

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 03-12676
. .
MET-COIL SYSTEMS CORPORATION, .
. .
. 824 Market Street
. Wilmington, Delaware 19801
Debtor, .
. December 10, 2003
. 10:30 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtors: Goldberg, Kohn, Bell, Black,
Rosenbloom & Moritz, LTD
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For Formtek & Mestek:

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1 COURT CLERK: Please rise. You may be seated.

2 THE COURT: Good morning.

3 MS. PAMENTER: Good morning, Your Honor, Kathryn
4 Pamenter on behalf of Met-Coil Systems Corporation, the Debtor
5 in this case.

6 Your Honor, we have filed with the Court on December
7 9th, 2003 a copy of the amended agenda and I would ask to be
8 able to go through that almost in order. We've got a couple of
9 things that I can advise Your Honor on as we go through.

10 THE COURT: All right, that's fine.

11 MS. PAMENTER: Thank you. Items 1, 2 and 7 relate to
12 the disclosure statement that the Debtor and Mestek filed on
13 November 5th, 2003, only two months into the Debtors bankruptcy
14 case. As set forth on the agenda, we are asking that those
15 matters be continued to January 7th, 2004 at 2 p.m. The Debtor
16 has made substantial progress in this case and has been working
17 with numerous interested parties, so as to be able to fill in
18 the blanks that remain in the disclosure statement and the
19 plan.

20 The Future Claims Representative needs additional
21 time to finish its analysis, to calculate a number and to
22 complete the trust agreement and other documents that it has
23 been working on. We have been advised that that work will be

1 completed early next week and at that time we will be in a
2 position to be able to disseminate that information to other
3 interested parties.

4 As such, we do believe that it is in our best
5 interest and the Debtors best interest at this point in time to
6 continue the disclosure statement hearing and as well as
7 procedures of solicitation motion hearings so as to be able to
8 get that information, fill in the blanks in those documents and
9 to be able to proceed early in January.

10 We believe that once we have the number and the
11 documents from the Future Claims Representative, we will also
12 be addressing most of the objections that have been filed with
13 respect to those documents.

14 The solicitation procedures motion and the sale
15 procedures motion are directly related to the disclosure
16 statement and as such, we are asking that those be continued as
17 well, but I will tell the Court that we are going to go forward
18 with starting the marketing process so as to be able to give as
19 much time to the sale process as possible and give interested
20 buyers as much time to be able to look at the Debtor and move
21 forward in terms of starting to get some information with
22 respect to that. We have advised the Committee previously with
23 regard to that plan in terms of moving forward.

24 We have currently pending on January 7th, the omnibus
25 objection to approximately 15 claims all related on the same

1 basis, pursuant to Section 502(e) that they are contingent
2 claims. We would ask whether Your Honor would prefer to have
3 the disclosure statement hearing set at the same time as the
4 omnibus objections if Your Honor has the time, otherwise, we
5 would ask that the omnibus objection hearing be continued to
6 January 20th, the next omnibus date scheduled in this case.

7 THE COURT: Well, I did check the calendar and it
8 looks like I have two hours on the 7th for this case. Do you
9 think that will be sufficient for both matters?

10 MS. PAMENTER: I believe so, Your Honor.

11 THE COURT: All right. Then let's leave it on for
12 the 7th.

13 MS. PAMENTER: Thank you. Your Honor, items 3, 4 and
14 5 are uncontested matters as set forth on the agenda. We have
15 filed certificates of no objection and Your Honor has entered
16 the orders with respect to those items.

17 THE COURT: All right.

18 MS. PAMENTER: I'm going to come back to item 6 in a
19 moment because that is the only matter that we're actually
20 going forward with today. Item 8 on the agenda is the motion
21 to assume the settlement agreement. There have been a number
22 of developments within the last 24 hours with respect to this
23 motion which requires us to ask that we adjourn this matter to
24 January 7th, or if Your Honor prefers, January 20th.

25 Briefly, first the parties are engaged in settlement

1 negotiations and we do believe it's likely that we may be able
2 to resolve all of the issues with Travelers and as such, would
3 like the opportunity to be able to accomplish that.

4 Second, as Your Honor may be aware from the pleadings
5 that have been filed related to the motion to assume the
6 settlement agreement, proceedings related to that motion have
7 been pending in both Iowa and Illinois courts. Yesterday,
8 Judge Sonderde of the United States Bankruptcy Court for the
9 Northern District of Illinois, granted a motion transferring
10 venue of the adversary proceeding pending there to this court
11 and as such, a continuance would afford the time for the
12 transfer to occur as a practical matter, as well as for all of
13 the pleadings to be before Your Honor so that you wouldn't be
14 in a position to deciding things piecemeal.

15 THE COURT: Okay. All right. Do you want to at
16 least as a place saver, continue it to the 7th?

17 MS. PAMENTER: That would be terrific, Your Honor, if
18 that would be possible.

19 THE COURT: All right.

20 MS. PAMENTER: We appreciate that. Would it be
21 possible if we were able to reach a resolution with this
22 matter, we would obviously want to bring a 9019 motion before
23 Your Honor as soon as possible. If we're able to do that,
24 would you permit us to file the appropriate motions to have
25 that heard on the 7th as well, so as to be able to fully

1 resolve that, or would you prefer that that be set for the
2 20th?

3 THE COURT: Well, depending on when you file your
4 motion, I'll deal with it then, but as long as you keep the
5 Committee and other interested parties advised of the status,
6 you can include that in the motion for shortened notice if
7 needed.

8 MS. PAMENTER: Thank you. With regard to item number
9 9, the Official Committee of Unsecured Creditors has agreed to
10 withdraw its application to retain Bederson and Company without
11 prejudice to refile that motion at a later date.

12 That leaves us with item 6 on the agenda which Your
13 Honor scheduled for oral argument today. We have Mestek's and
14 Formtek's motion for summary judgment which the Debtor joined,
15 as well as Honeywell's motion to dismiss and withdraw a
16 document which, in part, implicates the Debtor's motion for
17 preliminary relief. We would respectfully suggest the
18 following procedure if Your Honor permitted.

19 Argument by Honeywell on the motion to dismiss
20 followed by argument by the Debtor, Mestek and Formtek in
21 response to Honeywell's motion to dismiss and at the same time,
22 in support of the motion for summary judgment with appropriate
23 responses to follow after.

24 THE COURT: Well, am I hearing the summary judgment
25 today?

1 MS. PAMENTER: Yes, Your Honor.

2 THE COURT: Well, I wasn't aware I was hearing that.
3 Have all pleadings been filed on the summary judgment?

4 MS. PAMENTER: That's my understanding, yes, Your
5 Honor.

6 THE COURT: All right. Well, I'll hear you.

7 MS. PAMENTER: We have copies of the pleadings in
8 binders if that would be helpful.

9 THE COURT: Well, I have copies of the pleadings.

10 MS. PAMENTER: Okay. If we're proceeding in that
11 order, then I would turn the podium over to Honeywell in their
12 motion to dismiss.

13 THE COURT: All right.

14 MR. MONACO: Good morning, Your Honor, Frank Monaco,
15 for Honeywell International. Your Honor, I'd like to introduce
16 my co-counsel, Steven Selbst, seated at counsel table and Craig
17 Zimmerman, from the McDermott, Will and Emery firm. They've
18 both been admitted pro hac vice in this case.

19 THE COURT: All right.

20 MR. MONACO: And will present the argument.

21 THE COURT: All right, thank you.

22 MR. ZIMMERMAN: Good morning, Your Honor, Craig
23 Zimmerman on behalf of Honeywell. Your Honor, before I get
24 started, I know you know that we've got the motion to dismiss
25 up and the motion for preliminary injunction. Before I start

1 my argument, I didn't know whether the Court had any particular
2 issues it wanted me to focus on or questions it wanted me to
3 address.

