IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

	x	Chapter 11
In re:	:	Case No. 01-0706 (MFW)
ETOYS, INC. *et. al.*,	:	Jointly Administered
Debtors.	:	**Hearing Date: Sept. 19, 2013 at 10:30 AM** **Obj. Deadline: Sept. 5, 2013**
	x	**Re: D.I. 2512**

PLAN ADMINISTRATOR'S LIMITED OBJECTION TO FIRST & FINAL FEE APPLICATION OF TRAUB BONACQUIST & FOX LLP AS GENERAL COUNSEL TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS RELATING TO THE IPO LITIGATION FOR THE PERIOD FEBRUARY 26, 2002 THROUGH JULY 31, 2013

Barry Gold, as Plan Administrator for the post-confirmation estate of EBC I, Inc., f/k/a eToys, Inc., hereby submits this limited objection (the "Limited Objection") to the *First & Final Fee Application of Traub Bonacquist & Fox as General Counsel to the Official Committee of Unsecured Creditors Relating to the IPO Litigation for the Period February 26, 2002 Through July 31, 2013* [D.I. 2512; filed 8/22/2013] (the "TBF Fee App."), and respectfully states as follows:

1. The Plan Administrator is compelled to file this Limited Objection to the TBF Fee App because, based on the information currently available to the Plan Administrator, the circumstances do not warrant granting Traub, Bonacquist & Fox LLP ("TBF") the fee award it requests of six percent (6%) of the gross settlement fund to be received from Goldman Sachs & Co. ("Goldman") in settlement of the action against Goldman that has been pending for more than eleven years (the "IPO Litigation"). TBF seeks this contingency fee on top of a twenty-nine percent (29%) contingency fee that is separately being requested by Wachtel Missry LLP and Pomerantz Grossman Hufford Dahlstrom & Gross LLP (the "Special Litigation Counsel"),

special litigation counsel to the Official Committee of Unsecured Creditors (the "OCUC") and the Post-Effective Date Committee (the "PEDC," and together with the OCUC, the "Committees"). *See First & Final Application Of Wachtel Missry LLP And Pomerantz Grossman Hufford Dahlstrom & Gross LLP For Compensation For Services Rendered And For Reimbursement Of Expenses As Special Litigation Counsel To The Official Committee Of Unsecured Creditors For The Period February 26, 2002 Through June 30, 2013* [D.I. 2509] (the "SLC Fee App."). On information and belief, TBF's role on behalf of the Committees in the prosecution of the IPO Litigation (as defined below) was limited in both time and scope, and at best ancillary to that of the Special Litigation Counsel, who even TBF is forced to acknowledge "did the laboring oar of the work." (TBF Fee App., ¶ 21)

2. TBF has not established, and cannot establish, that it is entitled to the entire six percent (6%) contingency fee it is claiming pursuant to the TBF Fee App. To be clear, the Plan Administrator is not *per se* opposed to TBF receiving *some* compensation for its role in the IPO Litigation, but the compensation to be awarded TBF must be commensurate, in light of all of the circumstances, to TBF's contribution to the IPO Litigation and the benefits received by the Debtors' estates as a result thereof. At present, TBF has failed to provide adequate information in connection with the TBF Fee App. to allow the Plan Administrator to determine the fair and reasonable amount of compensation, if any, that should be allowed and paid to TBF for services rendered in connection with the IPO Litigation.[1]

3. The TBF Fee App. suffers from several deficiencies that preclude the application's approval in its current form.

[1] The Plan Administrator reserves the right to supplement this Limited Objection to the extent TBF attempts offer such information through any reply or otherwise in connection with proceedings on the TBF Fee App.

