

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
ETOYS, INC., *et al.*, .
 . Case Nos. 01-0706(RB)
 . through 01-0709(RB)
 .
Confirmed Debtors. . August 22, 2005
 . 2:00 p.m.
 . (Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 THE CLERK: All rise.

2 THE COURT: Be seated, please. Good morning.

3 MR. ROSNER: Good afternoon, Your Honor. For the
4 record - -

5 THE COURT: Good afternoon, rather.

6 MR. ROSNER: For the record, Your Honor, Fred Rosner
7 with Jaspan, Schlessinger, Hoffman for the Post Effective
8 Date Committee. We're before the Court in the matter of
9 ETOYS, which is Chapter 11 Case No. 01-0706 through 0709.
10 This is the agenda for today, August 22 - -

11 THE COURT: Mr. Rosner, I've reviewed the agenda.

12 MR. ROSNER: Yeah.

13 THE COURT: I understand there are parties appearing
14 telephonically. Is that correct?

15 MR. ROSNER: Your Honor, yes. We have - - I'd like
16 to make some introductions. Perhaps I could start with the
17 courtroom, and then we could move to the telephone. To my
18 right is attorney Susan Balaschah and she is primary counsel
19 to the Post Effective Date Committee. And to her right is
20 attorney Greg Werkheiser, who represents the Plan
21 Administrator. And seated to my left is Mr. Bill Harrington,
22 with the Office of the United States Trustee. I understand
23 as well, Your Honor, that there may be parties seeking to
24 participate in today's hearing, and I'd ask that those
25 parties now identify themselves - -

1 THE COURT: I'll make that request, counsel.

2 MR. ROSNER: Yeah. Sure.

3 THE COURT: Thank you. Those individuals appearing
4 telephonically, would you state your name for the record,
5 please?

6 MR. KENNEDY(Telephonic): Yes, Your Honor. This is
7 Michael Kennedy, and I am calling from Dallas, Texas. And I
8 guess, Your Honor, I'm not officially involved in the case
9 yet, however - - and I'll have to let Mr. Haas speak up to
10 the extent the Court will allow him to do so, to announce,
11 you know, my readiness, and my willingness, and my ability to
12 represent Mr. Haas, depending on what happens here today.

13 THE COURT: Mr. Kennedy, Judge Baxter, have you
14 filed a motion, or have you been moved by a member of this
15 bar, the Delaware Bar, to participate *pro hac vice*?

16 MR. KENNEDY(Telephonic): I have not entered a *pro*
17 *hac vice* yet, Your Honor. However, in speaking with the
18 clerk on Friday, she said that following the notice of
19 appearance, I would have 30 days within which to do so.
20 Whereas it is my understanding that what is on the Court's
21 agenda today may be dispositive of CLI's claims, I thought it
22 would be prudent to wait to see if the Court would entertain
23 giving CLI additional time, since the Court has been so
24 gracious thus far, and Mr. Haas has had - -

25 THE COURT: Mr. Kennedy?

1 MR. KENNEDY (Telephonic): Yes, sir.

2 THE COURT: Judge Baxter. I think you responded to
3 my question. Inasmuch as you currently are not admitted to
4 practice to this Court, and you've just acknowledged that you
5 have filed - - you have not filed the appropriate pleadings
6 to become so admitted, there will be no further participation
7 by you during the course of this hearing. I understand
8 Steven Haas is on the phone as well?

9 MR. HAAS (Telephonic): Yes, sir.

10 THE COURT: Mr. Haas, you've heard my comment, and
11 we'll proceed accordingly. I understand that you did call
12 and register timely to participate in this hearing. You will
13 be allowed to participate to that extent. Mr. Rosner, you
14 may proceed.

15 MR. ROSNER: Thank you, Your Honor. Your Honor,
16 this is the motion by the Post Effective Date Committee to
17 dismiss CLI's claims for failure to prosecute, and for
18 failure to obey orders of this Court. Your Honor, I've gone
19 through the docket and culled out certain orders and
20 pleadings that I'd like the Court to take notice of, judicial
21 notice of, that is, Your Honor. And each of these I think
22 would constitute - -

23 THE COURT: Let me ask this, Mr. Rosner. You filed
24 on behalf of the Post Effective Date Committee a motion to
25 dismiss claims filed by Collateral Logistics. That motion

1 was duly noticed upon all entitled parties?

