Status Conference Date and Time: February 1, 2005 at 9:00 a.m.
Response Deadline: January 25, 2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re	Chapter 11
ETOYS, INC. *et al.*,[1]	Case Nos. 01-0706 (MFW) through 01-0709 (MFW)
Debtors.	Jointly Administered

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OBJECTION BY TRAUB BONACQUIST & FOX LLP TO MOTIONS SEEKING, *INTER ALIA*, SANCTIONS, DISGORGEMENT OF FEES, AND IMMEDIATE REMOVAL OF TRAUB, BONACQUIST & FOX LLP FILED BY ROBERT K. ALBER AND COLLATERAL LOGISTICS, INC. (Docket Nos. 2145 and 2146 respectively)

Traub, Bonacquist & Fox LLP ("TB&F"), by and through its undersigned counsel, respectfully submits this objection (the "Objection") to the motions filed on or about December 22, 2004, by Robert K. Alber (Docket No. 2145) (the "Alber Motion") and on behalf of Collateral Logistics, Inc. ("CLI") (Docket No. 2146) (the "CLI Motion" and, together with the Alber Motion, the "Motions"). In support thereof, TB&F asserts as follows:

PRELIMINARY STATEMENT

1. This Objection is made on behalf of TB&F by the undersigned counsel after an investigation conducted (under the direction and supervision of counsel) in furtherance of counsel's representation to the Court on December 22, 2004 that such an investigation would be undertaken.

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[1] The Debtors are the following entities: EBC I, Inc. f/k/a eToys, Inc. ("eToys"), EBC Distribution, LLC, f/k/a eToys Distribution LLC, PMJ Corporation and eKids, Inc.

2. CLI is a creditor whose claim is being contested by the PEDC.[2] Mr. Alber is an "out-of-the money" shareholder whose stock was canceled under the Plan and who, despite the overwhelming success of these cases, likely will receive no distribution on account of his equity interests. In a transparent effort to manipulate the post-confirmation administration of these reorganized estates to further their personal interests at the expense of the general unsecured creditors of these estates,[3] the Movants seek the entry of an order of this Court pursuant to sections 327 and 1103 of the Bankruptcy Code and Bankruptcy Rule 2014 disqualifying TB&F

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[2] Capitalized terms that are not otherwise defined herein shall have the same meaning as set forth in the *Declaration of Paul Traub (A) In Opposition To Emergency Motions filed By Or On Behalf Of Collateral Logistics, Inc. and Robert K. Alber and (B) As Supplemental Disclosure Under Bankruptcy Rule 2014* (the "Traub Decl.", annexed hereto as Exhibit "A" and incorporated herein), and in the *Declaration of Michael S. Fox (A) In Opposition To Emergency Motions Filed By Or On Behalf of Collateral Logistics, Inc. and Robert K. Alber and (B) As Supplemental Disclosure Under Bankruptcy Rule 2014* (the "Fox Decl.", annexed hereto as Exhibit "B" and incorporated herein, and together with the Traub Decl. sometimes collectively referred to herein as the "Supplemental Disclosure Declarations").

[3] The CLI Motion amounts to little more than a collateral attack on the objection by the Post Effective Date Committee (the "PEDC") to CLI's administrative claim. In what is plainly an attempt to circumvent the claims objection process, CLI is asking this Court to appoint a "Trustee . . . [so] that the Court can clearly see why [the] CLI claim has been unreasonably withheld or negotiated." See CLI Motion at p. 4. Even more, CLI seeks: (i) "modification of the motion to compel of December 6, 2004 for the PEDC to do so in kind where Frederick Rosner was requested to answer Collateral Logistics discovery questions and has refused to do so in extreme bad faith", (ii) "a directive that a new stipulated scheduling order of the Collateral Logistics Inc. Claim can occur whereby all previous scheduling orders are held harmless against Collateral Logistics Inc.", (iii) "a ruling conclusion that the Haas Affidavit of November 2001 is not a waiver which has been falsely stated against Collateral Logistics" and (iv) "a court directive that Collateral Logistics be allowed thirty days to obtain new counsel after decision on the Mattel issue." None of that relief is warranted. The matter is set for trial in this Court on February 4, 2005; however CLI's recently retained counsel (its third law firm in this case) has recently filed a motion seeking to delay the trial. Fox Decl. at ¶ 18, n. 6. Pursuant to an order of the Court dated January 24, 2005, the Court has re-set the trial of the CLI claim objection until June 20, 2005.

As a member of the so-called "eToys Shareholder Group," Mr. Alber wants the post-confirmation estate to be administered by a person of his liking for the principal benefit of the Debtors' former shareholders, rather than for the Debtors' general unsecured creditors. To that end, not only does he want this Court to appoint a new Plan Administrator and a new Post Effective Date Committee (see Alber Motion at p. 30, ¶¶ 7 & 8), but he is also asking the Court to give the eToys Shareholders Group a seat on the PEDC (see Alber Motion at ¶ 9) and to appoint counsel to be paid by the estate to represent the shareholders. See Alber Motion at ¶ 11. There is simply no basis for granting Mr. Alber such relief. The so-called "eToys Shareholder Group" is not officially recognized by this or any other court. Moreover, contrary to Mr. Alber's assertions, the PEDC is properly constituted and Mr. Gold is properly acting as Plan Administrator. Finally, shareholders are not eligible to serve on the PEDC. In relevant part, the confirmed Plan (which went effective almost 2 ½ years ago and thus, cannot be modified) provides that the members of the initial PEDC must be former members of the Creditors' Committee, and thereafter any substitute members were required to be creditors of the Debtors. See Plan at Sec. 5.4(b).

from continuing to act as counsel herein, and directing TB&F and Paul Traub, a member of TB&F,[4] to disgorge all fees paid to each of them to date in these cases.[5]

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[4] Alber is wrong in seeking any separate disgorgement of any amounts from Mr. Traub, in that Mr. Traub has never received any sums from the Debtors' estates separate and apart from the fees paid to TB&F in its capacity as counsel to the Committee, and thereafter the PEDC.