A. TBF Has Failed To Comply With The Terms And Conditions Of Its Engagement In Connection With the IPO Litigation

4. TBF is not entitled to a six percent (6%) contingency fee because TBF has failed to comply with the terms and conditions of its engagement as incorporated into the Order, dated February 26, 2002 [D.I. 922] (the "Expanded Retention Order"), pursuant to which its initial engagement as general counsel to the OCUC was modified in contemplation of TBF providing services in connection with the IPO Litigation. The Expanded Retention Order approved expanding the scope of the employment and retention of TBF to include "the investigation and prosecution, if appropriate of IPO related litigation, ***as more fully set forth in the Application and the Fox Affidavit.***"[2] (Expanded Retention Order, at 2) (emphasis added). Under the Expanded Retention Order, TBF was to be compensated "[p]ursuant to section 328(a) of the Bankruptcy Code and further order of this Court . . . for services rendered and reimbursement of expenses incurred solely in connection with the investigation and prosecution, if appropriate of IPO related litigation, ***as more fully set forth in the Application and the Fox Application*** . . . ."[3] (Id.) The Expanded Retention Order also provided that "except as otherwise set forth herein, the terms of the order authorizing the retention of TB&F, dated April 25, 2001

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2 As used in the quote above, "Application" refers to the *Application for an Order Expanding the Scope of the Employment and Retention of Traub, Bonacquist & Fox LLP, as General Counsel to the Official Committee of Unsecured Creditors,* filed on January 2, 2002 [D.I. 838] (the "TBF Expanded Retention Application") (**Exhibit A** hereto) and "Fox Affidavit" refers to the supplemental affidavit of TBF partner Michael Fox made in support of the TBF Expanded Retention Application and annexed thereto.

3 It bears noting that there does not appear to have been any separate engagement agreement between TBF and the OCUC to govern the terms of its engagement in connection with the IPO Litigation. Rather, the terms and conditions were those described in the TBF Expanded Retention Application, the Fox Affidavit and the TBF Expanded Retention Order.

shall remain in full force and effect."[4] Thus, the Expanded Retention Order plainly incorporated terms and conditions from the TBF Expanded Retention Application, the Fox Affidavit and the Original TBF Retention Order.

5. The TBF Expanded Retention Application filed by the OCUC, TBF's client at the time, obligated TBF to maintain separate time records for its work in connection with the IPO Litigation, stating:

> TB&F will also ensure that TB&F attorneys separate the time spent and expenses incurred, in connection with the investigation and IPO litigation from all other time spend [sic] and expenses incurred in these cases and specifically identify such services and expense in a single category. TB&F will make every effort to ensure that all such related services and expenses are not a part of its general billing, but placed into a separate category so as to maintain the integrity of the contingent nature of such services and expenses.

(TBF Expanded Retention Application, ¶ 7).[5] *See also* Fox Aff., ¶ 13 ("TB&F will also require TB&F attorneys to separate the time spent and expenses incurred, in connection with the investigation and IPO litigation from all other legal services and expenses incurred in these cases.") and ¶ 14 ("TB&F will create a specific category designated as "IPO Litigation" and will make every effort to ensure that it assigns all such related services and expenses into that category so as to maintain the integrity of the contingent nature of the fees and expenses related to such services.").

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[4] The referenced authorizing the retention of TBF, dated April 25, 2001, is the Order [D.I. 246] (the "Original TBF Retention Order"), which authorized the OCUC to engage TBF as its general counsel in these chapter 11 cases, The Original TBF Retention Order provided that TBF would, among other things, make applications to this Court for compensation and reimbursement of expenses subject to the standards generally applicable to other professionals retained in these chapter 11 cases.

[5] The Special Litigation Counsel never committed to account for time and expenses in the manner described in the TBF Expanded Retention Application or the Fox Affidavit.