4 THE COURT: Not really.

5 MR. ZIMMERMAN: I'm going to do a little bit
6 different than the order that's been proposed inasmuch as I
7 think both our positions with respect to the motion to dismiss
8 and our motion on preliminary injunction are based on three
9 basic propositions and rather than repeat myself with respect
10 to both of them, I'll just hit those three basic propositions.

11 The first is --

12 MS. PAMENTER: I'm sorry to interrupt, I apologize.
13 The preliminary injunction is not up for today, Your Honor.
14 What is up for today is the motion to dismiss and the motion
15 for summary judgment. Your motion to dismiss may somehow
16 implicate the motion for preliminary injunction, but we're not
17 arguing that motion today.

18 MR. ZIMMERMAN: That makes my job a lot easier, Your
19 Honor. I'll focus on the motion to dismiss. Your Honor, with
20 respect to the motion to dismiss, our position is based on
21 three basic propositions. The contract dispute that is at the
22 core of the Illinois action that is pending, as well as Count 2
23 of the adversary proceeding, is a contract dispute between
24 non-Debtor parties. It is a dispute between Honeywell, Mestek
25 and Formtek as parents and parties to the indemnity agreement.

1 THE COURT: Well, is it as successors or because of
2 your pierce the corporate veil argument?

3 MR. ZIMMERMAN: Actually, Your Honor, it's based on
4 the contract itself. The indemnity agreement itself defines
5 the parties as Met-Coil, Lockformer, and their parents. Our
6 argument is parents within that contract and this will be
7 something we'll be arguing as well in the motion for summary
8 judgment, that the term parents itself needs to be interpreted
9 to include a party like Mestek or Formtek, which is presently a
10 party which is presently the parent of this Debtor and,
11 therefore, with the ongoing indemnity obligations, subject to
12 those obligations.

13 THE COURT: Well, their argument is they didn't
14 execute that contract.

15 MR. ZIMMERMAN: My argument is that Met-Coil and
16 Lockformer executed that contract and were empowered to bind
17 subsidiaries, affiliates and parents and in this instance the
18 intent of the parties was to bind future parents. And the
19 evidence of that, Your Honor, and jumping to the merits of the
20 contract dispute, is that at the time the contract was entered
21 into in 1994, Met-Coil, one of the signatories, who is defined
22 as being parent, subsidiaries, affiliates, et cetera, had no
23 parent and in order to give that term the proper meaning, you
24 have to understand it to mean any parent who arises later on.

25 But, again, backing up, this is a dispute between

1 non-Debtors, it is litigation to which Met-Coil is not a party
2 and at which its estate interests are not at stake. It's a
3 direct claim by Honeywell for indemnity against a party to an
4 indemnity contract. As such, this Court, I suggest, does not
5 have subject matter jurisdiction over the claim.

6 The other two counts, the other two substantive
7 counts in the adversary proceeding, relate to Honeywell's alter
8 ego claims against Mestek. I think it is clear as we briefed
9 in our papers, that Honeywell's alter ego claims are personal
10 to Honeywell, they relate specifically to the conduct of Mestek
11 and Formtek with regard to Met-Coil and the indemnity
12 agreement, the obligations under the indemnity agreement and
13 how they've administered that. And as such, and given that the
14 injury itself is unique to Honeywell and it's the indemnity
15 agreement that's impaired, under the Foodtown decision, the 3rd
16 Circuit's Foodtown decision, that is a personal claim to
17 Honeywell and not property of the estate and not a claim that
18 the Trustee should be permitted, or the Debtor should be
19 permitted to control.

20 The first count of the adversary complaint, Your
21 Honor, ultimately boils down to the prayer for preliminary
22 injunctive relief which we're not arguing today. We have
23 argued that that claim needs to be dismissed for failure to
24 state a claim and our premise is as follows.

25 The justification for preliminary injunctive relief

1 that are offered by the plaintiffs are that Mestek will be the
2 plan funder, that there is some risk to the estate from
3 collateral estoppel, and ultimately, that the alter ego claims
4 are property of the estate. As I already said, our argument
5 is, and I think it's fairly clear that the alter ego claims are
6 not property of the estate, so that justification disappears.

7 With regard to collateral estoppel, as we've
8 indicated, we think the chances of collateral estoppel against
9 Met-Coil arising out of the Illinois action is a red herring.
10 The chances are nominal at best and, frankly, since it's
11 ultimately this Court, most likely, that would be gauging the
12 collateral estoppel effect, we could be fairly certain that
13 there won't be a binding effect.

14 Finally, with regard to the plan funding issue, this
15 is exactly -- we are exactly the same posture we are now as
16 when we filed the motion to dismiss, which is Mestek's status
17 as plan funder is highly contingent and highly speculative.
18 The contingencies themselves are --

19 THE COURT: Well, but a motion to dismiss for failure
20 to state a cause of action, you have to prove that there is no
21 set of facts as alleged that would create a cause of action.
22 It's clear that courts have entered 105 injunctions.

23 MR. ZIMMERMAN: Absolutely true, Your Honor.

24 THE COURT: In circumstances where the injunction is
25 to consent to a proposed plan funder.

1 MR. ZIMMERMAN: That is correct, Your Honor.

2 THE COURT: You don't have to be at confirmation
3 stage for courts to enter such actions and, again, at this
4 early stage on a motion to dismiss, can I really say there's no
5 potential cause of action here?

6 MR. ZIMMERMAN: I think, Your Honor, that you can and
7 the reason I say that is because to their complaint they
8 attached a number of exhibits and in those exhibits as well as
9 in the complaint itself, it is clear that Mestek's willingness
10 to fund the plan is contingent upon this Court ruling in its
11 favor on the merits of the underlying dispute with Honeywell.
12 So, there is, in fact, I mean there is a fair amount of
13 uncertainty with regard to whether or not they will ultimately
14 be the plan funder.

15 THE COURT: Well, but doesn't that warrant -- if
16 there's jurisdiction to enter a 105 finding that Counts 3 and
17 4, at least, are related because there needs to be -- and
18 possibly Count 2, that there needs to be a resolution of this
19 in order for the plan to go forward and it is related to the
20 Debtor's plan, therefore, and, therefore, to the administration
21 of this estate.

22 MR. ZIMMERMAN: Well, Your Honor, I don't deny that
23 you've got -- we're not arguing you don't have jurisdiction
24 over Counts 3 and 4, and clearly with regard to the 105
25 request, that is also an issue that's squarely -- our only

1 jurisdictional argument is with respect to the declaratory
2 judgment.

3 THE COURT: To 2.

4 MR. ZIMMERMAN: To 2, right.

5 THE COURT: Well, let's go to you're a alter ego,
6 pierce the corporate veil argument that this is personal. If
7 you're successful in arguing it, it won't simply implicate your
8 rights, though, will it? A decision in your favor on that
9 point will pierce the corporate veil and effect not just your
10 rights as a creditor but all creditors rights.

11 MR. ZIMMERMAN: I disagree, Your Honor. We would be
12 collecting directly from Mestek. This would not be something
13 that would be passing through the Debtors estate.

14 THE COURT: No, it would have collateral estoppel
15 effect. A finding that they're the same entity, or should be
16 treated as the same entity legally. How can it be limited to
17 your claim?

18 MR. ZIMMERMAN: Well, the premise for piercing the
19 corporate veil claim would be in addition to the general
20 respecting the corporate form issues, which everybody who is
21 pursuing a piercing of the corporate veil would need, it
22 relates specifically to as the Illinois complaint reflects, the
23 conduct of Mestek with regard to the defense of these action
24 and administration of the indemnity agreement.