2 MR. ROSNER: Yes it was, Your Honor.

3 THE COURT: Other than the responses received to
4 such motion, have you received any further response?

5 MR. ROSNER: No I have not, Your Honor.

6 THE COURT: And I understand objections to that
7 relief sought were made by Collateral Logistics to PEDC's
8 motion to dismiss Collateral. Which was an un-docketed item.
9 And there was a motion by Mr. Haas to receive compensation by
10 503(b), substantial contribution, etcetera.

11 MR. ROSNER: Yes.

12 THE COURT: Is that correct?

13 MR. ROSNER: Yes. And - -

14 THE COURT: Other than those 2 papers, have you
15 received any further response?

16 MR. ROSNER: No I have not, Your Honor.

17 THE COURT: So it's just the first matter that I
18 addressed that was directly responsive to the motion of the
19 Committee? To dismiss the claims filed by Collateral
20 Logistics?

21 MR. ROSNER: That's correct, Your Honor.

22 THE COURT: All right. Do you have further comment
23 in this regard?

24 MR. ROSNER: Well, I wanted to add to the record
25 that I've gone through the record and I've pulled certain of

1 the orders and pleadings that may bear on this matter. May I
2 approach with a binder of those?

3 THE COURT: Sure.

4 MR. ROSNER: Your Honor, I've just given the Court a
5 binder of certain pleadings that I've pulled from the docket.
6 And in respect of our motion to dismiss for failure to
7 prosecute, in our motion we cited the Workman vs. Biles
8 (phonetic) case, which appears at 2004 US District Court,
9 Lexus 4948, and that decision outlines 6 factors for the
10 Court to consider in connection with a motion to dismiss for
11 failure to prosecute. Let me just give an overview of those
12 6 factors. The first factor is the extent of CLI's
13 responsibility in failing to prosecute its claim. The second
14 factor is the prejudice to the estate caused by the failure
15 of CLI to meet scheduling orders and respond to discovery.
16 The third factor is the history of CLI's
17 dilatoriness(phonetic). The fourth factor is whether the
18 conduct of CLI is willful or in bad faith. The fifth factor
19 is the effectiveness of sanctions, other than dismissal. And
20 the sixth factor is the merits of CLI's claim. And I'd like
21 to turn the Court's attention to tab number 1, which is the
22 initial order authorizing the retention of CLI to provide
23 services to these estates.

24 THE COURT: I have that reference.

25 MR. ROSNER: Well, I'll further direct the Court to

1 paragraph 3 and 5. And just as an overview, those paragraphs
2 taken together require that CLI, as an estate retained
3 professional, file monthly, quarterly, and finally a final
4 fee application. And in addition, to the extent that CLI in
5 the performance of its services, was incurring expenses, it
6 had to file a copy of those expenses with the Court so that
7 interested parties, including the public at large, could
8 review those expenses and determine their reasonableness.
9 And - -

10 THE COURT: In light of those requirements set forth
11 in paragraphs 3, 4, and 5, Mr. Rosner, to your knowledge has
12 there been compliance?

13 MR. ROSNER: Your Honor, there has not been by CLI.

14 THE COURT: Very well. Do you have further comment?

15 MR. ROSNER: Tab number 2 is the second order
16 authorizing the retention of Collateral Logistics, and this
17 basically extended the time period that they were to render
18 services for the estate. And it contains similar
19 requirements. And I could direct the Court to paragraphs 3,
20 4, 6, and 7, and not to belabor this, but to summarize,
21 again, CLI is required to file monthly, quarterly, and final
22 fee applications, and statements of expenses incurred, so
23 that interested parties could review and comment and
24 certainly that the Court could pass on their appropriateness
25 and reasonableness. And, anticipating the Court's inquiry,

1 no, CLI did not comply with the requirements of those orders.
2 In fact - -

3 THE COURT: Counsel, I have acquainted myself with
4 both papers set forth under Exhibits 1 and 2, and I note that
5 Judge Mary Walrath further signed off on both of those
6 orders.