6. Further, it can be implied from the circumstances of the filing of the TBF Expanded Retention Application that it was premised on the expectation that TBF would perform approximately twenty percent (20%) of the work in connection with the IPO Litigation. The TBF Expanded Retention Application was filed by the OCUC on January 7, 2002, the same date, that the OCUC filed its application to engage the Special Litigation Counsel in connection with the IPO Litigation [D.I. 839] (the "SLC Retention Application").[6] The SLC Retention Application, in turn, contains the statement that "The Firms have represented that each will perform about forty percent (40%) of the necessary legal services and, that TB&F will likely perform about twenty percent (20%) of the necessary legal services in conjunction with TB&F's rendition of bankruptcy related legal services in connection with the investigation and prosecution of any causes of action against Goldman related to the IPO." (SLC Retention Application, ¶ 16) It is highly likely that the Court had both the TBF Expanded Retention Application and the SLC Retention Application before it for consideration at the same time. Not only were both applications filed on the same day, but the orders granting the applications were entered on the same day, February 26, 2001, and appear in successive docket entries [D.I. 922 & 923].

7. From the above, it is clear that the terms and conditions of TBF's engagement in connection with the IPO Litigation included the obligation to keep detailed time records and to separately account for its time and expenses relating to the IPO litigation separately from those it was incurring in other facets of the Debtors' chapter 11 cases as counsel to the OCUC. Moreover, the premise of TBF's engagement was that TBF would contribute

[6] Indeed, the two applications show up in adjacent docket entries. It is highly likely that TBF prepared both the TBF Expanded Retention Application and the SLC Retention Application for the OCUC.

approximately twenty percent (20%) of the legal services necessary to the investigation and prosecution of the IPO Action. As far as the Plan Administrator can determine from the available information, TBF has not complied with these terms and conditions.

TBF Has Not Properly Supported Its Application With Required Time Records

8. Although TBF represented in connection with requesting entry of the Expanded Retention Order that it would record and separately code for time spent on the IPO Litigation, TBF has yet to demonstrate that this occurred. TBF provided no fee detail in connection with the TBF Fee App.

9. TBF asserts in the TBF Fee App. that "the Retention Order imposed no affirmative obligation on Applicants to record their time for this engagement." (TBF Fee App., ¶ 22) That, plainly, is not correct. As described above, TBF expressly committed to record and code time for the IPO Litigation engagement separately from all other time for which it was seeking payment in these chapter 11 cases.

TBF Has Not Come Close To Providing 20% Of Necessary Legal Services In Connection With The IPO Litigation

10. Although TBF's engagement pursuant to the Expanded Retention Order was premised on the representations of TBF's then client, the OCUC, that TBF would provide approximately twenty percent (20%) of the legal services in connection with the IPO Litigation, TBF now admits that its contribution was far less. By TBF's own admission, its attorneys contributed less than three percent (3%) of the total time incurred by TBF and the Special Litigation Counsel in connection with the IPO Litigation. According to TBF, it "estimates that it devoted more than 1,000 hours to this engagement." (TBF Fee App., ¶ 21) Special Litigation Counsel, however, maintain that they invested more than 35,000 hours to this engagement. (SLC Fee App., ¶ 22)

11. Moreover, TBF's estimate that it committed more than 1,000 hours to the IPO Litigation engagement appears vastly overstated. Other than the Special Litigation Counsel who had the primary role in prosecuting the IPO Litigation, TBF was the only other law firm ever approved by this Court to receive compensation on a contingency fee basis for services to be rendered in connection with the IPO Litigation. It, however, now appears that TBF ceased engaging in the active practice of law as a law firm sometime in 2005 or 2006 – more than seven years prior to settlement of the IPO Litigation. According to statements made by TBF's counsel since filing of the TBF Fee App., to support the TBF Fee App., TBF is apparently relying, in substantial part, on time that was allegedly incurred by former TBF attorneys who joined Dreier LLP ("Dreier") in 2006.[7] This exodus to Dreier occurred only after the departure in 2005 of other TBF attorneys, including one of its two remaining founding partners.[8] In short, between 2005-2006, the break-up of TBF as a practicing law firm was complete.