[5] In addition to asking for relief under sections 1103 and 327 of the Bankruptcy Code and Bankruptcy Rule 2014, the Movants make outrageous and false allegations of criminal conduct and the like plainly designed to inflame and prejudice this Court. See Alber Motion at p. 27, ¶ 2; CLI Motion at p. 3, ¶ 19, p. 5, ¶¶ 31 – 33. We will not dignify those allegations and requests for relief with a response.

Unfortunately, TB&F, Paul Traub and Michael S. Fox are not the only ones unfairly tarred by these baseless Motions. The Movants seek an order of this Court (i) sanctioning Mr. Gold, (ii) directing that he disgorge the fees paid to him in these cases and (iii) removing him from his role as Plan Administrator. See Alber Motion at pp. 29-30, ¶¶ 1, 2 and 7; CLI Motion at p. 1 (CLI seeks an order "removing Barry Gold as an illegal post petition professional" and requiring the "seizure of all fees paid Barry Gold." They also lash out at Mark Kenney, Esq., the Asst. U.S. Trustee with responsibility for the administrative oversight of these cases, unfairly criticizing him for the work he has done in these cases and others over the past several years (see Alber Motion at p. 31, ¶ 12; CLI Motion at pp. 3 – 4, ¶¶ 9 – 18, 24 & 26), and requesting that Mr. Kenney "be replaced due to his failure to be proactive in investigating the facts . . . presented to him." Alber Motion at p. 31, ¶ 12. See CLI Motion at p. 1 (CLI seeks the "removal of Mark Kenney for failure to perform."). No grounds exist for criticizing Mr. Gold's work as Plan Administrator, let alone removing him from the post as Plan Administrator. Mr. Kenney has done a good job overseeing these cases and Messrs. Traub and Fox and TB&F regret that he must endure CLI and Mr. Alber's baseless attacks.

The Movants also seek the appointment of an examiner or trustee to investigate an alleged conflict among Goldman Sachs and R.R. Donnelly that somehow taints the settlement reached by the Plan Administrator and the PEDC with Goldman Sachs. See CLI Motion at p 4, ¶ 29. The hearing on the motion to approve that settlement has been deferred pending resolution of the issues raised by the Motions.

The Movants simply have their facts wrong. They seem to be concerned that the Plan Administrator is settling the Goldman Sachs IPO Litigation presently pending in New York State Supreme Court. He is not doing so. That litigation is presently pending in the New York State Supreme Court, and has nothing whatsoever to do with the proposed Goldman Sachs settlement, which relates to certain avoidance action issues only. Moreover, and in any event, to TB&F's knowledge there is no conflict among Goldman Sachs and R.R. Donnelly & Sons Co ("R.R. Donnelly"). CLI and Alber erroneously contend that at the time the Goldman Sachs settlement was concluded, a conflict existed between Goldman Sachs and R.R. Donnelly, purportedly a member of the PEDC, in that members of Goldman Sachs at the same time held seats on the R.R. Donnelly Board of Directors. In truth, at the time the Goldman Sachs settlement was concluded, R.R. Donnelly was not a member of the PEDC. In addition, even assuming, *arguendo*, R.R. Donnelly was a PEDC member at the time alleged, the persons alleged by CLI and Alber to have a presence on the R.R. Donnelly Board were not associated with Goldman Sachs, but in reality are employees of an entity called GSC Partners which, upon information and belief, is entirely separate and independent from Goldman Sachs. Based upon information publicly available on the GSC Partners website (see www.gscpartners.com), GSC Partners was founded in 1994 by Alfred C. Eckert III. Its senior officers and advisors are long-time colleagues with ***prior*** professional relationships from Goldman Sachs, The Blackstone Group, and Citigroup, among others. According to that same website, GSC Partners is a private investment firm, with over $6.9 billion of assets under management. GSC Partners specializes in distressed debt investing, mezzanine lending, and structured finance. GSC Partners is privately owned, has over 90 employees, and has offices in New Jersey, New York and London. GSC Partners, who CLI and Alber contend is otherwise known as "Goldman Sachs Capital Partners", in fact has nothing to do with Goldman

3. The Movants contend, without factual or legal support, that Mr. Traub's association with Barry Gold, the Plan Administrator, through Asset Disposition Advisors, LLC ("ADA"), an entity that has no relationship to the Debtors or these cases, is per se a disabling conflict under sections 1103(b) and 327 of the Bankruptcy Code which, if disclosed in accordance with Bankruptcy Rule 2014 when Mr. Gold was retained by the Debtors, would have precluded TB&F from representing the Creditors' Committee in the chapter 11 cases and from representing the PEDC post-confirmation. Thus, they contend that by reason of that alleged (but unsubstantiated) conflict TB&F should be disqualified as counsel to the PEDC. They also maintain that in failing to disclose Mr. Traub's interest in ADA, TB&F violated Bankruptcy Rule 2014 and should be compelled to disgorge all fees paid to TB&F pre- and post-confirmation.

4. There is simply no merit to those assertions. As a law firm that is routinely retained as counsel to debtors and creditors' committees in chapter 11 cases in bankruptcy courts throughout the country, TB&F takes seriously its disclosure obligations under the Bankruptcy Code and Bankruptcy Rules. As will be explained more fully below, in 2001 and 2002 TB&F did mistakenly and unintentionally fail to disclose that after the commencement of the chapter 11 cases, and after TB&F was retained as counsel to the Creditors' Committee by Order of this

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Sachs but instead refers to Greenwich Street Capital Partners II, L.P., a GSC Partners investment fund that that maintained holdings in R.R. Donnelly.

Based upon the foregoing, it is clear that the CLI and Alber contention that an irreconcilable conflict existed as between the PEDC, R.R. Donnelly and Goldman Sachs is factually inaccurate. No such conflict ever existed. Even rudimentary research into publicly available information would have revealed to both CLI and Alber that no conflict existed. In fact, the information contained herein was obtained by TB&F from the very same website that Alber refers to in his own pleadings. See Fox Decl. at ¶ 4, n.3.

