren was granted 2,000,000 stock options on April 2, 2001. The options had a total value of \$30,357,750 on their grant date. (LP Ex. 463, Omnicom Proxy, dated April 15, 2002, at OMNRJC 0063-64.; LP Ex. 469, Individ. Defs. Compensation Information, OMC 0059676-80, at OMC 0059679.)

692. Wren also had substantial personal holdings in Omnicom stock during the Class Period. On December 31, 2000, he owned 208,488 shares of Omnicom common stock, worth \$17 million at then prevailing market prices. (LP Ex. 120, Wren Form 5, dated Jan. 15, 2001; LP Ex. 120, Omnicom stock price table) Wren also owned a total of 2,433,800 stock options. At year end 2000, Wren's in-the-money options were worth \$50 million based on the difference between their exercise prices and Omnicom's market price. (LP Ex. 402 (Dep. Ex. 68), Omnicom Proxy, dated April 11, 2001, at OMNRIB 0011; LP Ex. 143, Wren Dep. 36:14-37:4) A year later, at December 31, 2001, Wren owned 208,712 shares worth \$18.6 million and had

4,433,800 stock options whose in-the-money value was \$85.4 million. (LP Ex. 471, Wren Form 5, dated Feb. 8, 2002; LP Ex. 120, Omnicom stock price table; LP Ex. 463, Omnicom Proxy Statement, dated April 15, 2002, at OMNRJC 0065, 71.) Wren testified that a “substantial part” of his personal net worth – he estimates 50% – is dependent on the value of Omnicom stock. (LP Ex. 1430, Wren Dep. 49:21-51:17.)

693. Weisenburger received total W-2 compensation of \$2,298,999 in the year 2000, \$2,787,703 during 2001, and \$2,062,850 during 2002. (LP Ex. 468, Compensation to Individ. Defs. from Omnicom Management, OMC 0070921)

694. Weisenburger was granted 200,000 stock options on March 8, 2000, which had a value on their grant date of \$3,722,000. (LP Ex. 472, Weisenburger Form 4, dated March 20, 2000; LP Ex. 402 (Dep. Ex. 68), Omnicom Proxy, dated April 11, 2001, at OMNRIB 0010) He was given 400,000 stock options on February 2, 2001, which were worth \$8 million; and 750,000 options on October 2, 2001, worth \$8.1 million. (LP Ex. 469, Individ. Defs. Compensation Information, at OMC 0059680; LP Ex. 463, Omnicom Proxy, dated April 15, 2002, at OMNRJC 0064) Weisenburger received no stock options grants in 2002, but was awarded 8,300 shares of restricted stock. (LP Ex. 469, Individ. Defs. Compensation Information, at OMC 0059680)

695. Crawford received compensation from Omnicom of approximately \$1,395,000 each year from 2000 through 2002. (LP Ex. 468, Compensation to Individ. Defs. from Omnicom Management, OMC 0070921) Crawford received no stock option grants or restricted stock awards during this time. (LP Ex. 469, Individ. Defs. Compensation Information, at OMC 0059676)

696. Crawford also had substantial holdings of Omnicom stock, some of which he sold during the class period. On December 31, 2000, Crawford owned 334,400 shares, which were then worth \$27.7 million. He sold 21,600 of the shares on January 18, 2001 and realized proceeds of \$1.9 million (LP Ex. 402 (Dep. Ex. 68), Omnicom Proxy, dated April 11, 2001, at OMNRIB 0017; LP Ex. 469, Individ. Defs. Compensation Information, at OMC 0059676; LP Ex. 473, Crawford Form 4, dated Feb. 7, 2001; LP Ex. 120, Omnicom stock price table) At year end 2001, Crawford still held 291,650 Omnicom shares worth \$26 million. On February 27, 2002, he sold 12,000 additional shares and received \$1.1 million in proceeds. (LP Ex. 474, Crawford Form 4, dated March 7, 2002; LP Ex. 469, Individ. Defs. Compensation Information, at OMC 0059676; LP Ex. 120, Omnicom stock price table)

697. Angelastro received \$547,918 in compensation from Omnicom in 2000; \$750,606 in 2001; and \$949,394 in 2002. (LP Ex. 468, Compensation to Individ. Defs. from Omnicom Management, OMC 0070921)

698. In addition to his salary, Angelastro received annual awards of restricted stock. In 2000, he received 5,265 shares. (LP Ex. 475, Angelastro Form 4, dated April 3, 2000.) In 2001, Angelastro received 7,500 shares of restricted stock and in 2002 he was again awarded 7,500 shares. (LP Ex. 469, Individ. Defs. Compensation Information, at OMC 0059678)

699. Angelastro also received a stock option grant of 100,000 shares on October 2, 2001. (LP Ex. 469, Individ. Defs. Compensation Information, at OMC 0059678) When granted, those options had a value of \$1,085,620. (LP Ex. 463, Omnicom Proxy Statement, dated April 15, 2002, at OMNRJC 0064)

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