

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-0706 (MFW) through
. 01-0709 (MFW)
. .
ETOYS., et al., .
. 824 Market Street
. Wilmington, Delaware 19801
Debtors. .
. March 1, 2005
. 9:34 a.m.

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

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1 THE COURT: Good morning.

2 MR. GARRITY: Good morning, Your Honor. My name is Jim
3 Garrity.

4 THE COURT: All right. Mr. Garrity, please move it
5 closer. It's not a good system, I'm sorry.

6 MR. GARRITY: Thank you, Your Honor. Is that better?

7 THE COURT: That's better.

8 MR. GARRITY: Thank you, Your Honor. Again, my name is
9 Jim Garrity and I'm with the law firm of Shearman and Sterling.
10 And we appear before you today as counsel to the Traub Bonacquist
11 firm. At counsel's table with me is Mr. Ronald Sussman. As I
12 take Your Honor knows, Mr. Sussman is a member of the law firm
13 of Kronish Lieb Weiner & Hellman and he is assisting as co-
14 counsel to the trial before you in this matter. Would Your Honor
15 like to take appearances from other counsel or would --

16 THE COURT: I don't think that's necessary. We can
17 just proceed.

18 MR. GARRITY: Thank you, Your Honor. Then might I
19 suggest that we proceed in the following way. If I could briefly
20 update Your Honor as to the events that have transpired since we
21 were last before you on February 1st and review briefly with you
22 the matters that are on the calendar. And then suggest to you a
23 process beginning with the various motions, if that would be
24 acceptable to Your Honor.

25 THE COURT: Well, let me hear your suggestion.

1 MR. GARRITY: Okay. Thank you, Your Honor. As Your
2 Honor knows, the genesis of the matters, at least as they relate
3 to Traub Bonacquist, that are before the Court today are the
4 emergency motions that are dated December 20th and 21st, 2004
5 respectively filed by Robert K. Alber and Collateral Logistics,
6 Inc.

7 As Your Honor knows, CLI, Collateral Logistics, alleges
8 that a hold to the administrative expense claim against the Etoy
9 estate in the sum of \$750,000, that claim is being disputed by
10 the Post-Effective Date Committee.

11 THE COURT: I'm familiar with all the facts. Just tell
12 me what your suggestion is for proceeding.

13 MR. GARRITY: My suggestion would be the following. As
14 Your Honor knows, we have emergency motions on the calendar. We
15 have the motion by Mr. Alber that has been brought against the
16 Morris Nichols law firm. We have the --

17 THE COURT: Goldman settlement.

18 MR. GARRITY: We have the Goldman settlement. We have
19 motions filed by Traub Bonacquist for a continuation of the
20 hearing. We have a motion by the U.S. Trustee to seek
21 disgorgement and a motion by the U.S. Trustee to settle the U.S.
22 Trustee's motion against the Traub Bonacquist firm.

23 THE COURT: I don't see the U.S. Trustee's motion or a
24 motion for a continuance on the agenda.

25 MR. GARRITY: Your Honor, I think it would be on the

1 second amended agenda. It is --

2 THE COURT: I didn't get the first amended or the
3 second amended.

4 MR. GARRITY: I apologize, Your Honor. Your Honor,
5 would it be all right if I handed up a copy?

6 THE COURT: Yes.

7 MR. GARRITY: Your Honor, I have the corresponding
8 binders for the second amended agenda. Would you like to use
9 these replacement binders?

10 THE COURT: Sure.

11 MR. GARRITY: May I approach?

12 THE COURT: Yes. Well, is it just a repeat? I don't
13 need --

14 MR. GARRITY: This would be a full set.

15 THE COURT: I don't need the full set. I just need the
16 things after the settlement with Goldman Sachs. Items 5? Do you
17 have 5, 6 and 7? All right. Thank you. All right.

18 MR. GARRITY: Thank you, Your Honor. With regard to
19 the fourth matter on the second amended notice of agenda, this is
20 on page 4, the motion for order approving the settlement with
21 Goldman, Sachs & Company, we'd like to adjourn that matter today
22 and not go forward on that matter today.

23 THE COURT: And I guess there's no objection, is there?

24 MR. ALBER: I'd like to object to that, Your Honor.

25 THE COURT: Please talk into the microphone because

1 people can't hear you otherwise.