7 MR. ROSNER: Thank you. A review of the docket,
8 Your Honor, would reveal that CLI in fact never filed any of
9 the required fee applications, or statement of the invoices.
10 And I think this goes to the factors that I've just described
11 above, factors 1, 2, 3, and 4. Factor no. 1, CLI's
12 responsibility in this matter. These orders, which were all
13 entered in the year 2001, nearly 4 years ago, all clearly
14 require CLI to conduct itself as a professional and file the
15 appropriate fee applications. And CLI did not do that. And
16 it is solely responsible for its failure to comply with its
17 own order of retention. Factor no. 2 goes to the prejudice
18 to the estate. I'll just make the point, and you can hear
19 further from my co-counsel on this. But the fact that we
20 have this large, disputed claim outstanding, has halted our
21 ability to make distributions to general unsecured creditors
22 under the plan. And I would submit, Your Honor, that is very
23 substantial prejudice to this estate. Our goal was to make
24 the distributions, and we are at an impasse by reason of
25 these claims asserted by CLI.

1 THE COURT: Other than these claims asserted by CLI,
2 what's the status, Mr. Rosner, of the claims analysis
3 process?

4 MR. ROSNER: I might defer to - -

5 THE COURT: If you know.

6 MR. ROSNER: Let me cede the lectern to my co-
7 counsel.

8 THE COURT: Only if you know the answer to the
9 question, counsel.

10 MR. ROSNER: Ms. Balaschah.

11 THE COURT: Why don't you take a moment to consult.

12 MR. ROSNER: Your Honor, the claim asserted by CLI
13 is the single and last claim that this estate has to
14 administer.

15 THE COURT: So this claim stands between the ability
16 of the Trustee to file a motion for final decree?

17 MR. ROSNER: We're pretty close to that. I think
18 there's one or two outstanding litigations, but in terms of
19 the claims administration process and most importantly our
20 ability to make a further interim distribution, this claim
21 does stand in that way.

22 THE COURT: How many interim distributions have been
23 made thus far? If you know.

24 MR. ROSNER: Two, Your Honor.

25 THE COURT: And so potentially there's one

1 additional and final distribution? Or would there be others?

2 MR. ROSNER: Your Honor, one moment, please.

3 THE COURT: Ms. Balaschah?

4 MS. BALASCHAH: Yes?

5 MR. ROSNER: Yes.

6 THE COURT: Why don't I ask you another question so
7 I won't have Mr. Rosner continue to consult with you. If you
8 would, of the - - how many previous interim distributions
9 have been made?

10 MS. BALASCHAH: Your Honor, there have been 2
11 previous distributions. There is a third interim
12 distribution that we're waiting to make once this is
13 resolved. That will - -

14 THE COURT: Would that be a final - -

15 MS. BALASCHAH: Your Honor, that would conclude
16 substantially all of the matters before the Bankruptcy Court.
17 There is one litigation that's outstanding in the State Court
18 against Goldman Sachs. That litigation is ongoing. When
19 that litigation will be concluded, we can not predict,
20 however all of the matters before this Court are
21 substantially concluded. We could make what would be or may
22 be a final distribution depending upon the outcome of the IPO
23 litigation in the State Court.

24 THE COURT: What is the estimated total of
25 distributions made thus far on the two interim distributions?

1 MS. BALASCHAH: They have been about 13½¢, Your
2 Honor.

3 THE COURT: The total dollar amount if you know.

4 MS. BALASCHAH: Total dollar amount distribution had
5 to be close to \$50 million. There are approximately about
6 \$250 million in claims against this estate, Your Honor.

7 THE COURT: Now, the third and final distribution
8 would be estimated at what amount?

9 MS. BALASCHAH: Would probably add, depending upon
10 the resolution today, we could make another 3½ to 4¢, Your
11 Honor.