25 For instance, as --

1 THE COURT: But clearly, those same actions would
2 implicate the claims of the personal injury claimants
3 themselves. I mean if you get findings of fact in your favor
4 to the extent you're seeking them --

5 MR. ZIMMERMAN: It would certainly be binding on
6 Mestek, absolutely.

7 THE COURT: Exactly, and it would have collateral
8 estoppel effect not just in your favor but since it's against
9 them, it would extend to many more than one creditor.

10 MR. ZIMMERMAN: Well, creditors of Mestek, Your
11 Honor.

12 THE COURT: No, creditors of this Debtor would have a
13 claim against Mestek based on findings that the veil has been
14 pierced.

15 MR. ZIMMERMAN: With respect to their relationship to
16 our indemnity agreement. We are the only --

17 THE COURT: Well, that's your Count 2, but on the
18 alter ego theory, you're going beyond that, you're saying their
19 entire actions in connection with --

20 MR. ZIMMERMAN: Well, their entire actions with
21 respect to the defense of Met-Coil and with respect to the
22 defense of Honeywell and their fulfillment of their
23 obligations, the administration of their obligations under the
24 indemnity agreement. I'm not aware that anybody else is in a
25 position to take advantage of that finding --

1 THE COURT: Of a finding --

2 MR. ZIMMERMAN: Because nobody else's claim is
3 dependent upon how those obligations were administered.

4 THE COURT: No, but they may piggyback on you.

5 MR. ZIMMERMAN: Well, they certainly may take
6 advantage of some underlying facts with regard to respecting
7 the corporate forum.

8 THE COURT: Yes.

9 MR. ZIMMERMAN: But with regard, for instance, to the
10 fraud or inequity component of piercing the corporate veil,
11 only we would be the ones asserting that it is this obligation
12 that is being avoided in that context.

13 THE COURT: Perhaps the building blocks of your
14 complaint may implicate only activity vis-a-vis you, but
15 doesn't the ultimate ruling implicate a lot of other creditors,
16 if you're successful?

17 MR. ZIMMERMAN: If I am successful, certainly other
18 creditors may examine whether or not it is worth taking a shot
19 at doing the same thing.

20 THE COURT: Well, there's already a ruling.

21 MR. ZIMMERMAN: Well, and Mestek on a collateral
22 estoppel basis might be bound in it, but I don't think that our
23 rulings, in and of themselves, would be sufficient to establish
24 just piercing the corporate veil for just any creditor.

25 THE COURT: But, why?

1 MR. ZIMMERMAN: Because we would be talking about
2 conduct that relates specifically to the obligations that they
3 owe -- that Met-Coil owes to Honeywell and how those were
4 administered. I guess the injury to us is the avoidance of the
5 indemnity obligation. We are the only ones with that indemnity
6 obligation and the facts specific to the manner in which that
7 was administered are the facts that would have to be shown with
8 respect to piercing the corporate veil. Other creditors would
9 not -- if we had a base showing, if all we were doing was
10 asserting that they had neglected the corporate forum and,
11 therefore, you know, in a general sense, we should be permitted
12 to pierce the corporate veil and go directly at Mestek.

13 Your Honor, I --

14 THE COURT: Well, you're not going to assert any of
15 those other general --

16 MR. ZIMMERMAN: I am certainly going to assert that
17 as part of my case, but I'm not contending that that in and of
18 its is going to be sufficient. We're going to have to, you
19 know, my view is, we're clearly going to have to go beyond that
20 and talk about the specific obligations being avoided.

21 THE COURT: But to the extent you make an argument
22 generally, anyway, that is the estate's cause of action.

23 MR. ZIMMERMAN: As a component of our overall claim,
24 I still think that this is a claim that is going to end up
25 being Honeywell's loan. A critical component of it is the

1 Honeywell specific component and the injury itself is the
2 Honeywell loan.

3 THE COURT: Well, one argument you have is that it's
4 only, vis-a-vis, the activities, vis-a-vis, Honeywell. But I
5 don't hear you suggesting you're going to limit your argument
6 to that.

7 MR. ZIMMERMAN: Nor could I, Your Honor.

8 THE COURT: Right.

9 MR. ZIMMERMAN: I mean, if I were to acknowledge
10 that, then I'd have to acknowledge that the claim is probably
11 not going to go very far.

12 THE COURT: Yes. All right.

13 MR. ZIMMERMAN: Well, if you don't have any more
14 questions on the motion to dismiss, I'll come back and reply to
15 the motion for summary judgment.

16 THE COURT: All right, thank you.

17 MR. BARLIANT: Good morning, Your Honor, Ronald
18 Barliant on behalf of the Debtor. I'm going to speak briefly,
19 primarily to the motion to dismiss and Mestek's counsel, Mr.
20 Cole, will pick it up from there.

21 And, the reason I rise is, this proceeding involves
22 two issues that are really critical to the Met-Coil estate and
23 to the plan, the indemnification in the alter ego theory.

24 This case, and I think on the first day I probably
25 said pretty much the same thing I'm about to say now, this case

1 is driven by essentially three core facts. Met-Coil has
2 enormous TCE liabilities, although otherwise, it's a profitable
3 and viable business. And, second, Met-Coil has greater value
4 to Mestek, in our opinion at least and we'll find that out when
5 we go through the auction process, but we believe has greater
6 value to Mestek than to anyone else because of the same
7 synergistic reasons that caused Mestek to acquire it in the
8 first place and third, and probably most important, Mestek has
9 been sued on alter ego and other theories, on the Debtor's TCE
10 liabilities.

11 Those facts led us to the strategy that we're
12 attempting to follow in this case since day one, which is that
13 Mestek funds a plan in exchange for Met-Coil's equity and
14 protection from TCE liability. Now, the plan works because of
15 the economic incentives that arise from those three facts.
16 Those are the incentives that Mestek has to pay more than
17 anybody else would pay, and certainly more than Met-Coil itself
18 could generate to fund the plan, in our view. And, again,
19 we'll test that as is appropriate, but we believe that's how
20 it's going to turn out.

21 We have filed a plan now with Mestek as a
22 co-proponent of that plan, that incorporates that strategy.
23 Now, the reason Honeywell's indemnity claim, the one they filed
24 in Illinois, that is now here, is so important to us, is
25 because it undercuts the principle economic incentive that

1 Mestek would otherwise have to contribute to our plan. If it
2 turns out, and I find this hard to believe that it would out
3 this way, but if it were to turn out that every time Honeywell
4 gets sued, Honeywell can go to Mestek after Met-Coil has been
5 discharged, can go to Mestek and seek indemnification for those
6 same liabilities, then it's obvious that Mestek has much less,
7 if anything to gain, by contributing to this plan and that
8 necessarily results in simple economic terms, in less for
9 creditors if not in the complete failure of the plan we're
10 trying to put forward.

11 Now, Honeywell argues that Mestek's commitment is
12 speculative, or conjectural or words to that effect. Well, in
13 a sense, ever contribution to a plan is contingent until the
14 plan is confirmed. So, that's kind of a truism. But the key
15 thing here is the economic incentives that I've talked about,
16 that clearly indicate that this is real, this is more than
17 speculative or contingent. This is something Mestek has a
18 reason to do, and what they have a reason to do is of the
19 greatest possible benefit to this estate.

20 That's been demonstrated by Mestek's aggressive
21 support of this process, it's co-sponsorship of the plan.
22 Perhaps most important that's \$8 million Debtor-in-Possession
23 financing. I mean, this is not just somebody coming off the
24 street and saying maybe I'll put in a couple of dollars in the
25 plan. This is far more than that.