2 MR. ALBER: Sorry, Your Honor. Yeah, Robert Alber,
3 Etoy shareholder. We would like to object to that because during
4 the February 1st hearing, everybody was aware as to there was a
5 March 1st hearing where we'd hear all these issues. This is
6 costing extreme financial crisis in our --

7 THE COURT: Well, do you want me to hear the Goldman
8 Sachs settlement?

9 MR. ALBER: We want to hear -- oh, the Goldman -- oh, I
10 thought they were talking about the Trustee's. No, the Goldman
11 Sachs settlement, no.

12 THE COURT: You have no objection to continuing that?

13 MR. ALBER: No.

14 THE COURT: All right.

15 MR. GARRITY: Thank you. Your Honor, matter No. 5, the
16 Traub Bonacquist & Fox emergency motion to continue the
17 evidentiary hearings. As Your Honor, I'm sure, recalls, Your
18 Honor entered an order last Friday in effect mooted the request
19 we had there. So that is -- so 5 is taken care of. So, Your
20 Honor, again, what we would then have on the calendar are matters
21 Nos. 1 and 2 which are the emergency motions; No. 3 which is the
22 motion, again, as directed against the Morris Nichols firm. Then
23 we have No. 6 which is the U.S. Trustee's motion directed against
24 Traub Bonacquist & Fox directing the disgorgement of fees; and
25 No. 7 which is the United States Trustee's motion to approve a

1 settlement of the motion that's listed in Agenda Item No. 6.

2 Your Honor, do you need to take a moment just to --

3 THE COURT: No.

4 MR. GARRITY: No, thank you. Your Honor, what we would
5 suggest that the way to proceed would be as follows. To deal
6 first with the Items Nos. 1 and 2 and 6 and 7. Those would be
7 the emergency motions as they --

8 THE COURT: I know them, yeah.

9 MR. GARRITY: And then deal with No. 3 after that if
10 that would --

11 THE COURT: The Morris Nichols letter.

12 MR. GARRITY: That would be our suggestion, Your Honor.

13 THE COURT: All right. Any objection to basically
14 consolidating all of the motions to disqualify and disgorge the
15 Traub Bonacquist firm and Mr. Gold and the settlement by the U.S.
16 Trustee of its objections?

17 MR. ALBER: No, we don't have any objections to that,
18 Your Honor.

19 THE COURT: All right. I agree they should be
20 consolidated and heard together.

21 MR. GARRITY: Thank you, Your Honor. And if I could
22 make one other suggestion. As Your Honor knows, based upon your
23 review of the papers, we believe that there are a number of
24 issues that have been raised in both the Collateral Logistics and
25 Alber motions, emergency motions, which we believe the Court can

1 deal with as a matter of law. We respectfully disagree with the
2 movants and believe that, in fact, many of the forms of relief
3 that have been requested should be denied as a matter of law.

4 We would suggest to you, Your Honor, that we deal first
5 with those matters. And once we have dealt with those matters,
6 we would suggest that we turn our attention to the issues that
7 have been raised with regard to Mr. Gold, and then to the Traub
8 Bonacquist firm. And in particular there, Your Honor, with
9 regard to the issues that have now been put forward in the
10 context of the request by the United States Trustee to settle the
11 motion, the United Trustee's motion. And you can just deal with
12 all of that at once if that would be acceptable to Your Honor.

13 THE COURT: Do CLI or Alber have any comments on that?

14 MR. HAAS: No, Your Honor. Proceed as the Court wishes
15 and let CLI speak on it.

16 THE COURT: All right. CLI doesn't object?

17 MR. ALBER: We're fine, Your Honor.

18 THE COURT: All right. I'll hear argument then.

19 MR. GARRITY: Thank you, Your Honor. If I could turn
20 the Court's attention first to the emergency motion filed on
21 behalf of CLI. What I would propose to do, Your Honor, is just
22 to review with the 19 forms of relief that have been requested in
23 that motion, and identify the parties against whom the relief is
24 being sought, and then suggest to you again that there are a
25 number of the matters that have been raised that can be dealt

1 with as a matter of law.

2 Your Honor, as I indicated, CLI seeks 19 forms of
3 relief and we understand it and read the motion in their motion.
4 They seek an order of this Court -- I will just list them through
5 and then I will go back if that's acceptable, Your Honor --
6 disqualifying Traub Bonacquist & Fox as counsel to the Committee;
7 disqualifying Traub Bonacquist & Fox as counsel to the Post
8 Effective Date Committee.