12 THE COURT: Thank you.

13 MS. BALASCHAH: Your welcome, Your Honor.

14 THE COURT: Mr. Rosner, do you have further comment,
15 sir?

16 MR. ROSNER: Your Honor, I'd like to just go forward
17 with a few more - - application of the facts to a few more of
18 these factors in the outline of the case I described.

19 THE COURT: You're citing the factors set forth in the
20 - -

21 MR. ROSNER: In that Biles case. Which are
22 basically the factors under Rule 41 of the Federal Rules of
23 Civil Procedure.

24 THE COURT: Just to expedite the matter, Mr. Rosner,
25 the Court is familiar with the 6 factors cited under Workman

1 v. Biles.

2 MR. ROSNER: All right. I'm going to touch on the
3 highlights then only, Your Honor. Your Honor, we have - -
4 well, let me say this. Tab nos. 3 and 4 are the original
5 proof of claim and a supplemental proof of claim filed by
6 Collateral Logistics. Couple of points on this. One, CLI
7 has never obtained an order of this Court excusing it from
8 its obligation to file fee applications. So, when I say
9 we've objected to these claims, which we have, we certainly
10 - - if they had ever complied with the orders, we certainly
11 would have filed objections to the fee applications. But
12 this is only claim - -

13 THE COURT: Was CLI duly retained by this Court
14 pursuant to §327 of the Bankruptcy Code?

15 MR. ROSNER: Your Honor, I think it's 328,
16 retention. But, yes. By order of this Court. And the order
17 clearly required them to file fee applications. And they
18 failed to do that.

19 THE COURT: And both of the orders set forth in
20 Exhibits 1 and 2?

21 MR. ROSNER: Right. And the only thing they filed
22 with this Court is what I would characterize as a bare bone
23 proofs of claim, and we have raised issues as to whether - -

24 THE COURT: Which you're saying is set forth in
25 Exhibit 3.

1 MR. ROSNER: Three. And then there is a
2 supplemental proof of claim in 4. And we had challenged
3 whether or not some of the expenditures that had been claimed
4 to have been made actually were made. Specifically the
5 purported salaries paid to the various individuals listed in
6 the proofs of claim. We would also submit that CLI was not
7 entitled to get reimbursed for paying the salaries of its own
8 employees from this estate. Put that aside for the moment.
9 We don't think they actually made those payments to those
10 people, and we have spent much time and effort trying to get
11 even a single document from CLI. A copy of a paycheck. A
12 copy of a bank statement. A copy of any of the necessary
13 withholding taxes that an employer would have to pay for his
14 employees, including FICA or 941 taxes. So we have
15 substantial questions as to the bona fide-ness of the amounts
16 that CLI seeks from this estate, both in terms of its
17 retention and that the amounts that they claim they spent,
18 for which they seek the estate to pay for, actually were
19 made. And that goes to factor number 6 under the Biles case,
20 the merits of the claim. Your Honor, we've also, in the
21 several iterations, or reincarnations of this case that have
22 - - and we've been through, I think, with CLI, 5 sets of
23 counsel. Three outside counsel, and two local, or some
24 permutation of that. But they've in effect had 5 lawyers
25 involved in this case on their behalf over the past year or

1 so, and they've never responded to our legitimate discovery
2 requests in respect of their claims, no less any of the
3 documents that they would have had to file for fee
4 applications. So, again that goes to factor number 2, the
5 prejudice to the estate for CLI's failure to obey scheduling
6 orders. And some evidence of that is tab no. 5, which is an
7 order compelling discovery entered by Judge Walrath on
8 December 6th of 2004. And that order was never complied with.
9 Your Honor, turning now to tab no. 6. This is the order
10 entered by this Court which granted CLI's former counsel
11 leave to withdraw, but did - -

12 THE COURT: That was The Bayard Firm.

13 MR. ROSNER: The Bayard Firm, right. And did impose
14 certain deadlines by which CLI was obligated to obtain new
15 counsel. And I'll refer to decretal paragraph no. 2, and
16 I'll read that into the record. "Ordered that CLI must
17 obtain new counsel, who shall enter an appearance with this
18 Court on or before June 20, 2005, 4:00 p.m." And I'll just
19 note for the record that that did not occur. That CLI did
20 not retain such counsel and he did not file an appearance by
21 that deadline. And the order further provides that it will
22 be "with no further extensions." And that order has become
23 final, and no stay has been entered in terms of its
24 effectiveness.

