

Mary Lee-Wlodek Joins the Sanli Pastore & Hill Team

Mary Lee-Wlodek recently joined Sanli Pastore & Hill as Vice President, Business Development. She brings with her over fourteen years of experience marketing financial services as an investment banker and commercial lender. She has worked with a variety of business clients throughout her career, including entrepreneurial ventures, middle market companies and Fortune 500 companies.

In her new position, Ms. Lee-Wlodek is responsible for SP&H's expanding Marketing Department, which is located in new office space at the company's headquarters in West Los Angeles. She is the strategic coordinator for company-wide business development programs, including product development, new office roll-out and target marketing, and she oversees public relations, advertising and graphic design. The SP&H Marketing Department also includes Angela Koveos, who will continue to produce the newsletter, seminars and various marketing and PR projects, and Christine Albino, who handles graphic design and advertising and assists in all marketing activities.

A California native, Ms. Lee-Wlodek grew up in Santa Maria prior to attending Stanford University, where she earned a B.A. in Economics. The highlight of her time at Stanford was spending six months studying (and eating!) at Stanford's campus in Florence, Italy. She earned her M.B.A. from

the Anderson School at UCLA, with a focus on Entrepreneurial Finance. While at the Anderson School, she was a Vice President of the Entrepreneur Association and an active mentor in the Riordan Mentor Program.

Ms. Lee-Wlodek joins SP&H from FINOVA Capital, where she was Vice President, Marketing for FINOVA's Healthcare Finance Division in Los Angeles. She began her career working for Goldman, Sachs & Co's Real Estate Investment Banking Group in New York. She moved to Los Angeles in 1987 as part of new West Coast Origination team for Goldman, Sachs. After completing her MBA, she joined Chase Manhattan Bank's corporate finance division in Los Angeles where she focused on financing highly leveraged transactions and loan workouts.

Mary and her husband are avid recreational athletes and enjoy hiking, golfing, skiing, bicycling, SCUBA and sailing.

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SP&H Expands Los Angeles Office Space

SP&H has expanded its headquarters in Los Angeles by adding office space on the 7th floor to its existing Penthouse suite. The Marketing Department has relocated to the 7th floor space, which is decorated in a fresh, dynamic style and offers a more focused environment for the Marketing Team of Mary Lee-Wlodek, Angela Koveos and Christine Albino. The new space also includes a large meeting room, where seminars and conferences will be held, and additional offices to meet the growth expectations

of SP&H. The Marketing Team is filling the space with new technology and equipment, with the addition of in-house software and a hi-tech, laser, color printer. We are all very excited about the new, improved Marketing Department, office space and vision and energy that Mary will bring to the firm. Look out for many exciting things to come from SP&H!

valuation.com— A New Paradigm *by: Nevin Sanli and Mary Lee-Wlodek*

Bargain Dollar Days....Value Pricing....Sale of the Century....We Will Not be Undersold.... Human nature dictates that we like to pay as little as possible for something in return. We want to feel as though we are getting a “good value” for our hard earned dollars. For example, when purchasing a new car, one most likely comparison shops among dealers for the best price. Retailers advertise “sales prices” at every possible opportunity to lure shoppers into their lairs. A strong US dollar relative to another currency prompts foreign travel. In similar fashion, investors in the public stock market and private equity sources traditionally have depended on the ratio of share price to expected earnings per share, or “Price/Earnings” (P/E), to evaluate the relative risk/return scenarios for various investment opportunities. For instance, logically, an early stage company without a proven track record is a riskier investment than a company that consistently has generated increasing sales, margins and earnings for many years. Hence, an investor should pay a lower P/E for the higher risk, early stage company than for the proven company.

No anymore! There is a new paradigm for business valuations as “.com” start-ups flood the market for private and public capital. Venture capital and public offerings alike are infusing billions of dollars into companies that not only generate negative earnings, but also lack signs of becoming, profitable within foreseeable future. By definition, all of the companies are “growth companies”, as the internet industry itself is in its infancy.