1 Honeywell's claim, however, undercuts, if it were to
2 succeed, would undercut the value and the strength of Mestek's
3 commitment and in that way it's directly related to this case.

4 There's another reason why this Court has
5 jurisdiction. Honeywell admits that if its claim has an impact
6 on the estate, then this Court has jurisdiction. Page 11 of
7 its opening brief and Page 14 of its reply, Honeywell says that
8 its claim has no impact or would have no impact if it were
9 successful, because if Honeywell wins Mestek would have a right
10 of indemnity against Met-Coil, therefore, the result would be
11 just a change in the names of the creditors, Mestek would just
12 be a creditor on the same claim and the same dollar amount and,
13 therefore, there'd be no effect on the estate. But the premise
14 is false. There's no right of indemnity that Mestek would have
15 if Honeywell were to succeed on its underlying theory.

16 Honeywell is not arguing and there is no basis for
17 any argument that Mestek is a guarantor of Met-Coil's
18 obligation under the indemnification. As I understand their
19 argument, at most Mestek is a co-obligor, a direct obligor on
20 the indemnification because of the way they work through the
21 definitions.

22 At most, Mestek would have a right of contribution
23 for some percentage, and that's not even clear. I mean, I
24 don't even know that that's true. But the key point is that
25 there would be an effect on the estate if Honeywell prevails

1 against Mestek and its claim is satisfied by Mestek,
2 Honeywell's claim goes away and Mestek has either no claim
3 against the estate, or a claim for contribution in some
4 percentage. I think by the admissions made by Honeywell
5 itself, in its own briefs, this Court has jurisdiction.

6 Third factor that I think deserves mention, is that
7 we have now filed an objection to Honeywell's claim against
8 this estate based on the same indemnification that's involved
9 in this lawsuit. Therefore, this Court is going to be
10 considering that indemnification agreement in connection with
11 essentially the same claim that Honeywell is pursuing or
12 attempting to pursue against Mestek.

13 Your Honor already --

14 THE COURT: Well, is it the same issues? I mean,
15 their argument is that Mestek is liable under the
16 indemnification agreement under the terms of that, but I don't
17 think that implicates the straightforward indemnification claim
18 against the Debtor.

19 MR. BARLIANT: Yes, they have a different hurdle with
20 respect to Mestek. I mean we signed the indemnification
21 agreement, so we're clearly liable. They have to get past
22 that, but if they do get past that, then I think their claim is
23 the same and the interpretation of the indemnification
24 agreement is the same. Now, we've raised some issues in our
25 objection concerning what is and is not indemnified, that

1 presumably would be the same issues as raised in -- that would
2 ultimately be raised in this litigation.

3 THE COURT: All right.

4 MR. BARLIANT: The Court has already touched upon
5 this question, some of the things I was going to say about the
6 alter ego issues, but I do need to address those as well.

7 As counsel has already indicated, and as Honeywell
8 says in its brief, if the alter ego claim is based on grounds
9 generally applicable to creditors, it's property of the estate
10 and protected by the automatic stay. Honeywell admits, counsel
11 just admitted here that it is, in fact, relying on generally
12 applicable grounds in addition to what it regards as other
13 grounds and I'm going to suggest in a minute that those are
14 also generally applicable.

15 In fact, in its brief, Section C, unfortunately, the
16 version I have doesn't have numbered pages, Section C of their
17 brief, they are saying that their claims is because Mestek has
18 so dominated Met-Coil generally and with regard to the specific
19 subject matter of the parties agreement, that adherence to the
20 corporate fiction would be unjust and inequitable.

21 Well, I guess my first question would be, you know,
22 if they went ahead in the state court and won, how would we
23 know? How would we know whether they won on the basis of our
24 rights, meaning the Debtor's rights, Debtor-in-Possession
25 rights, or on what they call their specific grounds, how would

1 we know that? I think that alone is enough to say that that
2 cause of action belongs to this estate and Honeywell should not
3 be permitted to pursue it.

4 But there's even a deeper reason why Honeywell is
5 wrong. We have to remember that the claim we're talking about
6 is a claim against Mestek on an alter ego theory, abuse of the
7 corporate forum, it is not a breach of contract claim. They
8 may contend, do contend, that the indemnification agreement was
9 breached and they may even contend that something Mestek did in
10 its control of Met-Coil, caused that breach. But that's not
11 the underlying issue when it comes to alter ego, what they
12 really have to contend is that back in 1994, when they paid
13 \$800,000 to Met-Coil and got this indemnification back, Mestek
14 had done something in an abuse of the corporate forum, that as
15 inequitable and unfair or fraudulent that induced them to enter
16 into that transaction. The fact that later on Mestek allegedly
17 did something that pertains to the subject matter of the same
18 transaction, is not specific facts to their claim on an alter
19 ego theory. What they're saying is that Mestek controlled
20 Met-Coil in the making of decisions related to environmental
21 issues. I mean the Court has already suggested, told cases
22 about environmental claims essentially. I mean, they're
23 certainly trade creditors, but the environmental claims
24 predominate, but even that's not the key point.

25 The key point is, they are saying that Mestek

1 controlled Met-Coil. Everybody can say that, everybody can
2 point to Mestek's actions and alleged control of Met-Coil as
3 evidence that the corporate forum ought to be pierced and, in
4 fact, that is what the tort plaintiffs who have alleged alter
5 ego theories, are saying and if we have to come to that, quite
6 frankly, that is what the estate is going to say if we choose
7 to pursue that claim, that belongs to us.

8 There is nothing specific about that, simply because
9 it relates to environmental matters doesn't make it specific to
10 Honeywell. A vendor of staples has a different claim than a
11 vendor of paperclips. And, you know, if later on, after they
12 have extended their credit and down the road, the parent does
13 something that causes the Debtor to not pay for the staples,
14 that doesn't mean it's only the vendor of staples who has that
15 theory. The theory is based on abuse of the corporate forum
16 and it's a generally applicable theory.

17 Now, just to follow up, it's obvious that Honeywell
18 can't allege that Mestek did anything in 1994 because in 1994,
19 Mestek had no connection with Met-Coil.

20 Again, Your Honor, I rise because of the importance
21 of these issues to this estate. The alter ego claim for the
22 same reason as are true of the indemnification claim, is
23 clearly critical because it, quite frankly, is one of the
24 factors that gives Mestek the economic incentive to proceed.
25 It's an asset of this estate and it is an asset that has, under

1 the unique facts of this case, particular value to this estate.
2 So, Honeywell should not be allowed to compromise that asset.
3 Thank you, Your Honor. I'll turn the podium over to Mr. Cole.

4 THE COURT: All right.

5 MR. COLE: Good morning, Your Honor, my name is Adam
6 Cole from Greenberg, Traurig. I represent Formtek and Mestek.
7 These are the corporate parents of the Debtor. Formtek and
8 Mestek became corporate parents of the Debtor in June of 2000.
9 This is six years after the indemnity agreement that we're
10 talking about today.

11 We're here today on two motions, I'm here to address
12 summary judgment and then I'll probably loop back to any final
13 issues that you may have with respect to the motion to dismiss.

14 The settlement and indemnity agreement that's at
15 issue today is between the Debtor and an entity known as Allied
16 Signal. Allied Signal was a predecessor of the defendant,
17 Honeywell. The settlement indemnity agreement was signed in
18 December of 1994, that's nearly six years prior to the time
19 Mestek and Formtek purchased the Debtor.

20 The settlement release and indemnity agreement is
21 Exhibit E, to the Frank Citera declaration that's been
22 submitted, but I've brought extra copies, if it's more
23 convenient to look at. I'll hand up a copy to Your Honor.