25 THE COURT: Do you have further comment, counsel?

1 MR. ROSNER: Just turning now to tab no. 7.
2 Following the entry of the order I was just describing, CLI
3 when charged with this estate, to find substitute counsel - -
4 and that was back in June, I believe - - then proceeded to
5 file a number of pleadings based on a business relationship
6 it had with one of the local companies that files papers for
7 folks out of town, and filed a slew of pleadings, I won't
8 recite them all, but one of them was a motion to remove the
9 Assistant US Trustee who is assigned to this case from his
10 role in this case, and all of them were misdirected, and
11 ignored the principle charge given by this Court, which was
12 to find new counsel if it wanted to further participate. And
13 eventually that required the estate to expend more time and
14 more funds moving to strike various pleadings filed by Mr.
15 Haas, because he's not a licensed attorney and of course the
16 law provides that a corporation cannot appear *pro se*. And so
17 in tab 7 you see the Court's order memorializing that law,
18 and directing that Mr. Haas - - and this is decretal
19 paragraph 2 - - is prohibited from representing or causing
20 any future filings in this matter on behalf of CLI, and that
21 any future filings by CLI *pro se* or Haas, on behalf of CLI,
22 shall result in the imposition of sanctions. And following
23 the entry of service of that order on Mr. Haas, we do see
24 that he would email to my office voluminous pleadings, and
25 - - but not filing them - - and just as an officer of the

1 Court, I included them in the agenda today, but you know, he
2 didn't file them. So, I think he was trying to allude, in
3 his mind, the spirit and meaning of that order, which was get
4 a lawyer and show up, or don't show up *pro se*. And we have
5 him now, today, seeking to introduce a new counsel, which is
6 violative of the earlier order, which gave him that deadline.
7 And, Your Honor, I'll just wrap this up by saying that these
8 events go back to the year 2001, and CLI had more than ample
9 opportunity to file the appropriate fee applications. It had
10 the assistance of, as I said, 5 sets of counsel. It has - -
11 the estate's cooperation in terms of its own discovery, we
12 turned over 45 hundred pages of documents in response to
13 CLI's discovery, and the estate would like to conclude its
14 business with CLI. It would like to have these claims
15 expunged by reason of CLI's failure to prosecute its own
16 claims, the failure to, in effect, obey its own retention
17 orders, or alternately for failing to abide by this Court's
18 order or seeking to allude the plain meaning of this Court's
19 orders, and protract and prolong this litigation, which
20 punishes this estate because we can't make the distributions
21 to the legitimate creditors, and just continues to run up
22 fees unnecessarily of the various professionals who have to
23 read and digest this, and respond, and appear. Which we all
24 would like to avoid, and move on to more productive matters.
25 So for those reasons, I'd ask that the Court expunge the

1 claims.

2 THE COURT: Thank you. Mr. Haas, you've heard the
3 comments of Mr. Rosner - -

4 MR. HAAS (Telephonic): Yes, Your Honor.

5 THE COURT: - - who serves as counsel for the Post
6 Effective Date Committee. Do you have a response?

7 MR. HAAS (Telephonic): Yes, Your Honor. As number
8 1, the statement of 45 hundred documents, I say on the record
9 this day, under oath, I've never received any documents from
10 them. I even have a statement from, email statement from Mr.
11 Rosner refusing to send me documents. Also, additionally, my
12 contract, I was encouraged, as it stated also in the former
13 chairman committee affidavit, not to seek counsel, and that
14 part of the Court order stated that the local counsel for the
15 estate would put those items that they said that I failed to
16 file, in the record. I was constantly, repetitively told by
17 them that they would do it when it was appropriate, and it is
18 reaffirmed by the chairman's affidavit. Everything he said
19 to you is half truths, half statements, in an effort to
20 dismiss my claim. I did the work, I provided the work, I did
21 substantial contribution, I'm entitled to be paid, and their
22 sole omni objection to this date is that the Haas affidavit,
23 which is the only thing they did provide, and in that one
24 document they didn't service me. They put it into the
25 record, and they've always stated that that was a waiver.