Moreover, and in any event, the Movants are not entitled to that relief because section 1104 of the Bankruptcy Code authorizes the appointment of a trustee or examiner for cause shown "after the commencement of the case but before confirmation of a plan," 11 U.S.C. § 1104, and the Plan was confirmed nearly 2 ½ years ago by order of this Court dated November 1, 2001 (Docket No. 1383).

Court, Mr. Traub and Mr. Gold formed ADA – a separate entity from TB&F with no connection to the Debtors. Traub Decl. at ¶ ¶ 13-16; Fox Decl. at ¶ 19-24. TB&F failed to do so even as it was disclosing that relationship in other cases in this and other courts throughout the country. TB&F does not have, and never has had an actual or potential conflict of interest, let alone hold an interest adverse to the Debtors' pre- and post-confirmation estates. TB&F is, and always has been "disinterested" as that term is defined in section 101(14) of the Bankruptcy Code. In 2003, almost one (1) year after the Effective Date of the Plan, TB&F became cognizant of the disclosure issue as a result of the disclosure it made in this Court in connection with the Bonus Stores, Inc. chapter 11 case. At that point, TB&F, perhaps mistakenly, determined that it was unnecessary to supplement its Bankruptcy Rule 2014 disclosure given the fact that the Debtors' Plan had been confirmed. Accordingly, and for the reasons more fully set forth below, TB&F respectfully submits that its unintentional and good faith failure to disclose in these cases Mr. Traub's relationship with Mr. Gold through ADA does not warrant the harsh penalty of disqualification as counsel either to the PEDC or to the Creditors' Committee, or the disgorgement of the fees paid to TB&F.

FACTS[6]

5. On or about March 7, 2001 (the "Petition Date"), EBC I, Inc. f/k/a/eToys, Inc. ("eToys, Inc."), EBC Distribution, LLC, f/k/a/ eToys Distribution LLC, PMJ Corporation and eKids, Inc. (collectively, the "Debtors") filed voluntary petitions for relief in this Court under chapter 11 of the United States Bankruptcy Code. Traub Decl. at ¶ 3; Fox Decl. at ¶ 2.

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[6] The facts are set forth in the Supplemental Disclosure Declarations. Except as necessary, they will not be repeated herein.

6. By Order of this Court dated April 25, 2001, TB&F was retained as general bankruptcy counsel to the Official Committee of Unsecured Creditors (the "Creditors Committee") appointed in the Debtors' cases, *nunc pro tunc* to March 16, 2001. Traub Decl. at ¶ 4; Fox Decl. at ¶ 3. By Order of this Court dated January 7, 2002, the scope of TB&F's retention was expanded to include legal services in connection with the investigation and prosecution of claims against Goldman Sachs for alleged misconduct with respect to the underwriting of the initial public offering of shares of common stock of eToys, Inc. Traub Decl. at ¶ 4; Fox Decl. at ¶ 4.

7. TB&F's involvement in the Debtors' cases did not start on the Petition Date. On January 10, 2001, at eToys, Inc.'s request, an Informal Committee of Unsecured Creditors (the "Informal Committee") was organized, which consisted of seven unsecured creditors[7] holding claims in excess of $90 million. The Informal Committee and TB&F as its counsel worked in concert with the Debtors to address creditor concerns. Fox Decl. at ¶ 5.

8. From the pre-petition period beginning January 10, 2001 through the appointment of the Creditors' Committee, the Informal Committee, together with TB&F as its counsel, expended enormous time, energy and effort actively marketing the Debtors' assets for the purpose of effectuating a sale, merger or capital infusion for the Debtors. These efforts resulted in the sale of Baby Center, Inc., Baby Center Advertising, LLC, and Baby Center Canada, Ltd. as going concerns. Insufficient capital, brought about in part by a disappointing Christmas holiday season, together with aggressive collection action by landlords and equipment lessors, precipitated the need for these chapter 11 filings. Fox Decl. at ¶ 6.

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[7] The members of the Informal Committee consisted of: Mattel, Inc.; Hasbro, Inc.; Lego Systems, Inc.; R.R. Donnelly & Sons Co.; Staffmark Investments, LLC; Fir Tree Value Fund; and Pacific Asset Management. Each member of the Informal Committee, with the exception of Hasbro, Inc. (who was replaced by US

9. Thus, by the time the Debtors commenced these cases they were well down the road of conducting a liquidation of their businesses and underlying component assets. That process carried over into the chapter 11 cases, and from the very early stages of these cases it was concluded there was no prospect that the Debtors could reorganize their affairs and emerge from chapter 11 as a going concern. In fact, by the time the cases commenced, the Debtors had already discontinued the operation of their website. Fox Decl. at ¶ 7.

10. Shortly after the Petition Date, the Court approved a key employee retention plan ("KERP"), with the support of the Creditors' Committee, that among other things, provided certain of the Debtors' key corporate personnel with some financial protection and incentive to remain in the Debtors' employ during the post-petition liquidation stages. As part of that initial KERP, it was made clear that the Debtors' two (2) senior most executives, David Haddad and David Gatto, had committed their continued service to the Debtors only through May 18, 2001. As a result, in or about May 2001 the Debtors and the Creditors' Committee commenced the search for suitable individuals to take the helm of the Debtors and steer the Debtors through the remainder of the liquidation process. Initially, it had been the Debtors' desire to have either their retained financial advisor, Crossroads, LLC (n/k/a XRoads, LLC ("Crossroads")) or, alternatively, the Creditors' Committee's financial advisor, Richard Cartoon, LLC ("Cartoon") assume that role. However, following discussions with the U.S. Trustee's office, it was determined that Crossroads, given its role as the Debtors' retained financial advisor, would not be an acceptable candidate. The search for a replacement chief executive was therefore expanded, with both the Debtors and the Creditors' Committee submitting names of potentially acceptable individuals to be interviewed. Fox Decl. at ¶ 9.

Bank Trust, N.A. as Trustee), were appointed and served as members of the Committee through Plan confirmation.