24 THE COURT: All right.

25 MR. COLE: Your Honor, the background of this

1 agreement was that prior to 1994, the Debtor discovered TCE had
2 spilled into the ground at it's Lisle, Illinois manufacturing
3 facility. TCE is a solvent that the Debtor once used as part
4 of its manufacturing process and Allied Signal was the entity
5 that provided the TCE and we contend, or I think the Debtor may
6 contend that Allied Signal was the entity that, in fact,
7 spilled the TCE.

8 This settlement was signed to resolve the dispute
9 between the Debtor and Allied Signal as to who would pay clean
10 up costs. The settlement agreement provides for a cash payment
11 from Allied Signal to the Debtor, or the Debtor's predecessor.
12 And, that cash payment was made before Mestek and Formtek
13 became the Debtors corporate parent.

14 The portion of the agreement that we're here today on
15 is found at Page 3, paragraph B, and it's a long paragraph so
16 I'll paraphrase. Paragraph B refers to Lockformer and Mequel.
17 Lockformer is now a division of the Debtor, agreed to defend,
18 hold harmless and indemnify Allied Signal, now Honeywell, from
19 all claims and if you read on, relating to TCE. The indemnity
20 agreement does not refer to the parent, that became the parent,
21 six years later.

22 The issue in this case is whether Mestek and Formtek
23 are also obligated under the indemnity agreement. The answer,
24 Your Honor, to that question, which is at the heart of this
25 case is no, for four reasons.

1 The first reason is found, again, at Page 11, where
2 the signatories of the agreement are found. The parents are
3 not signatories to this agreement, they did not agree to
4 indemnity under this agreement. In fact, the physics of time
5 make it impossible for the parents to have agreed to indemnify.

6 THE COURT: All right.

7 MR. COLE: This bears repeating, that this agreement
8 was entered into six years before the Debtor became the parent
9 subsidiary. For that reason alone, the parent, Mestek and
10 Formtek, cannot be bound under the indemnity.

11 The second reason is basic Hornbook corporate law. A
12 subsidiary does not have authority as a matter of law to bind
13 its parent. That's the purpose of the corporate forum. The
14 only time a subsidiary can bind its parent is when the
15 subsidiary acts as an agent for its parent. In this case we
16 are six years removed from that potential agency relationship.
17 Let's assume that Mestek and Formtek had been the corporate
18 parent of the Debtor six years previously. What Honeywell
19 would have to prove is that Met-Coil, the Debtor, acted as the
20 agent of the parent and in this particular case on the face of
21 the agreement, there is no indication that that would have
22 happened even back in 1994, for that separate reason and to
23 maintain the corporate forum. And basic Hornbook corporate law
24 dictate that summary judgment is warranted. Again, there are
25 no questions of fact. The only issues of potential fact were

1 whether or not Mestek and Formtek were the parent of Met-Coil
2 at the time and the answer to that question is obviously no.

3 The third reason is based upon the face of the
4 agreement. Now, Honeywell, I think, has been relying on the
5 definition of Met-Coil and Lockformer and that's found on Page
6 2 of the agreement. And that definition provides, and I'm
7 reading the Met-Coil definition, as used in this agreement the
8 term Met-Coil shall mean Met-Coil Systems Corporation and its
9 parents, subsidiaries, affiliated companies, predecessors,
10 successors, et cetera.

11 This agreement, again, was entered in 1994. To enter
12 into an agreement there has to be a meeting of the minds.
13 Met-Coil at the time could not have meant in its mind that it
14 was bidding Mestek and Formtek, because Mestek and Formtek did
15 not exist. In fact, there were no minds to meet at that time.
16 What Honeywell says is that the term parents applies to any
17 parent regardless of when the agreement was entered. Well,
18 that's not the law, Your Honor, and we've cited a case from the
19 3rd Circuit that directs the parties and courts to interpret
20 contracts based upon the circumstances that exist at the time
21 the contract was entered and that's the Kirshenbaum case, Your
22 Honor, at 243 F.3d. at 153.

23 The reasons -- well, all these reasons why summary
24 judgment is warranted, in large measure, are left uncontested.
25 In fact, the principles defenses in this case raised by

1 Honeywell is the issue of assumption. Honeywell argues that
2 Mestek and Formtek assumed the agreement by its actions post
3 June of 2000 when the Debtor became a subsidiary. Well, that
4 argument is invalid as a matter of law as well and the
5 principle reason it's invalid as a matter of law is because the
6 statute of frauds provides, and this is both the statute of
7 frauds in Delaware and Illinois, that to assume the debt of
8 another has to be signed in a writing by the entity bount.
9 There is no right of that nature and no discovery would find a
10 writing of that nature. In fact, these cases and these matters
11 have been pending for 10 years, and it's been through thousands
12 and thousands of pages of discovery, dozens of depositions, no
13 document of that nature was ever turned up. The statute of
14 frauds in and of itself, bars this action and bars Honeywell's
15 claim of assumption.

16 But, in fact, the second reason is set forth, again,
17 in the agreement. And the agreement states at Page, pardon me,
18 Your Honor, Page 10, paragraph seven says this agreement
19 constitutes the entire agreement and then paragraph eight says,
20 this agreement may not be altered, amended, modified or
21 otherwise changed except in writing, duly executed by
22 authorized representatives of all parties thereto.

23 What Honeywell is suggesting is a modification to
24 this agreement to add another obligor under the agreement. The
25 other obligor would be a party that entered into the picture

1 six years later. Again, this would be an agreement both signed
2 by Met-Coil and Honeywell, so if there was such an agreement,
3 that agreement would most definitely be within the possession
4 of Honeywell. There is no such agreement. The fact is, there
5 is no writing. As a matter of law summary judgment is
6 warranted even though there's a defense asserted of assumption.

7 Your Honor, we've come back full circle. The second
8 principle defense to our claim that is raised by Honeywell is
9 the subject matter jurisdiction defense. Your Honor, this case
10 is related to the Debtor's plan and has an impact on the
11 Debtor's plan and of course states the 3rd Circuit discussed
12 the test related to jurisdiction in a way that's directly
13 applicable to our case. It said that it related to
14 jurisdiction applies if the effect of the action has an effect
15 on the options the Debtor has and the freedom the Debtor has in
16 constructing a plan. My client has co-proposed a plan in which
17 it is making a substantial contribution. That contribution is
18 contingent upon the plan being approved and the plan having a
19 provision for an injunction. What Honeywell's case addresses
20 is whether or not the claimants, claimants who have been
21 injured, people who have property damage, can do an end run
22 around the plan, sue Honeywell and then Honeywell goes directly
23 against Mestek in an indemnity action. That has an effect on
24 the plan because if that is still an open issue at the end, my
25 client will not have gotten its relief in exchange for the

1 substantial contribution it's making to the plan. For that
2 reason alone, we believe that this case is directly related to
3 the bankruptcy.

4 Now, the only other issue I think that I'd like to
5 address is the alter ego issue. When we're talking about alter
6 ego, the 3rd Circuit and most courts in this country make a
7 distinction between general and specific alter ego claims. A
8 specific alter ego claim is a claim where a particular person
9 is injured by either inequity or fraud of the parent and the
10 parent is fraudulently using the corporate forum to protect
11 itself. The claims in this case parrot the claims that were
12 asserted by the personal injury and property damage plaintiffs.
13 They assert virtually identical facts and those identical facts
14 are that the corporate forum in general was not preserved.
15 There are no direct fraudulent facts, Mestek is not using the
16 corporate forum to commit a fraud against Honeywell. That's
17 not the allegation in this case. The allegation in this case
18 by Honeywell is that Mestek failed to maintain its corporate
19 forum.