Undoubtedly, there is extraordinary capacity for companies that are building the infrastructure for the internet, as well as for those who provide content for us all to browse. But, how can investors and entrepreneurs be sure that they are either buying or selling stock in these growth companies at appropriate valuations, given that:

- The current P/E ratio is irrelevant and there is a lack of comparable companies that can be used as proxies for projecting future earnings or value.
- The market size can be assumed to be enormous, but potential market share of competition are difficult to assess since the barriers-to-entry primarily are limited to computer literacy and a brain.
- Management of the earliest stage internet companies (ie: those seeking private equity capital) often consists of twenty-somethings whose only other job experience is delivering pizzas. Afterall, this demographic class takes computer literacy for granted and their brains are relatively fresh!

THE NEW PARADIGM

The rapid pace of private and public capital infusions into “.com” companies proves that investors are overcoming the aforementioned obstacles to applying traditional valuation theory to emerging growth companies. They obviously believe that they are getting good “values” at the prices they are paying. How are they justifying their investments in unproven companies serving and unproven industry at hugely negative forecasted P/E ratios?

- Potential market size—The internet, afterall, is a worldwide web.

What other industries can tout immediate, simultaneous distribution to New York, Beijing and Buenos Aires? The initial indicators of consumer appetite to use the www (demand) are creating more and more supply. Now, if the suppliers could just figure out how to make money...

- Potential market share—Hurry! If you get first mover advantage, you may just become the next eBay or Yahoo! (of course, we rarely hear about the failures).
- Potential management—If investors infuse sufficient capital into a .com company, they may be able to attract highly seasoned executive with proven abilities to build companies from scratch. These professional managers are getting caught up in .com hype, leaving huge compensation packages at traditional “bricks and mortar” industries for the lure of incentive stock option plans (ISOPs) at internet start-ups.
- Portfolio approach—Investors are betting on an overall trend that the internet is going to be successful, although some individual investments may fail. By diversifying their portfolios among various .com companies, they believe that their average return will be acceptable, or even exceptional, of their portfolios as a whole. This approach is similar to that of a pharmaceutical company that spends extraordinary amounts of money in R&D for numerous drugs, but generates all of it’s earnings off a couple of successful patents.

AN OUNCE OF PREVENTION....

In light of the velocity of transactions created by .com mania, it is more important than ever for investors and business owners to practice disciplined due diligence, including independent business valuations for such situations as:

- Start up Value Planning
- Translation of a business plan into a Value
- Fair Market Value Opinion for a private capital raise
- Incentive Stock Option Plans (ISOPs) as a tool to attract seasoned senior management
- Fairness and Solvency Opinions for mergers and acquisitions
- Pre-IPO Valuation for Management, prior to engaging, an investment bank
- Pre-sale Value Enhancement Analysis
- Estate Tax Planning

For example, when a company is contemplating an IPO, the underwriters (investment banks) are motivated to price the stock such that they have 100% surety of the stock being fully subscribed.

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Obviously, a lower price per share lowers their risk. On the other hand, the company undergoing the IPO wants to maximize the proceeds raised in the IPO, since the company does not directly benefit from the stock trading up in the secondary market (follow-on offerings and individuals' stock option aside). The investment banks, however, continue to make commissions from after-market trading of the stock.

A well-documented business valuation, substantiated by an independent valuation advisor that cannot be accused of having a conflict of interest, provides peace of mind to all parties involved in an IPO that a stock is being offered at a fair price. There actually are lawsuits pending today to vast disparities between IPO prices and the market prices of new issues.

Given the litigious society we live in today, it is imperative that business owners and investors alike utilize disciplined valuation methodologies to assist in their decision making, and to provide support and documentation that will withstand third party scrutiny. By tapping into the skills of a specialized independent valuation advisor, investors, business owners and management will avoid the damages associated with business litigation. Such damages range from lost time and lost profits to lost business value and, at an extreme, bankruptcy or dissolution.