9 They seek sanctions of Traub Bonacquist & Fox of all
10 fees retroactive to the filing date. They seek the removal of
11 Barry Gold as an alleged illegal post-petition professional.
12 They seek removal of Mark Kenny of the U.S. Trustee's office for
13 his alleged failure to perform. They seek the appointment of an
14 examiner, the appointment of a trustee; I believe it was intended
15 to be trustee, it says U.S. Trustee, Your Honor, but either way.

16 They seek an order directing the seizure by the
17 trustee, presumably the trustee to be appointed, of all fees paid
18 to Barry Gold; the seizure by the trustee of all funds in the
19 possession of any party. They seek the Court -- they've asked
20 that the Court should request an oath from all remaining
21 interested parties as to their knowledge or lack of knowledge of
22 alleged crimes and deceptions.

23 They seek protection under the Federal Whistleblower
24 Act for protection to CLI; Federal Whistleblower protection to
25 Mr. Steven Haas. They seek a comfort order to insure that the

1 sanctions of disgorgement of fees does not bar other punishment
2 of criminal or monetary to the perpetrators of the alleged crimes
3 and offenses.

4 They seek a modification of the motion to compel a
5 December 6th, 2004 that was entered in the claims litigation with
6 the PEDC. They seek leave for CLI to be permitted to obtain new
7 counsel after the Court's decision on the Mattel issue; a
8 directive that a new stipulated scheduling order of the CLI claim
9 can occur whereby all previous orders are held harmless against
10 CLI.

11 They seek a ruling concluding that the Haas affidavit
12 of November 2001 is not a waiver. They seek a directive that
13 Mattel is no longer of material interest, therefore, to be
14 removed from the PDC -- PEDC, along with the removal of all R. R.
15 Donnelley from the PEDC for failure to declare a conflict of
16 Goldman Sachs members on the board of R. R. Donnelley.

17 And they seek an order of the Court staying any further
18 settlements until a trustee is appointed or some other
19 independent party that the Court deems appropriate to give a fair
20 and impartial review of such settlement offers, including the
21 Goldman Sachs settlement and the Kilroy Realty settlement.

22 Now, Your Honor, I think there are a number of those
23 matters, I believe, have actually been rendered moot give some of
24 the rulings that Your Honor has issued in connection with the
25 PEDC litigation with CLI. And I believe that the matters

1 relating to the modification of the motion to compel, I
2 understand Your Honor had dealt with that. I understand that
3 Your Honor -- that CLI has, in fact, obtained new counsel in that
4 matter, thereby rendering that request for relief moot.

5 The -- I understand that there is a new scheduling
6 order in conjunction with the CLI claim litigation, thereby
7 rendering that request for the directive moot. I understand that
8 the issue as to the -- whether or not the Haas waiver -- excuse
9 me, the Haas affidavit of 2001 is a waiver, I understand that has
10 been resolved, thereby rendering that issue moot. The request
11 that --

12 MR. HAAS: Judge, I don't agree.

13 THE COURT: Well, wait a minute, Mr. Haas. We'll wait
14 and hear you later.

15 MR. GARRITY: And -- Your Honor, the directive that
16 Mattel is no longer a -- no longer a material interest and ought
17 to be removed from the PEDC, I think the request with regard to
18 Mattel and Donnelley is moot because as Your Honor will recall,
19 in September of '03 you approved a settlement between the plan
20 administrator and --

21 THE COURT: Well, they're not on the committee any
22 longer.

23 MR. GARRITY: That's correct, Your Honor. That was my
24 point. Both of them are off the committee. And then, Your
25 Honor, with regard to the request that you stay any further

1 settlements until the trustee is appointed, let me just go back
2 to the issues with regard to the trustee. Unless Your Honor
3 wants to address these -- I think these are more PEDC related
4 matters, and as I said, I had understood that all of that has
5 really been rendered moot by virtue of subsequent events in that
6 case. If Your Honor -- perhaps wants to deal with that first
7 with CLI --

8 THE COURT: Well, let me hear from Mr. Haas. Do you
9 not agree that all those allegations are moot?

10 MR. HAAS: The only thing is the context of his
11 statement. He said that it had been resolved on the Haas
12 affidavit. I agree the Court can hear that later in the new
13 scheduling order, but I object to stating that it's been
14 resolved.