11. Throughout TB&F's involvement in these cases, Michael S. Fox, a member of TB&F had principal responsibility for the administration of these cases on behalf of the Informal Committee, and thereafter the Creditors' Committee and PEDC. In an effort to find a suitable candidate to fill the President/Chief Executive Officer role, Mr. Fox spoke with his partner Paul Traub and after consultation with the Creditors' Committee, Mr. Fox recommended to the Debtors that they consider Barry Gold to fill the President/Chief Executive Officer role . Fox Decl. at ¶¶ 8, 11. Based upon Mr. Fox's work experience with Mr. Gold (described below) and that of certain of his partners, Mr. Fox believed then (as now) that Mr. Gold was qualified to serve as the Debtors' President/Chief Executive Officer to manage the completion of the Debtors' asset liquidation efforts. Fox Decl. at ¶ 11.

12. Mr. Gold is an individual with considerable expertise in department store, discount store and specialty retailing, as well as in the acquisition and disposition of retail and wholesale companies, and the wind down and liquidation of retail companies. Traub Decl. at ¶ 9. Mr. Fox had known Mr. Gold since 1995 and was well familiar with his work having met him when TB&F was representing an *ad hoc* committee of trade creditors of Witmark, Inc. ("Witmark"). Witmark was a successful out-of-court restructuring in which Mr. Gold acted as Witmark's Chief Wind Down Officer. Moreover, Mr. Fox was aware that in 2000 TB&F was retained in separate engagements to act as special counsel to Jumbo Sports, Inc. ("Jumbo Sports") and Stage Stores, Inc. ("Stage Stores"), and that certain TB&F partners had occasion to work with Mr. Gold in those matters. Moreover, in early 2001, TB&F retained Mr. Gold to act as a consultant to TB&F in connection with its work for OfficeMax, Inc. and TB&F's retention as counsel to certain bank creditors of Drug Emporium, Inc. Fox Decl. at ¶ 10.

13. In mid-May 2001, the Debtors' representatives (Messrs. Haddad and Gatto, Debtors' outside counsel, and Crossroads), together with Cartoon, commenced the interview process among the potential chief executive candidates. At the conclusion of the interview process, the Debtors, with the consent of the Creditors' Committee, determined to hire Mr. Gold, in his individual capacity, to succeed certain members of Debtors' pre-petition management, and thereafter assume primary responsibility for oversight of the wind-down process and completion of the liquidation sales. Mr. Gold's letter of employment, dated June 11, 2001, was executed by Mr. Gold on June 12, 2001 (again solely in his individual capacity), initially assigned Mr. Gold the title of wind-down coordinator effective as of May 21, 2001, and provided further that subject to the satisfaction of certain stated conditions precedent, Mr. Gold was thereafter to succeed to the title of President/Chief Executive Officer of the Debtors. Fox Decl. at ¶¶ 11, 12.

14. TB&F served as general bankruptcy counsel to the Creditors' Committee until the Effective Date of the Debtors' liquidating Plan, which was confirmed by Order of this Court dated November 1, 2002. Traub Decl. at ¶ 5; Fox Decl. at ¶ 14. Upon the occurrence of the Effective Date under the Plan, the PEDC selected TB&F as its counsel. It continues to serve in that capacity. Traub Decl. at ¶ 7; Fox Decl. at ¶ 15.

15. Among other things, the Plan provides that the rights, powers and duties of the Reorganized Debtors under the Plan shall be exercised by the Plan Administrator, subject to the authority of the PEDC. By Order of this Court dated November 1, 2002, Mr. Gold was appointed the Plan Administrator and Fir Tree Value Fund, L.P., Mattel, Inc. and R.R. Donnelly & Sons Co. were initially appointed to the PEDC. Traub Decl. at ¶ 6; Fox Decl. at ¶ 15.

Currently, the members of the PEDC are: Fir Tree Value Fund, Fisher Price, Inc. and Lego Systems, Inc.[8]

16. ADA is a Delaware limited liability company formed under Delaware law on or about April 26, 2001, and is the product of discussions between Mr. Traub and Mr. Gold that commenced in January 2001. Traub Decl. at ¶ 10.. Mr. Gold and Mr. Traub are ADA's sole members and their relationship through ADA is a matter of public record. Specifically, in each instance where ADA has been retained in a chapter 11 case under either section 327 or 1103 of the Bankruptcy Code, ADA has made all disclosures to the Court and interested parties, including, but not limited to, any indirect connection to TB&F. Examples of such disclosures in this district alone can be found in *In re Homelife Corporation, et al.*, Case No. 01-2412 (EIK) (B.Ct. D. Del. 2001); *In re ZB Company, Inc., et al.*, Case No. 03-13672 (JBR) (B.Ct. D. Del. 2003); *In re Bonus Stores, Inc.*, Case No. 03-12284 (MFW) (B.Ct. D. Del 2003); *In re KB Toys, Inc.*, Case No. 04-10120 (JBR) (B.Ct. D. Del. 2004); and *In re Kitchen Etc., Inc.*, Case No. 04-11701 (PJW) (B.Ct. D. Del. 2004); and in other districts as early as 2002, *In re Phar-Mor, Inc.*, Case No. 01-2412 (JFF) (B.Ct. ND Ohio 2002); *In re The Athlete's Foots Stores LLC*, Case No. 04–17779 (SMB)(B.Ct. SDNY 2004). Traub Decl. at ¶ 13.

17. Although ADA's business is located in the same offices as TB&F, ADA's business affairs, including its books and records, are maintained separate and apart from those of TB&F. ADA and TB&F share some services, but ADA has its own telephone lines, has retained

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[8] The evolution of the composition of the PEDC is as follows: Mattel, Inc. resigned from the PEDC following the compromise and settlement of its claims, which left it no longer a creditor of the estates, and therefore no longer eligible to serve as a member of the PEDC. Mattel, Inc. was succeeded on the PEDC by Fisher Price, Inc. Upon information and belief, Fisher Price, Inc. is an affiliate of Mattel, Inc. However, Fisher Price's claim was not part of the Mattel, Inc. settlement referenced above, and Fisher Price remains a substantial creditor of the Debtors. After the two persons employed by R.R. Donnelly who were responsible for monitoring the Debtors' cases left R.R. Donnelly's employ, R.R. Donnelly discontinued serving as a member of the PEDC. Lego Systems, Inc., formerly a member of the Committee, thereupon succeeded R.R. Donnelly as a member of the PEDC. Traub Decl. at ¶ 6, n.4; Fox Decl. at ¶ 15, n.6.

its own accountant, and from time-to-time beginning in 2001 reimbursed TB&F for the cost of shared office administrative services provided by TB&F. Traub Decl. at ¶ 14.