1 Like I generously gave away the commissions I worked for a
2 year to get. That is conclusive of everything I say. I do
3 have a lawyer today, even though you said that technically he
4 can't be on today. He's willing to take the case, put in his
5 *pro hac*, be my attorney from then on. He understands the
6 entire context of the case, and he's willing to tell you that
7 he's not going anywhere, and he wants to do a quick
8 conclusion to this matter, including looking into the idea of
9 removing it from the Court, and taking it to the local
10 district if at all possible, to stop tying up the time of the
11 Bankruptcy Court. Because I've asked repeatedly from the
12 PEDC, Rosner and them, in order to do my final fee
13 application, the books and records, and he keeps referring
14 back to the old time line of Henry Hieman, who is no longer
15 my counsel, and saying that's the only one he has to comply
16 to. All the other new stipulated scheduling orders are moot.
17 They've never provided the books and records so I could give
18 an adequate, exact description of the commissions that I'm
19 owed. I can do it in generality, I can't do it exact. And
20 they would just waste this Court's time, and my time, and
21 everybody else's time involved fighting that it's not an
22 exact time. It can't be an exact science unless they do what
23 they're being hypocritical saying that I haven't done. And I
24 have provided answers to their questions. They said they
25 were inadequate the first time with Henry Heiman, I got new

1 counsel. He didn't want to stay around, I got a second
2 counsel who was on contingency and amazingly set a new
3 stipulating scheduling order so that they could time it
4 right, and then they put in a motion to withdraw. I am stuck
5 in a catch 22, fighting for my life here where I'm told I
6 can't defend myself, and I've contacted 1311 lawyers.
7 Because I've made allegations, and they've admitted to the
8 conflicts that are not disclosed. And I've made allegations
9 against the US Trustee's Office. Nobody locally is willing
10 to handle me, so I've had to go out of state. I now have
11 counsel that's willing to settle the matter, I'm willing to
12 go through whatever it takes - - is required by the Court.
13 I'm not going to put any more pleadings in. When Your Honor
14 put in the order for me not to state another thing, I didn't
15 state anything else other than my answers to their requests
16 to dismiss my claim, which came after the Wall Street Journal
17 came out.

18 THE COURT: Thank you. Mr. Haas, have you concluded
19 your comments?

20 MR. HAAS (Telephonic): Yes, sir.

21 THE COURT: Thank you.

22 MR. HAAS (Telephonic): Yes, Your Honor.

23 THE COURT: Mr. Harrington, you're here from the
24 Office of the US Trustee. You may be heard.

25 MR. HARRINGTON: Good afternoon, Your Honor.

1 William Harrington from the Office of the United States
2 Trustee.

3 THE COURT: Good afternoon.

4 MR. HARRINGTON: Your Honor, we are not formally
5 taking a position with respect to this motion. We are
6 concerned, Your Honor, with Mr. Haas' failure to appear with
7 counsel, or CLI's failure to have counsel appear at this
8 hearing. And in addition, Your Honor, we do think if the
9 Court is inclined to grant the motion that Mr. Haas should
10 be, or CLI should be held to it's requirement to file fee
11 applications, and they should be dealt with through the fee
12 application process, Your Honor.

13 THE COURT: Thank you. I believe I've heard from
14 all parties equally. Mr. Werkheiser?

15 MR. WERKHEISER: Yes, Your Honor. Gregory
16 Werkheiser, Morris, Nichols, Arsht, and Tunnell, counsel for
17 the Plan Administrator, and former counsel for the Debtor.
18 Your Honor, I rise simply just to respond to the allegation
19 that Mr. Haas was refused the opportunity to file a fee
20 application. I've personally been assigned to this case
21 since the outset of its filing, and although several years
22 have elapsed since this case was filed, I have no
23 recollection of Mr. Haas ever having requested us to file a
24 fee application on his behalf. We did, at one point in time,
25 file an affidavit on his behalf at his request, but as for

1 fee applications, I do not recall ever having received such a
2 request.