Discoverability of Pre-Litigation Expert Appraisal Reports:

The Consistent and the Dead

By: John C. Murphy and Rick E. Rayl

Aldous Huxley once observed that "the only completely consistent people are dead." Huxley, once an inarguably great novelist (and how inarguably consistent) had a point. Opinion-- even well researched, thoughtful opinions-- can change over time. Once a condemnation case is filed, depositions and other discovery occur. New facts may emerge. Even a good pre-litigation appraisal report may become obsolete.

Most business and real estate appraisal experts understand this fact. Many, however, express extreme reluctance about ever changing any pre-litigation opinion. Most appraisal experts-- particularly those who testify in court-- strongly prefer to remain consistent.

The pertinent California jury instruction gives such expert witnesses good reason for this attitude. One instruction, BAJI 2.20 ("Believability of Witnesses"), permits jurors, in evaluating a witness, to consider "a statement previously made by the witness that is consistent or inconsistent with the testimony of the witness." In other words, trial testimony inconsistent with a pre-litigation report can sink an expert. On a fundamental level, most appraisal experts, like most people, hate to be caught in an inconsistency; this is a situation, they claim, in which they wouldn't be caught...well, dead.

For this reason, attorneys for condemnees often search for inconsistencies between an expert's pre-litigation opinions, and

the opinions to which the same expert testifies in trial. Public agency attorneys, in turn, try to keep their experts' pre-litigation report is privileged even when they later designate the report's author as a trial witnesses. The arguments:

ARGUMENTS FOR KEEPING PRE-LITIGATION APPRAISAL REPORTS PRIVATE:

Most public agency lawyers focus on Code of Civil Procedure section 1255.060, subdivision (b). That code section provides:

In the trial of the issue of compensation, a witness may not be impeached by reference to any appraisal report, written statement and summary of an appraisal, or other statements made in connection with the deposit or withdrawal pursuant to this chapter, nor shall such a report or statement and summary be considered to be an admission of any party.

Public agency lawyers also point to the Tentative Report of the Law Revision Commission (September 27, 1967), the group which proposed section 1255.060, subdivision (b). The Tentative Report states that the statute "precludes impeachment of a witness at trial by reference to appraisal reports, statements of valuation data, other statements made by him in connection with (1) a deposit and notice thereof..." (California Law Revision Commission, Tentative Recommendation and a Study (September 1967), p. 1151.) The Law Revision Commission, in its 1967 Tentative Report, reasoned that "if such evidence could be used, it is likely that the plaintiff would make an inadequate deposit in order to protect itself from the use at trial of evidence submitted in connection with the deposit." (Id. at p. 1785)

A national treatise on condemnation tends to support this position. Nichols on Eminent Domain states that those statements of the condemning authority which "may become admissions" only include appraisals "of the property prepared and adopted for purposes other than acquisitions, negotiations or condemnation." (5 Nichols on Eminent Domain (3d ed. Rev. 1977). § 18.12[2], emphasis added.) Nichols is quite explicit. It states:

In the context of an eminent domain case, the concept of being compelled to produce drafts of an appraiser's report is a sobering thought. In most cases, the appraiser will work closely with the attorney in an attempt to refine (not sanitize) the report so that it accurately in a particular jurisdiction....[If produced] it is likely that those reports would be used to impeach the appraiser at trial. This author believes that the production of preliminary reports clearly encroaches on the work-product doctrine and should be discouraged. (7 Nichols, § 7A.02[1].)

Other arguments are available to public agencies. They may also argue that preliminary appraisal work is inadmissible under Evidence Code section 1152-- a statute which protects materials generated for purposes of settlement discussions. Some agency attorneys also argue that pre-litigation reports should be admissible only if they are truly inconsistent. (See *El Monte Union High School District v. Consumer Holding Co.* (1966) 247 Cal.App.2d 173 [155 Cal.Rptr.467].)

Continued from Page 3 Discovery of Pre-Litigation Expert

No question exists, of course, that pre-litigation reports are usually inadmissible when prepared by a different appraiser than the one who will testify at trial. An expert cannot usually be impeached with a report he or she did not write, and has never seen or relied upon. But when an agency designates as its expert witness the same person who prepared the pre-litigation report, problems can arise.