18. Moreover, TB&F, its partners (other than Paul Traub), associates and other personnel have no interest whatsoever in ADA.[9] In 2001, TB&F did make four (4) advances to help ADA get off the ground and to fund Mr. Gold, but those advances were treated by ADA and TB&F as loans to ADA that were repaid in full by ADA by the fall of 2001. Traub Decl. at ¶ 12; Fox Decl. at ¶ 22. Periodically, ADA has utilized certain TB&F personnel as non-legal consultants to provide consulting services on certain of its projects; however, ADA has paid TB&F from time to time for their time and expenses. Traub Decl. at ¶ 15; Fox Decl. at ¶ 24.

19. Mr. Traub has never discussed ADA's books and records or financial affairs with Mr. Fox or any other TB&F lawyer, except to the extent necessary when ADA calls upon certain TB&F personnel for non-legal consulting services. Neither Mr. Fox nor Ms. Balaschak have ever provided such non-legal consulting services to ADA, had any reason to learn about the scope of ADA's business, or the ability to do so because TB&F and ADA maintain separate books and records. Traub Decl. at ¶ 16, Fox Decl. at ¶ 24.

DISCUSSION

NO GROUNDS EXIST FOR DISQUALIFYING TB&F AS COUNSEL TO THE PEDC OR COMPELLING THE DISGORGEMENT OF FEES BY TB&F

20. In accordance with the powers invested in the PEDC under the Plan nearly 2 ½ years ago (see Plan at Sec. 5.4), the PEDC selected TB&F to act as its counsel. TB&F has served in that capacity since that time, working with the Plan Administrator and the PEDC to

[9] During the period of time during which Mr. Gold and Mr. Traub explored whether to pursue a joint venture, Mr. Traub considered offering Michael S. Fox an interest in ADA. Mr. Fox executed a specimen signature card for a bank account opened in the name of ADA; however, neither Mr. Fox nor any other

complete the wind down of these estates. The Plan Administrator has substantially completed his work and is moving toward making a final distribution to creditors (subject to the outcome of the Goldman Sachs IPO Litigation) and closing these cases. Fox Decl. at ¶ 18. Indeed, other than the Goldman Sachs IPO Litigation (which is being handled primarily by Wachtel & Maysr and Pomerantz Haudek Block Grossman & Gross LLP, and on a secondary level by TB&F) the only significant matter that remains open herein is the PEDC's objection to the CLI administrative claim. Id. Given the status of the post-confirmation administration of these estates, TB&F respectfully submits that this Court should not disqualify TB&F, and in doing so give effect to the PEDC's choice of counsel herein and permit TB&F to complete the wind down of these estates.

21. Of course, TB&F does not suggest that a party's choice of counsel is the determining factor in assessing the merits of a motion to disqualify. Although a party's choice of counsel is "entitled to great deference," Exco Resources, Inc. v. Milbank, Tweed, Hadley, & McCloy LLP (In re Enron Corp.), 2003 U.S. Dist. LEXIS 1442, *12 (S.D.N.Y. Jan. 28, 2003), in appropriate circumstances, a court can reject it. A court's power to disqualify an attorney "stems from the inherent authority to supervise the attorneys appearing before it." In re Muma Services, Inc., 286 B.R. 583, 587 (Bankr. D. Del. 2002) (quoting Kaiser Group Int'l, Inc. v. Nova Hut (In re Kaiser Group Int'l), 272 B.R. 846, 850 (Bankr. D. Del. 2002)). The exercise of that authority is within the court's discretion. Id. See also U.S. v. Miller, 624, F. 2d 1198, 1201 (3d Cir. 1980). Motions to disqualify professionals, however, are "viewed with disfavor because they interfere with a party's right to employ counsel of its choice." In re Enron Corp., 2003 U.S. Dist. LEXIS 1442 at *12. Thus, a court should disqualify counsel only when it finds, on the facts of

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TB&F attorney (other than Mr. Traub) has or ever had any interest in ADA. Mr. Fox does not have nor has he ever had check signing authority on behalf of ADA.

the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary or other rule or regulation that the attorney has violated. In re Muma Services, Inc., 286 B.R. at 587 (citing U.S. v. Miller, 624 F. 2d at 1201). Disqualification is never automatic. Id. Thus, in determining an appropriate sanction, a court must "consider the end that the disciplinary rule is designed to serve and any countervailing policies." Id. (quoting U.S. v. Miller, 624 F.2d at 1201).

22. Contrary to the Movants' assertions, TB&F's retention as Creditors' Committee counsel did not violate sections 1103(b) or 327 of the Bankruptcy Code because at all relevant times TB&F was disinterested and did not hold an interest adverse to the Debtors' estates. Moreover, even though those provisions do not strictly govern TB&F's retention by the PEDC, for those same reasons its continued representation of the PEDC post-confirmation is consistent with the policies underlying those provisions. Accordingly, TB&F respectfully submits that there is no basis to disqualify it or for TB&F to be compelled to disgorge any portion of the fees paid to it in respect of services rendered as counsel to the Creditors' Committee, and thereafter the PEDC. The Motions should therefore be denied.

A. Section 1103(b) Provides No Basis for Disqualifying TB&F

23. Section 1103(b) provides, as follows:

> An attorney or accountant employed to represent a committee under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

11 U.S.C. § 1103(b). This provision is intended to prevent attorney conflicts of interest. In re National Liquidators, Inc., 182 B.R. 186, 192 (S.D. OH 1995). See also In re Muma Services, Inc., 286 B.R. at 587.

> Thus, it prevents concurrent representation if such representation would interfere with counsels' vigorous advocacy for either client, jeopardize counsel's undivided loyalty to either client, or endanger the confidences and secrets of either client . . . It also prohibits dual representation where there exists even the appearance of impropriety.