12. No basis exists under the terms and conditions of TBF's engagement pursuant to the Expanded Retention Order to recover compensation for services rendered by Dreier attorneys. The engagement approved by this Court was for TBF, not Dreier, to provide legal services to the OCUC in connection with the IPO Litigation. While the PEDC was free, subject to the terms of the Plan, the confirmation order, the Plan Administrator agreement, and its own bylaws, to hire whomever it wanted to represent it in connection with these chapter 11

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7 *See* Elaine Chow, Dreier Adds Traub, Bonacquist & Fox LLP To Fold, Law360 (Sept. 16, 2006, 12:00 a.m. ET), http://www.law360.com/articles/10260/dreier-adds-traub-bonacquist-fox-llp-to-fold?article_ (**Exhibit B** hereto).

8 *See* Biography of Michael S. Fox, Partner, http://www.olshanlaw.com/attorneys-Michael-Fox.html (last accessed Sept. 5, 2013, at 9:10 p.m. ET) (**Exhibit C** hereto) ("Michael previously was a founding partner of the boutique bankruptcy firm Traub Bonacquist & Fox LLP, practicing there from 1987 to 2005, when he moved his practice group to Olshan.").

cases or the IPO Litigation, it remains that only TBF and the Special Litigation Counsel were ever approved by this Court under section 328(a) to receive compensation on a contingency fee basis.

13. Accordingly, TBF has not complied with the terms and conditions of its engagement as incorporated into the Expanded Retention Order and, therefore, has no contractual or court-mandated right to recover the claimed six percent (6%) contingency fee.

B. The Unforeseen And Unforeseeable Developments In These Chapter 11 Cases Establish That Section 328(a) Approval For TBF Pursuant To The TBF Expanded Retention Order Was Improvident And Should Be Revisited

14. Although the Expanded Retention Order did approve the terms and conditions of TBF's modified engagement in connection with the IPO Litigation pursuant to section 328(a) of the Bankruptcy Code, the unusual and unforeseeable developments in these chapter 11 cases demonstrate that the approval of the six percent (6%) contingency fee for TBF was improvident. Accordingly, the terms and conditions of the TBF Expanded Retention Order should not bind this Court in evaluating what, if any, compensation to award TBF for its role in the IPO Litigation.

15. TBF was initially employed pursuant to an Order, dated April 25, 2001, as general counsel to the OCUC, and served in that capacity from March 16, 2001 through the confirmation date of the chapter 11 plan (the "Plan") of the Debtors. Following the November 5, 2002 effective date of the Plan, TBF was engaged as general counsel to the PEDC. TBF billed in connection with both these engagements on an hourly basis and was expected to provide detailed descriptions of its fees and expenses as is typical in chapter 11 cases.

16. Although, on information and belief, TBF never formally withdrew as counsel to the PEDC in any filing with this Court, the information available to the Plan Administrator indicates that by some point in 2005 TBF had effectively discontinued its

representation of the PEDC in connection with the Debtors' chapter 11 cases. Indeed, review of the docket in the main bankruptcy establishes that not since January 25, 2005, when the PEDC filed its opposition to certain motions filed by Collateral Logistics, Inc. and Robert K. Alber [D.I. 2170], has TBF appeared on the signature block of a court filing in the main bankruptcy case made on behalf the PEDC.

17. TBF's apparent withdrawal as counsel to the PEDC in connection with these chapter 11 cases coincided with the break-up of TBF as a practicing law firm. In 2005, Michael Fox, one of TBF's two remaining founding partners, departed TBF and moved his bankruptcy practice to the law firm now known as Olshan Frome Wolosky LLP. By 2006, Paul Traub, the other remaining founding partner of TBF, had moved his practice, together with that of most (if not all) of TBF's other remaining partners, to Dreier. Later, following the heavily reported implosion of Dreier, on information and belief, the various former TBF partners moved on to multiple other law firms or other positions. Accordingly, by 2006, it appears that TBF, while it may have been technically still in existence as an entity, was not functioning as a law firm engaged in the ongoing practice of law, at least not in any way connected with these chapter 11 cases.[9]

18. The Plan Administrator is mindful that "once the Bankruptcy Court has determined that the terms and conditions of a professional's compensation are reasonable, it may thereafter reduce that compensation only if it determines, under § 328(a), that 'such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.'" *In re Northwestern Corp.,*

[9] Consistent with the foregoing is the fact that TBF's registration as an active entity in New York state (where TBF was formerly located) was revoked on January 25, 2012. *See* NYS Department of State, Division of Corporations, Entity information for Traub, Bonacquist & Fox LLP (last accessed August 15, 2013) (**Exhibit D** hereto).