3 MR. HAAS (Telephonic): That's false testimony, Your
4 Honor.

5 THE COURT: I beg your pardon?

6 MR. HAAS (Telephonic): That's false testimony, Your
7 Honor. I specifically talked to Mr. Werkheiser - -

8 THE COURT: This is Mr. - -

9 MR. HAAS (Telephonic): - - Mr. Werkheiser said it
10 was - -

11 THE COURT: Just one second, sir.

12 MR. HAAS (Telephonic): - - a regrettable decision
13 that he - -

14 THE COURT: Sir, just one second.

15 MR. HAAS (Telephonic): Yes, sir.

16 THE COURT: Just one second. Mr. Werkheiser, did
17 you conclude your comments?

18 MR. WERKHEISER: Yes, Your Honor.

19 THE COURT: Mr. Haas, you may respond.

20 MR. HAAS (Telephonic): Yes. I specifically spoke to
21 Mr. Werkheiser at the end, because in my court order that my
22 applications are to be done with the assistance of Debtor's
23 counsel. It was designed that way to save money from the
24 estate, and I'd always worked for the creditors before
25 settling at the end of the estate. And he said he couldn't

1 do that because Barry Gold wouldn't approve of it. And I
2 said, this is - - you're my attorney of record. He said,
3 that was a mistake to do that, but I'm the attorney of the
4 estate first. And stating that I never requested is false,
5 and stating the other stuff is false too.

6 THE COURT: Thank you. Mr. Werkheiser, do you have
7 further comment?

8 MR. WERKHEISER: Your Honor, I think we're going to
9 have to just agree to disagree, because I simply don't recall
10 that conversation.

11 THE COURT: Very well. Thank you.

12 MR. WERKHEISER: Thank you, Your Honor.

13 THE COURT: I believe I've heard from all parties
14 unless Ms. Balaschah has further comment?

15 MS. BALASCHAH: Nothing further, Your Honor.

16 THE COURT: Very well. As indicated by counsel for
17 the Committee at the outset of today's hearing, the matter
18 before the Court is twofold. Firstly, it's a motion by the
19 Post Effective Date Committee to dismiss claims filed by
20 Collateral Logistics, and secondly and emergency motion by
21 Collateral Logistics for an extension of time to seek new
22 counsel and/or to act *pro se*. Due notice was given with
23 respect to the hearings on these matters. CLI, rather
24 Collateral Logistics, hereinafter referred to as CLI, was
25 retained by the Debtors' estates as a professional to provide

1 transportation and security services in connection with the
2 liquidation of certain estate inventory. Pertinent retention
3 orders expressly required CLI to file both interim and final
4 fee applications with all supporting records and invoices.
5 Notably, CLI has failed to do so. It filed two bare bones
6 proofs of administrative claim on February 14th, 2002 and on
7 March 1st, 2002. Those proofs of claim, like any supporting
8 documentation as is required under Rule 3001 subsection c.
9 Nevertheless, as a result of negotiations between the
10 Committee and representatives on behalf of CLI, a negotiated
11 compromise resulted with the estate paying \$400 thousand to
12 prevent the estates from continuing to incur fees and
13 expenses in connection with CLI's claims. To date, more than
14 4 years after CLI ceased rendering services to the Debtors'
15 estate, CLI has not prosecuted its proof of claim.
16 Furthermore, CLI has failed to comply with the PEDC's
17 discovery request and has disregarded a Court order which was
18 dated December 6th, 2004. Rule 41 of the Federal Rules of
19 Civil Procedure, as adopted under the Bankruptcy procedural
20 rules provides in pertinent part the following at subsection
21 b, caption, Involuntary Dismissal and Effect Thereof: For
22 failure of the Plaintiff to prosecute or to comply with these
23 rules, or any order of Court, a Defendant may move for
24 dismissal of an action or of any claim against the Defendant.
25 Unless the Court, in its order for dismissal, otherwise