20 So, for that reason this is a general alter ego claim
21 and it is definitely property of the estate under the
22 applicable law. Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. ZIMMERMAN: Your Honor, if I can briefly respond.
25 I'm going to focus my comments with regard to this on what we

1 said we would talk about, which is the motion for summary
2 judgment. I wanted to pick up on a couple of points that
3 counsel made just to make sure that there isn't any
4 misapprehension about our position with respect to the summary
5 judgment motion.

6 Counsel indicated that there had been loads of
7 discovery conducted with respect to these issues and that if
8 any writing existed, well, certainly it would have popped up by
9 now. The truth is, there's been no discovery with regard to
10 the Honeywell Met-Coil indemnity agreement. There's been no
11 discovery with regard to, as far as I know, certainly none in
12 the Illinois action filed by Honeywell and none in this court.
13 As you know, we're just arguing the motion to dismiss.

14 THE COURT: Right.

15 MR. ZIMMERMAN: None with respect to the formation of
16 that contract, what the parties intended, nor has there been
17 any discovery as between Honeywell and Met-Coil and Mestek with
18 regard to how those indemnity obligations were administered,
19 how they were accounted for, how they were treated. I'm sure
20 counsel is, you know, being absolutely candid with the Court
21 when he says that there are no documents out there that would
22 evidence such an agreement or an assumption, but we haven't had
23 any discovery to test that assertion and neither this Court nor
24 Honeywell should have to face summary judgment and a final
25 judgment in this action without having had an opportunity to at

1 least determine whether that assertion can be supported or
2 rebutted.

3 With regard to, and this leads into the fact that one
4 of our principle objections to the motion for partial summary
5 judgment is a Rule 56(f) objection, motions requesting this
6 Court to defer a ruling with regard to the summary judgment
7 motion until Honeywell has had an opportunity to take that
8 discovery.

9 Getting back to the contract interpretation argument
10 that counsel presented and the notion that the contract does
11 not bind Mestek and Formtek, counsel said that the contract,
12 the real issue was on Page 3. Think really what it boils down
13 to is on Page 2 in the definition of Met-Coil. Met-Coil is
14 defined as counsel indicated to include its parents,
15 subsidiaries, et cetera. Met-Coil didn't have a parent in
16 1994, that term would be rendered meaningless if this Court
17 were to --

18 THE COURT: Well, did anybody own the stock of Met-
19 Coil?

20 MR. ZIMMERMAN: I'm sure there were shareholders,
21 Your Honor, but as far as I know, there were no corporate
22 entities that we would consider to be parent.

23 With regard to this term and its parents, if it's to
24 have any meaning at all, it would include future parents and
25 that makes perfect sense, Your Honor, given what the nature of

1 an indemnity agreement is. It is agreement that's going to
2 have performers going over a period of time, binding a parent
3 down the road gives the indemnitee additional assurances that
4 those obligations will be met and won't be faced with a
5 situation like Honeywell is faced with today.

6 Now, counsel says that, you know, you have to look
7 only at the facts as they existed at the time of contracting. I
8 think that's a very interesting position for Mestek to take
9 since as I understand it, their claim against the insurers in
10 the DuPage County action, the insurance action, is based on
11 exactly the reverse. Their argument is that Illinois law
12 allows for a contract of indemnity to interpret the term
13 stockholder used in a policy used in 1960 or 70, to include a
14 future stockholder and you can't have it both ways, Judge.

15 THE COURT: Well, I don't know that, but if I make a
16 ruling in their favor today, that may implicate their action
17 elsewhere.

18 MR. ZIMMERMAN: It certainly may, Your Honor. We've
19 certainly provided the Court in our papers with the --

20 THE COURT: But let's go back to your, has to include
21 future.

22 MR. ZIMMERMAN: Okay.

23 THE COURT: I mean, how can I make that leap, that
24 when I sign a contract, I'm binding future people that don't
25 even exist, or I don't know who they are. How can I make that

1 leap?

2 MR. ZIMMERMAN: Well, certainly, Your Honor, you can
3 certainly -- the authority that we have cited to Your Honor in
4 the papers, the Shellmark decision, for instance, indicates
5 that a corporate affiliate may bind another corporate affiliate
6 with the signatore. This contract --

7 THE COURT: But does it bind all future affiliates?

8 MR. ZIMMERMAN: If it says all future affiliates,
9 Your Honor, I would argue --

10 THE COURT: Well, future isn't mentioned in here.

11 MR. ZIMMERMAN: No, but Your Honor the term parents
12 makes sense only if you interpret it to include future because
13 there was no parent at that time. That term would be
14 meaningless.

15 THE COURT: Well, except were there successors,
16 assigns, joint ventures? Was there a joint venture at the
17 time?

18 MR. ZIMMERMAN: I don't know the facts, Your Honor,
19 with respect to that. What I do know, Your Honor, is that
20 there wasn't a parent, and the contract has the word parent in
21 in --

22 THE COURT: Well, it has it --

23 MR. ZIMMERMAN: And the law in Illinois is, is that
24 you have to give every term of a contract its meaning. This
25 term parent would be meaningless because there was no such

1 entity.

2 THE COURT: This definition follows Lockformer.
3 Lockformer had a parent.

4 MR. ZIMMERMAN: Yes.

5 THE COURT: You threw in the kitchen sink and
6 repeated the language in the definition of Met-Coil that you
7 had in Lockformer.

8 MR. ZIMMERMAN: To get there, Your Honor, we would
9 have to talk to the parties about what they intended at the
10 time of contracting and then we're going to --

11 THE COURT: And then we're back to the, certainly it
12 implicates the Debtor because you're going to have to find out
13 what the Debtor meant when it signed this.

14 MR. ZIMMERMAN: Well, certainly, Your Honor, we're
15 going to have to take discovery with regard to what the parties
16 intended at the time, if we have to get there. That's right.

17 THE COURT: Well, and doesn't that mean that Count 2
18 clearly implicates the Debtor and, therefore --

19 MR. ZIMMERMAN: I don't deny, Your Honor, that as it
20 --

21 THE COURT: Should not be dismissed.

22 MR. ZIMMERMAN: To the extent that we need to take
23 discovery of Met-Coil, we will have to come to this Court to
24 get permission to do so.

25 THE COURT: Well, but any decision as to what the

1 parties meant in the contract, obviously, is going to implicate
2 the Debtor.

3 MR. ZIMMERMAN: Well, it implicates the Debtor only
4 to the extent that there's -- I mean, you would have to
5 ultimately find that that decision had a binding effect on
6 Met-Coil. Our position, Your Honor, earlier is that Met-Coil
7 will not be collaterally estopped by that finding. It's not --

8 THE COURT: If it's coming out of the mouths of
9 Met-Coil's representatives as the way you're going to prove
10 that?

11 MR. ZIMMERMAN: The ultimate issue preclusion that is
12 the core of collateral estoppel and the risk that's being --
13 our position is, is that that is not a risk to Met-Coil.

14 THE COURT: Well --

15 MR. ZIMMERMAN: Again, Your Honor, let me go back.
16 To the extent what we have an ambiguity with regard to what the
17 term parent means, all the more reason for why our Rule 56(f)
18 motion should be granted and we'll be able to take additional
19 discovery. Clearly, again, we haven't had an opportunity to
20 take any discovery with regard to whether any of the theories
21 that Mestek acknowledges could bind it to the contract,
22 ratification, assumption, et cetera, might be implicated here.
23 The evidence that has been presented is presented by Anthony
24 Hobson in his declaration attached to our papers and Mr. Hobson
25 indicates that Mestek has been very actively involved in the

1 administering the indemnity agreement. Mr. Hobson also
2 happened to be one of the attorneys representing Honeywell in
3 negotiating this indemnity agreement and his declaration, which
4 is the only evidence with respect to that, is that they
5 intended to attempt to bind future parents.