15 MR. GARRITY: Your Honor, I am corrected by Mr. Fox.
16 And we agree with Mr. Haas's --

17 THE COURT: All right. Then it's just not a matter for
18 today.

19 MR. GARRITY: Thank you, Your Honor. If I could then
20 address, Your Honor, the allegations with regard to the
21 appointment of an examiner. And the request for the appointment
22 of a trustee. As Your Honor knows, Section 1104(a) of the
23 Bankruptcy Code governs the matters relating to the appointment
24 of an examiner or a trustee.

25 As Your Honor knows, 1104(a) provides in substance that

1 an examiner or a trustee can be appointed for cause if in the
2 best interest of the estate and creditors. But that has to
3 happen between the period of the commencement of the case and
4 prior to the confirmation of a Chapter 11 plan.

5 As there has been a plan confirmed in these cases, Your
6 Honor, we respectfully submit that as a matter of law, the
7 request for the appointment of an examiner and the appointment of
8 a trustee be denied.

9 THE COURT: Would you like to address that legal issue?

10 MR. HAAS: Yes.

11 MR. ALBER: Yes, I would, Your Honor.

12 THE COURT: Well, let me hear from Mr. Alber first.

13 MR. ALBER: Yes, I would, Your Honor, thank you.

14 THE COURT: Please be sure you're speaking right into
15 it because others can't hear you otherwise.

16 MR. ALBER: Okay. Is this okay, Your Honor?

17 THE COURT: That's fine.

18 MR. ALBER: Okay. Thank you. We contend that the plan
19 was misrepresented and it was fraudulently put before the Court
20 because the non-disclosure, failure to disclose and the actions
21 of -- this is where the MNAT/he stuff comes in that we're going
22 to be addressing later along with the Barry Gold, Paul Traub --
23 connection, which were not disclosed.

24 There were crimes that were committed prior -- that
25 started prior to the bankruptcy filing that continued up until --

1 THE COURT: Well, you didn't ask to rescind the
2 confirmation order though.

3 MR. ALBER: No, we didn't.

4 THE COURT: So --

5 MR. ALBER: We didn't know we had to.

6 THE COURT: Well --

7 MR. ALBER: We brought up crimes that had been
8 committed prior to the confirmation. The U.S. Trustee's office
9 is addressing the concerns.

10 THE COURT: Well, they may or may not have, but the
11 problem is that the statute does require -- or it does state that
12 I don't have authority to appoint a trustee or examiner before
13 confirmation.

14 MR. ALBER: That you don't have authority to appoint an
15 examiner or trustee before confirmation?

16 THE COURT: I don't have authority to appoint one after
17 confirmation.

18 MR. ALBER: After confirmation.

19 THE COURT: Sorry.

20 MR. ALBER: Then perhaps we should address the issues
21 that came up during the deposition as far as the failures to
22 disclose.

23 THE COURT: Well, those are issues in the -- I'm not
24 suggesting that I can't give other relief. But I think the
25 argument is that one remedy I can't give you is appointment of a

1 trustee or examiner because of the language of the statute. Have
2 you looked at the section?

3 MR. ALBER: No, I haven't. No, this was an issue.

4 THE COURT: Pass him a copy of the Code. I think it's
5 clear, is it not?

6 MR. ALBER: Yeah, I have -- I actually have a copy
7 here, but this is an issue that CLI's been bringing before the
8 Court as far as an examiner. We've been asking for an attorney
9 which we understand that we're not entitled to one.

10 THE COURT: Well, you're entitled to one. You -- the
11 estate just won't pay for it.

12 (Pause)

13 MR. ALBER: That's fine, Your Honor. As I stated,
14 that's a CLI issue that we've never learned more to address --

15 THE COURT: All right. Mr. Haas?

16 MR. HAAS: Your Honor, what I would like to say is that
17 plan proposed as a proponent which specifically stated that the
18 creditors, being the creditors from the attorneys Paul Traub and
19 firm, proposed Barry Gold as the plan administrator. At that
20 time, they were required to disclose their relationship and
21 didn't.

22 What the subsequent evidence that we have of the
23 connection of Traub's firm with Ronald Sussman's firm, Kronish
24 Lieb, and their connection to Madsen Capital Partners (phonetic)
25 which acquired votes. And this not being disclosed, not alone

1 not setting aside the issue of the matter of law that we've come
2 to know that if they fought claims, they're not allowed to profit
3 therefrom.

4 We're concerned about vote rigging. We're certainly
5 concerned about keeping the issue quiet. The non-disclosed
6 relationship that Traub's firm is required to call a committee
7 member meeting, and I'll refer you back to the November/December
8 hearing where I first raised up the issue of Mattel and everybody
9 argued that Mattel couldn't be release and the Court said, why
10 does it matter. And they still argued because at that time,
11 everybody believed that Mattel was on the board.