1 specifies a dismissal under this subdivision, and any
2 dismissal not provided for in this rule, other than a
3 dismissal for lack of jurisdiction or improper venue, or for
4 failure to join a party under Rule 19, . . . adjudication on
5 the merits. Subsection - - with regard to construction of
6 Rule 41, subsection b, Courts in this district typically
7 apply 6 factors when considering the propriety of an
8 involuntary dismissal. One, the extent of the party's
9 personal responsibility. Two, the prejudice to the adversary
10 caused by the failure to meet scheduling orders and respond
11 to discovery. Three, a history of dilatoriness. Four,
12 whether the conduct of the party or attorney was willful or
13 in bad faith. Fifth, the effectiveness of sanctions, other
14 than dismissal. And sixth, the meritoriousness of claim or
15 defense. These factors need not be satisfied conjunctively
16 for the Court to conclude that dismissal is warranted.
17 Herein, under prong 1, the Workman v. Biles test that I just
18 enunciated, CLI has failed to comply with the retention
19 orders, and failed to file fee applications as ordered.
20 Further, the proofs of claim failed to comply with Rule 3001,
21 subsection c, which provides that supporting documentation is
22 required. In pertinent part Rule 3001, subsection c
23 specifically provides the following, and I quote, "When a
24 claim is based on a writing, the original or a duplicate
25 shall be filed with the proof of claim. This rule assists a

1 Debtor in Possession in ascertaining the basis and accuracy
2 of the claim." Also, Official Form 10 requires supporting
3 documentation. As to prong 2 of the Workman v. Biles test,
4 CLI has failed to comply with Court orders compelling
5 discovery. And has, as a result, delayed prosecution of its
6 claim. As to prong 4, bad faith has been exhibited by CLI
7 since it has ignored retention order requirements by failing
8 to file interim and final fee applications. By failing to
9 comply with discovery requests, and orders of the Court, and
10 has failed to file required documentation in support of its
11 proof of claim. Thusly, based on the factors set forth
12 above, the Post Effective Date Committee's motion is well
13 premised, and is hereby granted. And the objection thereto
14 is sustained, is denied.

15 MR. HAAS (Telephonic): I intend to appeal, Your
16 Honor.

17 THE COURT: Just one moment, please. Also, the
18 objections filed by CLI shall be denied further because the
19 Court issued an order, specifically on July 26th, 2005, which
20 was earlier referenced by the Committee's counsel, which
21 ruled, in effect, that CLI cannot appear *pro se*. The Court
22 order stated that sanctions would be imposed if CLI or Steven
23 Haas filed further pleadings without the benefit of counsel.
24 More than a reasonable opportunity has been provided for this
25 relief - - strike that. Accordingly, the emergency motion by

1 CLI for an extension of time to seek new counsel, and/or to
2 act *pro se*, is hereby denied. This Court ruled previously,
3 on June 6th, 2005, that CLI had until June 20th, 2005 at 4
4 o'clock p.m. to find new counsel, and that there would be no
5 further extensions. In this regard, more than a reasonable
6 opportunity has been provided for this relief. No persuasive
7 demonstration has been shown for a further continuance in
8 this regard. Further, the Honorable Mary Walrath of this
9 District orally instructed representatives of CLI at a
10 previous hearing which convened on March 1st, 2005, that CLI
11 as a corporate entity could not prosecute matters before the
12 Court *pro se*, that is without the benefit of legal counsel.
13 So, more than sufficient notice has been given in this
14 regard. Accordingly, those are the rulings of the Court.
15 Mr. Rosner, you are to submit an entry consistent with these
16 rulings.

17 MR. ROSNER: I will, Your Honor. Thank you.

18 THE COURT: Very well. There being nothing further,
19 we stand adjourned.

20 (Whereupon at 2:57 p.m. the hearing in this matter was
21 concluded for this date.)

22

23

1 I, Jennifer Ryan Enslin, approved transcriber for
2 the United States Courts, certify that the foregoing is a
3 correct transcript from the electronic sound recording of the
4 proceedings in the above-entitled matter.

5

6 /s/Jennifer Ryan Enslin
Jennifer Ryan Enslin
18 Bar Drive
Newark, DE 19702
(302) 836-1905

10/12/05