In re National Liquidation, Inc., 182 B.R. at 192 (citations omitted).

24. The standards for the retention of professionals under section 1103(b) are different from the standards governing a debtor's retention of professionals under section 327 of the Bankruptcy Code. Both sections share the prohibition against a professional representing an entity having an "adverse interest in connection with the case." However, section 327(a) of the Bankruptcy Code also provides that the professional most not hold an adverse interest **and** must be "disinterested." 11 U.S.C. § 327(a).

25. Section 1103(b) provides no basis for disqualifying TB&F from acting as counsel to the PEDC both because it is not strictly applicable to that engagement and because, in any event, TB&F's retention as PEDC's counsel (and as counsel to the Creditors' Committee) does not run afoul of the policies underlying section 1103(b). The statute applies only to an attorney "employed to represent a committee under section 1102 of [the Bankruptcy Code]." Pursuant to section 5.4(a) of the Plan, the Creditors' Committee was dissolved and TB&F was discharged as counsel to the Creditors' Committee. TB&F is currently retained only as counsel to the PEDC. See Traub Decl. at ¶ 7; Fox Decl. at ¶ 15. Since TB&F is presently retained by the PEDC and not the Creditors' Committee, by the plain language of the statute, section 1103(b) is inapplicable.

26. Moreover, the continued retention of TB&F by the PEDC will not undermine the policies underlying section 1103(b). The Movants do not allege that TB&F suffers from a conflict resulting from its concurrent representation of the Creditors' Committee and a rival client. Rather, the Movants seem to contend that during the chapter 11 cases there was adverse interest between TB&F and the Creditors' Committee by reason of Mr. Traub's association with ADA, and that the taint spilled over into TB&F's representation of the PEDC. An adverse interest is "'any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimants.'" In re Muma Services, Inc., 286 B.R. at 590 (quoting In re National Liquidators , Inc., 182 B.R. at 192, quoting TWI Int'l v. Vanguard Oil & Serv. Co., 162 B.R. 672, 675 (S.D.N.Y. 1994)). An actual conflict involves the representation of two presently competing and adverse interests, while a potential conflict occurs where the competition "may become active if certain contingencies arise." In re American Printers & Lithographers, Inc., 148 B.R. 862, 866 (Bankr. N.D. Ill 1992).

27. There is simply no truth to the Movants' contentions. Mr. Gold's employment by the Debtors (and subsequently as Plan Administrator) is completely unrelated to his work at ADA. Traub Decl. at ¶ 19. ADA had no involvement with the Debtors' chapter 11 cases or in the post-confirmation administration of the reorganized Debtors' estates. Id. Neither ADA nor TB&F (including Paul Traub personally) has ever shared in the fees earned or paid to Mr. Gold in these cases. Id. TB&F has no interest in ADA, and Mr. Traub's work with ADA is separate and apart from his work with TB&F. Traub Decl. at ¶ 23. Mr. Traub's relationship with Mr. Gold through ADA does not give rise to an adverse interest or even an appearance of one. Moreover, it is worth noting that in this circuit it is well settled that disqualification of counsel

cannot be premised on the mere appearance of conflict alone. See In re Pillowtex, Inc., 304 F.3d 246, 250 (3d Cir. 2002); In re Marvel Entertainment Group Inc., 140 F.3d 463, 476 (3d Cir. 1998). Indeed, the actions of TB&F during the chapter 11 cases and the post-confirmation period belie the Movants' allegations that TB&F suffers from a disqualifying adverse interest. In its capacity both as counsel to the Creditors' Committee and the PEDC, TB&F has vigorously represented and protected the rights of all unsecured creditors. Among other things:

- TB&F played an instrumental role in the sale of the eToys inventory and website to KB Toys;
- TB&F played a similarly instrumental role in the sale of the Baby Center operations to Johnson & Johnson;
- TB&F was a significant moving force behind the formulation and ultimate prosecution of the Goldman Sachs IPO Litigation;
- TB&F negotiated a comprehensive settlement of complicated inter-creditor disputes between and among bondholders, capital lease holders and senior debt holders, which settlement significantly reduced administrative and general unsecured claims, and paved the way for a prompt confirmation of the Plan;
- TB&F prosecuted objections to hundreds of claims and miscellaneous other claims objections on behalf of the Creditors' Committee and the PEDC. As a result of TB&F's efforts, general unsecured claims have been reduced by more than $230 million;
- Separate from the Goldman Sachs IPO Litigation, TB&F, working in conjunction with Debtors' counsel, commenced approximately 200 adversary proceedings to recover alleged preferences and fraudulent conveyances for the benefit of the Debtors' estates and creditors. All but one such action has been resolved. In addition, TB&F settled, without the need to commence proceedings, a number of other disputes. TB&F's efforts have resulted in the recovery of more than $6 million for the benefit of the estates.

Fox Decl. at ¶ 17.

28. There is no basis for disqualifying TB&F pursuant to section 1103(b). Rather, it is respectfully submitted that the actions of TB&F throughout this case confirms that they have consistently and vigorously represented the interests of the PEDC and the Creditors' Committee, often in the face of opposition by numerous parties and that TB&F has done a superb job of fulfilling their fiduciary duty here." See In re Muma Services, Inc., 286 B.R. at 591 (court declined to disqualify law firm under section 1103(b)).

B. Because TB&F is Disinterested, There is No Basis for Disqualifying It Under Section 327

29. As a technical matter, section 327 is not relevant to the PEDC's retention of TB&F for the same reason section 1103(b) is not – by its terms section 327 simply does not apply to the PEDC's post-confirmation retention of TB&F. Arguably, section 327 did not apply to TB&F's retention by the Creditors' Committee, since, as noted, section 1103(b) governs the retention of professionals by the Creditors' Committee. Notwithstanding that section 327 has no direct applicability to TB&F's pre- and post-confirmation activities in these cases, as will be demonstrated below, TB&F's continued retention by the PEDC does not run afoul of the policies underlying section 327 (and neither did its retention by the Creditors' Committee).