334 B.R. 40, 43 (D. Del. 2006) (quoting *In re Federal Mogul–Global Inc.,* 348 F.3d 390, 397 (3d Cir. 2003)). But, in February 2002, no one in this case could have anticipated that three years after the Expanded Retention Order was entered, the TBF firm would break up and its attorneys would eventually head their different ways. TBF is one of the law firms that may have started the engagement contemplated by the Expanded Retention Order, but it was not one of the law firms that finished that engagement.

19. Moreover, because of the turmoil that likely came along with the break-up of TBF as a law practice (not to mention the subsequent turmoil that likely occurred at Dreier), it is far from clear that TBF attorneys were making meaningful contributions in the later stages of the IPO Litigation.[10] Notably, TBF founding partner Michael Fox was the affiant in support of the OCUC's request for entry of the Expanded Retention Order, but by 2005, Mr. Fox had departed from TBF. There is no indication that Mr. Fox continued to have ongoing involvement in the IPO Litigation after he moved his practice to the Olshan firm. Instead, on information and belief, Paul Traub purported to take this matter with him when he and other former TBF partners moved their practices to Dreier.[11]

20. Nor is there any indication that TBF and the former TBF attorneys have had any meaningful involvement in the IPO Litigation for at least the last several years. Whatever the reason for their having eschewed active involvement in the continued prosecution of the IPO Litigation, it could not have been reasonably anticipated at the time that the Expanded

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[10] This statement is not intended to question the abilities or professional dedication of TBF attorneys; rather, it is merely an observation based upon what appears to have been the chaotic reality for former TBF attorneys during this period.

[11] This is consistent with representations made in the affidavits in support of the TBF Fee App. that 1/4th of the six percent (6%) contingency fee being claimed will be allocated to the bankruptcy trustee for Drier.

Retention Order was entered that TBF would effectively abandon any substantive involvement in the IPO Litigation before its conclusion. *See, e.g., In re Airlift Int'l, Inc.,* 24 B.R. 128, 130-31 (Bankr. S.D. Fla. 1982) (reducing compensation, notwithstanding section 328(a) approval of engagement terms, when professional discontinued work before its engagement was complete). It is fundamental that when a professional is hired for an engagement, especially on a contingency fee basis, that professional is expected to see the engagement through to its conclusion if it wants to be paid according to the terms and conditions of its engagement as approved by the bankruptcy court. TBF failed to do that here, which was a development that the parties and the Court had no reason to foresee at the time that TBF was engaged in connection with the IPO Litigation.

21. Moreover, the fact that neither TBF nor any of the TBF attorneys appear to have had any substantive involvement in the IPO Litigation dating back at least several years strongly suggests that whatever services were provided by TBF and former TBF attorneys did not figure directly in the meaningful recovery that the Debtors' creditors now stand to receive through settlement of the IPO Litigation. By late 2010, the prospects of any recovery from the IPO Litigation looked bleak. On November 8, 2010, the Supreme Court of New York, New York County, entered an order granting summary judgment for Goldman and dismissing the PEDC's complaint against Goldman. The PEDC appealed, but the Supreme Court of New York, Appellate Division, First Department, affirmed the summary judgment ruling in a 4-1 decision entered on December 8, 2011.[12] Thereafter, the PEDC sought leave to appeal to the New York

[12] Notably, neither TBF nor any former TBF attorney was listed as counsel of record for the appeal when this opinion issued; nor, on information and belief, was TBF or any former TBF attorney identified as counsel of record on the briefs filed in the Appellate Division appeal.