COUNTER-ARGUMENTS:

Most landowner or business owner attorneys begin and end their arguments with a citation of *County of Contra Costa v. Pinole Point Properties, Inc.* (1984) 27 Cal.App.4th 1105 [33 Cal.Rptr.2d 38]. The Pinole Point court held squarely that the condemnor can impeach the condemning agency's trial expert through an earlier appraisal report by that same expert. (Pinole Point, *supra*, 27 Cal.App.4th at pp. 1112-1113.)

Moreover, the official Law Revision Commission Comment, 1975 addition, contains some significant differences from the earlier Tentative Report. Unlike the Tentative Report, the official Comment does not explicitly address earlier reports by the witness him or herself. (Cal. Law Revision Comment, 1975 addition, West's Ann. Code Civ. Proc., § 1255.060 (1982) pp. 691-692.)

Most important, the general law of expert discovery, both in California and federal courts, contradicts Nichols. One federal district court observed, "Discovery of the reports of experts, including reports embodying preliminary conclusions, can guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date." (*Hewlett-Packard Co. v. Bausch & Lomb, Inc.* (N.D. Cal 1987) 116 F.R.D. 533, 537, *affd.* (Fed. Cir. 1990) 909 F.2d 1464, quoting *Quadrini v. Sikorsky Aircraft* (D.Conn. 1977) 74 F.R.D. 594, 595; but see *Taylor v. Anderson-Tully Company* (W.D. Tenn. 1993) 151 F.R.D. 295, 297 [disagreeing in part with *Quadrini*: "On balance, the court includes that were there is no showing of in a particularly complex expert dispute, parties should not be required to produce their expert witness' reports which have been prepared in anticipation of litigation."].)

CONCLUSION:

California trial courts are likely to compel production of preliminary reports of those experts designated to testify at trial. Public agencies should (1) insist that an appraiser complete his pre-litigation work carefully enough to withstand cross-examination in court; or (2) consider hiring different experts to testify at trial - and avoid contaminating those trial experts with earlier, inconsistent reports from others.

John C. Murphy, a partner at Nossaman Guthner Knox & Elliott, specializes in eminent domain trials. He has nearly 20 years experience representing landowners, businessowners and public agencies. His successful jury verdicts have been the subject of profiles in both the Los Angeles and San Francisco Daily Journals. He is currently President of Chapter 67 of the IRWA. He may be reached at 949/833-7800, or jmurphy@nossaman.com.

What's New

Gordon & Holmes, LLP, specializing in business litigation, recently opened its doors for business in San Diego with partners Frederic L. Gordon and Rhonda J. Holmes-Thompson at the helm. Their services focus on plaintiffs' civil trial matters with an emphasis in business litigation and condemnation (property & business owners).

Sanli Pastore & Hill has worked with the partners on some notable condemnation cases, including *Caltrans v. Cal Johnson d.b.a. American Recycling*, where the largest goodwill loss jury award in California was won by their client. For more information on this case, check our website at www.sphvalue.com.

Gordon and Holmes-Thompson both formerly were of Thorsnes, Bartolotta, McGuire & Padilla. Their new offices are located at 1230 Columbia Street, Suite 700, San Diego, CA / Tel. 619-696-0440.

Sacramento Expansion

SP&H is pleased to announce the expansion and relocation of our Northern California operations!

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Upcoming Speaking Engagements

- **March 27 & 28—San Diego, California**
Nevin Sanli will be using his real experience as an expert witness in an Eminent Domain Mock Trial educational forum for the International Right of Way.
- **April 27—Montebello, California**
Nevin Sanli will be participating in a panel discussion of "Valuation Issues Relating to Billboards" at the International Right of Way (Chapter 1) Valuation Conference.
- **June 8 & 9—Los Angeles, California**
Thomas E. Pastore will be speaking on "Loss of Goodwill: What is Goodwill? Measurement of Loss; Duty to Mitigate; Choosing an Expert" at the CLE International Eminent Domain Conference.

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