30. As noted, section 327(a) of the Bankruptcy Code provides for a debtor in possession, with the Court's approval, to employ attorneys "that do not hold or represent an interest adverse to the estate," and that are "disinterested persons." 11 U.S.C. § 327(a). See In re First Jersey Securities, Inc., 180 F.3d 504, 509 (3d Cir. 1999) (in order to be retained as counsel to a debtor in possession, "counsel must 'not hold or represent and interest adverse to the estate' ***and*** must be a 'disinterested person.'") (quoting In re BH &P Inc., 949 F.2d 1300, 1314 (3d Cir. 1991) (citing In re Star Broadcasting, Inc., 81 B.R. 835, 838 (Bankr. D.N.J. 1988)). While section 327 is not strictly applicable to TB&F's initial retention as Creditors' Committee

counsel, and thereafter to its retention as counsel to the PEDC, section 328(c) of the Bankruptcy Code provides that a court may deny the allowance of compensation for services rendered and reimbursement of expenses to a professional employed under section 327 or section 1103 "if at any time during such professional person's employment . . . such professional person is not a disinterested person, ***or*** represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed." 11 U.S.C. § 328(c). Even assuming, arguendo, that section 327 of the Bankruptcy Code is relevant to TB&F's retention as Creditors' Committee counsel, that section would not have precluded TB&F's retention as such, and the policies underlying section 327 do not preclude its continued representation of the PEDC because, as demonstrated above in paragraphs 27-28, TB&F has never had an actual or potential conflict of interest with these estates, or even an interest adverse to the estates, ***and*** as will be shown below, TB&F is, and always has been, "disinterested."

31. Section 101(14) of the Bankruptcy Code defines a "disinterested person" to be a person that:

> (A) is not a creditor, an equity security holder, or an insider;
>
> (B) is not and was not an investment banker for any outstanding security of the debtor;
>
> (C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
>
> (D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
>
> (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security

> holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason.

11 U.S.C. § 101(14).

32. TB&F, and each attorney thereof have always been disinterested. Specifically, at all relevant times, TB&F and each attorney thereof (i) were not creditors, equity holders, or insiders of the Debtors; (ii) were not and had not been an investment banker for any outstanding security of the Debtors; (iii) were not and had not been, within the three years prior to the Petition Date, an investment banker for a security of the Debtors, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the Debtors; and (iv) were not, and had not been, within two years before the Petition Date, a director, officer, or employee of the Debtors or of an investment banker of the type specified in subparagraph (B) or (C) of section 101(14) of the Bankruptcy Code. Fox Decl. at ¶ 26.

33. Moreover, TB&F did not hold a materially adverse position to the interests of the Debtors' estates or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the Debtors or an investment banker specified in section 101(14)(B) and (C). The "materially adverse interest" standard incorporated into the definition of disinterestedness under section 101(14)(E) and the "interest adverse to the estate" language in section 327(a) overlap and are duplicative and form a single test to judge conflicts. In re BH&P Inc., 949 F.2d at 1314 (noting that "[t]here is, indisputably, some overlap between the section 327(a) standard and section 101(14)(E) disinterest requirement.").

34. Accordingly, TB&F respectfully submits that sections 327, 328, and 1103 of the Bankruptcy Code do not warrant TB&F's disqualification from these chapter 11 cases or the disgorgement of its fees.

C. TB&F Should Neither Be Disqualified Nor Compelled to Disgorge Any Fees Under Bankruptcy Rule 2014

35. TB&F is well aware of the disclosure provisions of Bankruptcy Rule 2014,[10] and their importance to the efficient administration of bankruptcy cases. See In re Northwestern Corp., 2004 Bankr. LEXIS 1023 at * 7 (Bankr. D. Del. July 23, 2004) (one of the primary purposes of the disclosure rules "is to allow parties in interest, and the Court, to determine whether the proposed counsel is disinterested and whether such counsel holds or represents an interest adverse to the estate"). Moreover, TB&F understands that Bankruptcy Rule 2014 mandates disclosure of all connections with the named parties, not simply those relevant to the disinterestedness inquiry under section 327(a). See In re 22 Acquisition Corp., 2004 WL 870813 at *8 (E.D. Pa. Mar. 23, 2004) (citing In re Filene's Basement, Inc., 239 B.R. 845, 849 (Bankr.D.Mass. 1999)); see also In re Leslie Fay Cos., 175 B.R. 525, 535 (Bankr. S.D.N.Y. 1994) "[T]he requirements of Fed. R. Bankr. P. 2014 are more-encompassing than those governing the disinterestedness inquiry under section 327 . . . while retention under section 327 is only limited by interests that are "materially adverse," under Rule 2014, 'all connections' that are not so remote as to be de minimus must be disclosed"). Finally, TB&F accepts that it has the burden of insuring that its Rule 2014 disclosure is complete and accurate. See BH&P, Inc., 949

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[10] Bankruptcy Rule 2014 states, in relevant part, as follows:

> An order approving the employment of attorneys ... pursuant to ... § 1103 ... of the Code shall be made only on application of the ... Committee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.
>
> Fed. R. Bankr. P. 2014(a).

F.2d at 1317 ("It is not ... the obligation of the bankruptcy court to search the record for possible conflicts of interest. That obligation belongs to the party who seeks employment by the estate.")

36. TB&F had no duty to disclose the existence of ADA or the relationship between Mr. Traub and Mr. Gold at the time of its initial retention as Creditors' Committee counsel because as of that date, ADA had not been formed and Mr. Gold had not yet been employed as the Debtors' wind-down coordinator (and subsequently as President/Chief Executive Officer). Once Mr. Gold was appointed as the President/Chief Executive Officer for the Debtors, however, TB&F concedes in hindsight that it should have filed a supplemental affidavit with this Court under an expansive reading of the term "connections," as used in Bankruptcy Rule 2014. See 9 Collier on Bankruptcy at ¶ 2014.05 (15th ed. rev. 2004)(noting that the term "connection" is an "unfortunate one" because "[a]rguably two people are 'connected' if they serve together on a charitable board or are even friends.").