Court of Appeals, which was granted.[13] The appeal was fully briefed and scheduled for argument on May 29, 2013.[14] It was only after leave to appeal was granted and the prospect became more realistic that Special Litigation Counsel might obtain a reversal on appeal to New York's highest court that the Goldman settlement was reached.

22. To the best of the Plan Administrator's information, TBF and TBF attorneys had no meaningful involvement in the appellate proceeding.[15] All indications are that it was solely the efforts of Special Litigation Counsel that resuscitated an action that had been dismissed in 2010 and thereby created an opportunity for a meaningful recovery for the Debtors' creditors. That Special Litigation Counsel would have to go it alone for the last several years of the IPO Litigation was not contemplated (and was not capable of being contemplated) when TBF's Expanded Retention Order was entered in February 2002. Accordingly, TBF cannot rely on the section 328(a) approval of its engagement terms to immunize its claimed contingency fee from review under the reasonableness standards of section 330 of the Bankruptcy Code.

C. TBF Has Not Provided The Parties And The Court With An Adequate Record To Support Its Recovery Of Compensation Under The Section 330 Reasonableness Standard

23. Because TBF failed to comply with the terms and conditions of its engagement pursuant to the Expanded Retention Order and because TBF is not entitled to shield

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[13] It is apparently quite rare for the New York Court of Appeals to grant a motion for leave to appeal. According to the 2012 Annual Report, the court granted just 64 out of 999 motions for leave to appeal in civil cases that were filed in 2012 (*i.e.,* just 6.4%). *See* Court of Appeals of the State of New York, 2012 Annual Report of the Clerk of the Court, at 7 (2012) (excerpted at **Exhibit E** hereto).

[14] As with the intermediate appeal, on information and belief, neither TBF nor any TBF attorney was identified in the court filings made in connection with the appeal to the New York Court of Appeals.

[15] On information and belief, Paul Traub did come unannounced to at least one of the appellate hearings, ostensibly to monitor the proceedings.

its claimed fees from review through reliance on section 328(a) approval of the terms and conditions of its engagement, it is necessary and proper to review the TBF Fee App. under the reasonableness standards of section 330 of the Bankruptcy Code. So measured, TBF has not at this stage carried its burden to show that it is entitled to any compensation (although again the Plan Administrator does not necessarily dispute that TBF may, upon an appropriate showing, be entitled to some recovery).

24. The standard governing compensation allowable to Court retained bankruptcy professionals is set forth in section 330 of the Bankruptcy Code in relevant part as follows:

> (3) In determining the amount of reasonable compensation to be awarded to … [a] professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including –
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> (A) the time spent on such services;
> (B) the rates charged for such services;
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.
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> (4) (A) … the court shall not allow compensation for ---
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> (i) unnecessary duplication of services; or
> (ii) services that were not
>
> I. reasonably likely to benefit the debtor's estate; or
> II. necessary to the administration of the case."

11 U.S.C. § 330 (emphasis added).

25. The burden of proving that a fee applicant has "earned the fees it requests, and that the fees are reasonable" rests on the applicant itself. *Zolfo, Cooper & Co. v. Sunbeam-Oster Co.,* 50 F.3d 253, 262 (3d Cir. 1995). *See also In re Fleming Companies, Inc.,* 304 B.R. 85, 89 (Bankr. D. Del. 2003). It is the applicant's duty "to submit fee applications with enough detail to enable the court to reach an informed decision - one necessarily grounded in complete, coherent information-as to whether the requested compensation is justified." *In re Busy Beaver Bldg. Centers, Inc.,* 19 F.3d 833, 845 (3d Cir. 1994).