6 So, with respect to the evidence --

7 THE COURT: Well, but -- well.

8 MR. ZIMMERMAN: If the Court has no further
9 questions, I will give up the podium.

10 THE COURT: All right.

11 MR. ZIMMERMAN: Thank you.

12 MR. COLE: Your Honor, two minutes. Your Honor,
13 we're here on a motion for summary judgment involving a
14 contract and Honeywell has raised a Rule 56(f) motion. I
15 believe there are only two questions raised by Honeywell.
16 Number one, whether or not there was a document under which
17 Mestek assumed the obligations under this indemnity agreement.
18 Your Honor, again, there is no such document, but we're
19 prepared to provide testimony on an expedited basis which will
20 say, and I will tell everybody, it will say, there is no such
21 document and will have an opportunity to cross-examine. What
22 Honeywell is trying to do is get around the statute of frauds
23 which requires a document by bringing in Mestek's actions.
24 That is not the statute of frauds. What you have to rule under
25 Rule 56(f) is what specific discovery would be required, we're

1 prepared to do it today. We're prepared to put somebody on
2 today and tell Your Honor, or tell counsel, that no such
3 document exists, under oath.

4 With respect to the second piece of --

5 THE COURT: Well, can you get a summary judgment if
6 I'm going to hear testimony?

7 MR. COLE: Actually, you could, but what I'm prepared
8 to do is have that deposition on an expedited basis and we'll
9 come back to you in a week. The only testimony that's
10 relevant under this Rule 56(f) is if there is a writing that
11 assumes that agreement. Everything else is admitted as a
12 matter of law, summary judgment is key to one issue now,
13 whether or not there's an assumption agreement and that
14 assumption agreement does not exist and I will put somebody on,
15 either in a deposition or in this court, to say that, under
16 oath subject to cross-examination.

17 The second piece is whether the term parent includes
18 future parent. Honeywell raises outside issues to create an
19 ambiguity. Your Honor, you cannot use parole evidence to
20 create an ambiguity, parents means parents and there is no
21 ambiguity under that agreement. If that agreement does not --
22 if parents means parents and we were not the parent at the time
23 as a matter of law, summary judgment is compelled as to that as
24 well. If it requires a person from Mestek to come and say
25 parents did not mean future parents, or subject to

1 cross-examination, we're prepared to do that discovery as well
2 on an expedited basis.

3 THE COURT: Well, Mestek wasn't there.

4 MR. COLE: I'm sorry, Met-Coil. I apologize, you're
5 right. Met-Coil. But, again, I don't think the facts are in
6 dispute. I think the law is clear and, therefore, summary
7 judgment should be granted.

8 THE COURT: Well, I'm not sure you can say that. If
9 you're going to have somebody testify that parent didn't mean
10 future parent, and they have an affidavit that says parent
11 meant future parents, the only way it could be read and that
12 was our intent, I mean isn't there a dispute?

13 MR. COLE: It's only if -- there is a dispute as to
14 that issue, potentially, but it's only if Your Honor views the
15 document on its face as being ambiguous. And this gets back to
16 the issue of whether or not, and this is the issue that hasn't
17 been addressed by Honeywell, whether or not they could ever
18 enter into an agreement that binds their parent. And the only
19 defense to that is the assumption issue. You don't even have
20 to go to interpreting the agreement, the question that you need
21 to decide at this point is whether or not there's assumption.
22 The law is clear that a subsidiary cannot bind its parent to a
23 contract unless it's acting as its agent. That's clear.

24 THE COURT: Don't I need testimony on that?

25 MR. COLE: No, Your Honor, because I think the facts

1 are not in dispute. It's crystal clear that Met-Coil could not
2 have been acting as Mestek's agent because Mestek only became a
3 parent six years later.

4 THE COURT: Well, Met-Coil could have had authority
5 to sign this on behalf of all the existing parents,
6 subsidiaries, affiliates, et cetera. That's one issue. The
7 intent of the parties, there's apparently a factual dispute as
8 to what the intent was. That's step one.

9 MR. COLE: That may --

10 THE COURT: Step two, you say it can't apply to the
11 future, that may be again a matter in dispute because the
12 parties have differing interpretations of that as far as
13 whether the term future was intended to be included.

14 Your third argument is, acquiring Met-Coil later did
15 not mean there's an assumption of liabilities.

16 MR. COLE: This was not a merger into the parent,
17 this was --

18 THE COURT: Correct, correct, and your statute of
19 frauds issue, the difficulty with making a decision on the
20 statute of frauds is that it's hard to prove a negative. And
21 isn't it hard to prove a negative in the absence of discovery?

22 MR. COLE: Yes, but it's really just -- I agree it's
23 one question, it's really just one question and it's up to the
24 fact finder to find whether or not the person is liable.

25 THE COURT: But, I'm hearing a motion for partial

1 summary judgment, I don't have the facts and they're in
2 dispute.

3 MR. COLE: The only issue is whether or not on the
4 assumption issue, whether or not there's a written agreement
5 and no written agreement has been provided in response to
6 summary judgment. I guess the reason why --

7 THE COURT: Well, however, couldn't it be argued that
8 such a writing would be within the sole custody of Met-Coil or
9 Mestek?

10 MR. COLE: Absolutely, and why I'm here is --

11 THE COURT: And we're here on a motion for partial
12 summary judgment on this action, where discovery has not been
13 conducted in this case.

14 MR. COLE: I agree and on Rule 56(f), what I'm saying
15 is that the discovery has to be limited to the questions that
16 are left over, we shouldn't have six months of broad based
17 discovery, the question that's left over on an assumption is
18 whether or not that document exists. It's a very simple
19 question, does the document exist. And that's the reason why
20 under Rule 56(f) the discovery would be limited to that
21 question. Thank you, Your Honor.

22 THE COURT: Now, correct me if I'm wrong, you're only
23 asking for partial summary judgment on Count 2.

24 MR. COLE: That is correct.

25 THE COURT: Okay. Because you made some comments

1 about the alter ego, et cetera, but that's related to the
2 motion to dismiss.

3 MR. COLE: But that goes to the jurisdiction, yes, it
4 goes to jurisdiction.

5 THE COURT: All right.

6 MR. COLE: That's the reason why I --

7 THE COURT: All right.

8 MR. BARLIANT: Your Honor?

9 THE COURT: Yes.

10 MR. BARLIANT: Just quickly, Your Honor. I represent
11 the Debtor, not Mestek. My interest in this is as I indicated,
12 to get the plan process moving quickly. We've already lost
13 some time despite our best efforts, for reasons outside our
14 control, we're still trying to get this plan to confirmation as
15 quickly as possible, which is why the Debtor has joined Mestek
16 in its motion for partial summary judgment. So, I would urge
17 the Court if it allows any discovery at all, to keep that
18 discovery limited and short.

19 I will say with respect to this document issue, I
20 find it somewhat bizarre, frankly. The theory is that there is
21 a document that exists and the document was signed by Mestek
22 without Honeywell's knowledge, they don't know about it, and
23 the document assumes, by that document, Mestek assumed this
24 indemnification liability, without receiving any consideration
25 from Mestek and then put the secret document in the file

1 somewhere. It makes no sense.

2 THE COURT: Well, it has nothing to do with any
3 consideration from Honeywell, it's whether or not there was
4 consideration from Met-Coil. I don't know what the arrangement
5 and there may have been an arrangement between Met-Coil and
6 Mestek under which Mestek agreed to be bound or assumed this
7 liability.