37. TB&F's failure to disclose Mr. Traub's relationship with Mr. Gold through ADA during the chapter 11 cases was a mistake and oversight, not intentional wrongdoing. Neither Mr. Traub nor Mr. Fox recalls even considering whether to disclose Mr. Traub's joint venture with Mr. Gold in 2001 or 2002. Traub Decl. at ¶ 22-23; Fox Decl. at ¶ 28-29. In hindsight, their failure to do so is understandable when considering the circumstances surrounding ADA's formation, the state of the Debtors' chapter 11 cases in mid-2001, and Mr. Fox's complete lack of involvement in ADA. Specifically, ADA was officially formed in late April 2001, and by June 1, 2001 Mr. Traub ceased having day to day involvement in the Debtors' chapter 11 cases and although he continued to bill a limited amount of additional time in the cases his continued participation in the cases, was primarily in connection with the conclusion of certain pending asset disposition transactions, each of which was substantially competed by May 31, 2001; Mr.

Gold's assignment with the Debtors was not in any way related to ADA; TB&F has no interest in ADA; and Mr. Traub and Mr. Fox have always treated ADA's business separate and apart from the affairs of TB&F. Traub Decl. at ¶¶ 13-16; Fox Decl. at ¶¶ 19-21.

38. Consideration was given in 2003 whether it was necessary to disclose in these cases Mr. Traub's association with Mr. Gold through ADA. Ironically, it is as a result of TB&F's disclosure in July 2003 of Mr. Traub's relationship with ADA in connection with its proposed retention as counsel to the debtor in the Bonus Stores, Inc. chapter 11 case, that it occurred to both Mr. Fox and Mr. Traub that the firm possibly should have disclosed the relationship during the Debtors' chapter 11 cases. Traub Decl. at ¶ 22; Fox Decl. at ¶ 28. After considering the matter, it was concluded in good faith that it was not necessary for TB&F to supplement its disclosure since the Plan had been confirmed and gone effective.

39. A court has broad discretion to address an attorney's failure to comply with Bankruptcy Rule 2014. See e.g., In re 22 Acquisition Corp., 2004 WL 870813 at *8 (E.D. Pa. Mar. 23, 2004) (under Bankruptcy Rule 2014, a court has the discretion to disqualify, sanction, or take no action against a professional who failed to disclose any potential conflict); see also In re Northwestern Corp., 2004 WL 1661016 at *2 (Bankr. D. Del. July 23, 2004)("Inadequate disclosure does not mandate disqualification of counsel. Rather, the appropriate remedy is left to the discretion of the court."); In re Olsen Indus., 222 B.R. 49, 62 (Bankr. D. Del. 1997) ("The court cannot agree with the debtor's apparent assertion that this court should automatically disgorge all fees and expenses without regard to equitable circumstances that may exist here."); 9 Collier on Bankruptcy at ¶ 2014.05 (15th ed. rev. 2004) ("While serious omissions warrant disqualification of the professional or a reduction, denial or disgorgement of compensation, or

even more creative remedies, a court has broad discretion to determine whether the nondisclosure at issue justifies remedial measures at all.").

40. For all of the reasons discussed above, there is no basis in these cases to disqualify TB&F as counsel to the PEDC. The imposition of sanctions under section 328(c) generally serves to (i) punish the transgressor, (ii) deter future violations of the disclosure rules and (iii) preserve public confidence in the integrity of the bankruptcy process. In re Granite Partners, L.P., 219 B.R. 22, 55 (Bankr. S.D.N.Y. 1998). TB&F respectfully submits that the imposition of a monetary sanction here for its failure to comply with Bankruptcy Rule 2014 would not further those ends. TB&F failed to comply with Bankruptcy Rule 2014 as a result of mistake and inadvertence, and not as a result of intentional wrongdoing. Moreover, Mr. Traub has disclosed his relationship with ADA in every instance in which ADA has been retained as a professional by the Bankruptcy Court. Further, at all relevant times in these cases TB&F was disinterested and did not hold an interest adverse to the estates.

41. Finally, TB&F has done an outstanding job representing the Creditors' Committee and the PEDC, and Mr. Traub's relationship with ADA has in no way negatively impacted TB&F's performance hereunder. See ¶ 28 supra. Those facts militate against sanctioning TB&F. See In re Granite Partners L.P., 219 B.R. at 55 ("Before imposing a sanction under section 328(c) a court may consider the value of the service performed and the degree of harm and prejudice to the estate from the conflicted representation").

42. More specifically, in their Disclosure Statement, the Debtors estimated that general unsecured creditors could receive a 10.4% distribution on account of their claims. However, on the strength of the work done by TB&F and others in these cases to date, creditors have received distributions totaling 13.25%, a more than 30% increase than first projected. It is

now estimated that when the Plan Administrator completes the liquidation of these estates, the distribution to unsecured creditors will aggregate more than 16% (without consideration of any additional recoveries from the Goldman Sachs IPO Litigation), an approximate 60% increase from that which was first projected in the Disclosure Statement. Fox Decl. at ¶ 16.

43. A court's power to disgorge the fees and expenses of a professional should be "exercised with restraint and discretion" and courts "should apply principles of equity, as other courts have done." In re Olsen Indus., 222 B.R. at 62 (citations omitted). TB&F submits that in light of all of the facts and circumstances herein, there are no grounds to disqualify it and that it would be inequitable to direct it to disgorge fees paid in these cases.

CONCLUSION

44. The authorities cited in support of this Objection are set forth herein. Therefore, pursuant to Rule 7.1.2 of the Local Rules of Civil Practice and Procedure of the United States District Court for the District of Delaware (the "Local District Court Rules"), incorporated by reference into Del. Bankr. L.R. 1001-1(b), TB&F respectfully requests that the Court set aside the briefing schedule set forth in Rule 7.1.2(a) of the Local District Court Rules.

(Text Continued Next Page)

WHEREFORE, TB&F respectfully requests that this Court deny the Motions in all respects.

Dated: New York, New York
January 25, 2005

Respectfully submitted,

By: *_____/s/ James L. Garrity, Jr.*

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