26. In the TBF Fee App., TBF has failed to provide the Court and parties with adequate information to evaluate whether any payment is justified and, if so, the quantum of the payment that should be recoverable by TBF. Detailed time entries have been omitted from the TBF Fee App. Moreover, the text of the TBF Fee App merely discusses in general terms what the "Firms" (which TBF defines to include itself and the two Special Litigation Counsel law firms) did in connection with the IPO Litigation. The only individualized description of what TBF did consists of the following sentence: "TBF submits that it conducted interviews, held meetings and made case evaluations both prior to and after WM and PGHDC were separately retained."[16] (TBF Fee App., ¶ 21).

27. By denying the Court and parties the ability to review TBF's time records, TBF had rendered it impossible to assess what services it actually provided and whether and to what extent they were of benefit to the Debtors' estates. It may be a tired phrase, but the bankruptcy fee application process has long been premised on the concept of "trust but verify." If

[16] This sentence, of course, raises the question of how TBF can be entitled to compensation for work that was done before the Special Litigation Counsel were retained, given that the order expanding TBF's retention to include work on the IPO Litigation was entered on February 26, 2002, the same day as the order was entered approving the retention of the Special Litigation Counsel.

TBF will not make its detailed time and other records available for review, the "verify" piece is missing and the application cannot be granted.

D. When Reviewed Under A Section 330 Reasonableness Standard, It Is Clear That The Fees, If Any, Awarded TBF Should Be Far Less Than What TBF Seeks Pursuant To Its Application

28. Furthermore, even if TBF comes forward with properly documented time and other records (which it has not done to date) to support its claim to have contributed approximately 1,000 hours of attorney time to the IPO Litigation, it is highly unlikely that TBF could demonstrate that it is entitled to a recovery of the magnitude that it would receive were it paid an amount equal to six percent (6%) of the gross proceeds of the Goldman settlement. As discussed above, based on the information available to the Plan Administrator, it appears that neither TBF nor any of the TBF attorneys have had meaningful involvement in the IPO Litigation for at least several years. Specifically, the critical steps taken since the complaint was dismissed in 2010 to rescue the litigation and achieve some meaningful recovery for the Debtors' creditors appear to have been exclusively through the efforts of Special Litigation Counsel. In view of what appears to be TBF's negligible contributions in the latter stages of the IPO Litigation, to the extent that TBF actually comes forward with time and other records to support its application, those records would need to establish that TBF made an outsized contribution to the IPO Litigation effort during the earlier stages to justify anything close to the recovery that TBF seeks in the TBF Fee Application. In the absence of such record support, any fees to be awarded to TBF should be reduced substantially from what TBF seeks in the TBF Fee App.

E. Ambiguity Exists Concerning Whether TBF Was Authorized To Continue The IPO Litigation Engagement On Behalf Of The PEDC After 2005

29. This Court's Opinion, dated October 4, 2005, reported as *In re eToys, Inc.,* 331B.R. 176, 196 n.8 (Bankr. D. Del. 2005), contains the following text in a footnote: "As a

result of the Alber Motion, TBF has withdrawn as counsel in the IPO litigation and the PEDC is represented by others in that suit." Although the Plan Administrator is unaware of the record basis for this statement in the Court's opinion, it does create a question as to whether TBF was authorized to continue representing the PEDC in the IPO Litigation after the Opinion's issuance. The Plan Administrator respectfully requests that the Court clarify meaning of this footnote and its impact, if any, on the present TBF Fee App.

WHEREFORE, for the foregoing reasons, the Plan Administrator respectfully requests that (a) the TBF Fee App. be denied in its current form, (b) to the extent TBF is allowed any fees for services rendered in the IPO Litigation, those fees should evaluated pursuant to the standards set forth in section 330 of the Bankruptcy Code, (c) the Court exercise its discretion to award TBF only such fees as are properly supported and justified under section 330 of the Bankruptcy Code, and (d) the Court grant the Plan Administrator such other and further relief as is just and proper.

Dated: September 5, 2013
Wilmington, Delaware

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