8 MR. BARLIANT: Well, I suggest that there's not a
9 parent, any reason why a parent of a wholly owned subsidiary
10 would do that. In any event, Your Honor, my main point is that
11 whatever happens, I would urge that it happen on a very
12 expedited time frame. Thank you.

13 MR. ZIMMERMAN: Your Honor, we're perfectly happy to
14 proceed on an expedited basis with discovery. I would take an
15 issue with respect to --

16 THE COURT: Make sure you're talking into the mic or
17 --

18 MR. ZIMMERMAN: Sorry. I would take issue, Your
19 Honor, with the notion that somehow we're limited to a single
20 deposition of a person that they've chosen to come up and tell
21 us that there is no such document. There can certainly be
22 assumption by contract, we're talking about a number of
23 different factually intensive sorts of theories with respect to
24 whether or not a non-signatory can be bound. We can get the
25 discovery done very quickly, but I don't think it's just going

1 to be a matter of taking one deposition, it'll probably be a
2 matter of, you know, propounding discovery requests in the form
3 of a document request that is narrowly focused to which they
4 can respond to quickly and then moving quickly onto a narrow
5 set of depositions. I would anticipate, you know, we could
6 certainly work to get this done on a schedule that is in
7 accordance with trying to not slow down the process.

8 THE COURT: Well, let me rule on the motion to
9 dismiss first. The burden in sustaining and being successful
10 on a motion to dismiss is quite high, there have to be no set
11 of facts alleged or which could be alleged, which would support
12 the cause of action. I think clearly as to Count 1, there is
13 case law to suggest that under Section 105 an injunction may be
14 entered in favor, or enjoining actions against parties who are
15 not Debtors, and this typical instance is where the party in
16 favor, whom the injunction is issued, is going to fund a plan,
17 is an affiliate, or other party related to a
18 Debtor-in-Possession who is intimately involved and necessary
19 to the administration of the Chapter 11 case. I think the
20 averments of the Debtor establish that as to Mestek and that I
21 should not dismiss Count 1, again, making no ruling as to
22 whether or not that count will ultimately be successful. I
23 think there is clearly sufficient facts alleged which would
24 support a cause of action if correct.

25 The argument that Mestek's funding of a plan is

1 speculative, I don't think is sufficient. Clearly, at the
2 stage when injunctions are entered under 105, there's no
3 certainty that the party will fund the plan or will otherwise
4 put up money to handle the claims. I think generally these
5 injunctions are entered early in a case to give the parties
6 time to see if a successful reorganization can be found.

7 With respect to the alter ego, Counts 3 and 4, I
8 agree with the Debtor and Mestek that is it hard to conceive
9 how the argument can be made specific only to Honeywell,
10 particularly given the facts of this case where Mestek was not
11 an affiliate of Met-Coil or Lockformer at the time of the
12 indemnification agreement. So, the fraud or other activity
13 related or that form the basis of the alter ego action can't be
14 factually related specifically to the formation of the
15 indemnification agreement, which is the typical argument made
16 by individual creditors asserting individual alter ego actions.
17 Honeywell itself admits that it's going to have to, and will
18 present an argument generally regarding activities of Mestek,
19 vis-a-vis, Met-Coil and that cause of action clearly is
20 property of the estate under Section 544 and 541. So, I think
21 that Counts 3 and 4 clearly implicate, if not are the basis of
22 the estates cause of action. So, I think that they should not
23 be dismissed because of their relationship to estate causes of
24 action.

25 With respect to the contract cause of action, I think

1 I cannot decide that issue nor the motion for partial summary
2 judgment without additional facts and I think that discovery
3 must be had with respect to specifically what the parties
4 intended at the time they entered into the agreement and
5 specifically with respect to whether or not Mestek at any time,
6 assumed liability under the indemnification agreement,
7 vis-a-vis, Met-Coil. I think it's sufficient to limit the
8 discovery to those two issues rather than to number of
9 documents or number of depositions. But I think that has to
10 proceed before I can make any decision on the motion for
11 partial summary judgment. All right.

12 MR. BARLIANT: Your Honor, if I may? Our schedule
13 now is to present, if all goes well, present the disclosure
14 statement to the Court on January 7, and then I think our
15 confirmation date that we're looking at is in February,
16 correct? We're hoping for, February 17th. We do have an
17 omnibus date on January 20th, as well. I would request the
18 Court to set a discovery cutoff, meaning discovery completed
19 before that January 20th date. I would propose January 13th as
20 a date for the completion of discovery so the parties will know
21 if there really is an issue of fact. Hopefully, we can present
22 that so that we can go forward on February 17th with
23 confirmation.

24 MR. ZIMMERMAN: Your Honor, I'm perfectly happy with
25 January 20th, I think January 13th is probably a little

1 ambitious given the intervening holidays, particularly if we're
2 talking about trying to schedule witnesses for depositions. A
3 couple of days before then, I don't have a calendar in front of
4 me, might be good, but an entire week before the next omnibus
5 date is probably a little bit too much, and I'm perfectly happy
6 to agree to an expedited schedule in discovery. As I
7 indicated, we are going to have to make sure that all of the
8 parties are being as quickly responsive to discovery requests
9 as possible because any delay in getting documents or responses
10 is going to ultimately impact on our ability to take
11 depositions.

12 MR. BARLIANT: On behalf of the Debtor, I'll
13 certainly make that assurance and agree to a shortened
14 discovery schedule, short time to respond, and I'm assuming
15 based on what counsel has just said, that Honeywell will do the
16 same.

17 MR. ZIMMERMAN: Absolutely.

18 MR. BARLIANT: Mestek, I would hope and Mestek and
19 Formtek will do the same. Your Honor, the 13th would allow us
20 to continue this matter to the 20th. I'm not presuming on the
21 Court, that the Court would then be in a position to decide it,
22 but at least we could present wherever we were to the Court on
23 the 20th, and, again, hopefully be ready by February 17th to go
24 forward with this plan. That's why I suggested January 13th.

25 THE COURT: Well, between the 20th of January and the

1 17th of February, you have no other omnibus hearing?

2 MR. BARLIANT: We do not.

3 THE COURT: Well, I think given the holidays you're
4 going to have trouble. I will do this. I think a discovery
5 cutoff of the 20th of January and continuing this matter to
6 February 3rd at two o'clock.

7 MR. BARLIANT: Thank you, Your Honor.

8 THE COURT: I'll give you an argument date then and
9 that should allow you to file any supplemental briefs,
10 including if you want to submit affidavits or whatever, in
11 support of the issue raised by the motion for partial summary
12 judgment. The week before the 3rd you should be able to do
13 that.

14 MR. BARLIANT: Yes, thank you, Your Honor. Again, we
15 will, on behalf of Met-Coil, provide responses to written
16 discovery within 10 days after service. I would hope that we'd
17 get that commitment from the other parties.

18 MR. ZIMMERMAN: On behalf of Honeywell, Your Honor, I
19 make the same commitment.

20 THE COURT: All right.

21 MR. COLE: On behalf of Mestek and Formtek, we agree
22 to the same schedule.

23 THE COURT: Okay.

24 MS. PAMENTER: Your Honor, that completes the agenda
25 for the Met-Coil matter for today. We thank you.

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THE COURT: All right. We'll stand adjourned then.
MR. BARLIANT: Thank you, Your Honor.

CERTIFICATION

I, ELAINE HOWELL, court approved transcriber, certify that
the foregoing is a correct transcript from the official
electronic sound recording of the proceedings in the
above-entitled matter.

 Date: December 19, 2003

ELAINE HOWELL
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