12 Now, conveniently, they say that Mattel wasn't on the
13 board and they put Fisher Price. But if you use the records of
14 Fisher Price, all the mailings go to Lee Castille (phonetic) at
15 Mattel headquarters.

16 THE COURT: But please, Mr. Haas -- Mr. Haas -- Mr.
17 Haas.

18 MR. HAAS: Yes, ma'am.

19 THE COURT: Please don't refer to facts. I don't know
20 the facts. You're referring to facts that are not part of the
21 record.

22 MR. HAAS: Oh --

23 THE COURT: You're alleging that there's fraud in
24 obtaining the confirmation. When was the confirmation order
25 entered?

1 MR. GARRITY: November 1, '02, Your Honor.

2 THE COURT: Which is longer than six months.

3 MR. GARRITY: Your Honor, may I be heard briefly on
4 just a procedural matter?

5 THE COURT: Yes.

6 MR. GARRITY: I'm concerned -- I understood the Court's
7 rulings at the last hearing to preclude Mr. Haas or CLI from
8 being represented without an attorney. I recognize the Court's
9 got the discretion to consider whatever it wants, but I just want
10 to note for the record that we would object to Mr. Haas
11 representing CLI without an attorney in this matter. I believe a
12 corporation is to be represented by counsel, Your Honor.

13 THE COURT: And, Mr. Haas, do you -- is your counsel
14 here?

15 MR. HAAS: No, Your Honor. My counsel does not
16 represent me in this particular part. They only represent me in
17 my claim matter.

18 THE COURT: Well, but you, Mr. Haas, aren't a person
19 with an interest here. Only CLI is. So you cannot represent
20 CLI.

21 MR. HAAS: So does that mean that I remain quiet for
22 the rest of the hearing?

23 THE COURT: That's exactly what it means.

24 MR. MINUTI: Your Honor, if I could, Mark Minuti from
25 Saul Ewing representing Barry Gold. I just wanted to note my

1 objection as well for the record. Thank you, Your Honor.

2 THE COURT: All right. Well, for the record, I also,
3 notwithstanding that, I will consider Mr. Haas's comments, but it
4 appears that confirmation was two and a half years ago. And any
5 time to seek to revoke the confirmation order has also expired.
6 So I won't consider the request to ignore the confirmation order.
7 And consequently, under 1104(a), I am without power to appoint a
8 trustee or examiner.

9 MR. GARRITY: May I continue, Your Honor?

10 THE COURT: Yes.

11 MR. GARRITY: Your Honor, if we could just turn our
12 attention to the request by CLI that the Court order a seizure by
13 the trustee of all fees paid to Barry Gold and a seizure by the
14 trustee of all funds in the possession of any party. Your Honor,
15 in light of the fact that Your Honor has not appointed a trustee,
16 we would suggest that the relief sought be denied as a matter of
17 law, recognizing, of course Your Honor, that Your Honor had the
18 discretion in dealing with the issues as they relate to Mr. Gold.
19 We don't mean --

20 THE COURT: Well, let's deal with that in the issues
21 with Mr. Gold. I won't --

22 MR. GARRITY: All right. So I would ask that Your
23 Honor deny the request that there be an order for a seizure by
24 the trustee of all fees paid to Mr. Gold --

25 THE COURT: Well, let's -- no. We'll deal --

1 MR. GARRITY: We'll deal with that --

2 THE COURT: We'll deal with that later.

3 MR. GARRITY: Sorry. Then, Your Honor, the seizure by
4 the trustee of all funds in the possession of any party. Again,
5 we don't believe --

6 THE COURT: I don't know the facts. So I don't know if
7 there's a basis for that. So, I'll pass on that.

8 MR. GARRITY: All right. Thank you, Your Honor. That
9 the Court -- the next request for relief is that the Court should
10 request an oath from all remaining interested parties as to their
11 knowledge or lack of knowledge of the alleged crime and
12 deceptions. Your Honor, if Your Honor recalls, when we were last
13 before you on February 1, Your Honor, at the request of CLI as
14 well as Mr. Alber ordered that there be -- that discovery done in
15 these matters. Accordingly, we would respectfully request that
16 that relief be denied.

17 THE COURT: Well, we've gotten the discovery?

18 MR. ALBER: Yes, Your Honor. We held the depositions
19 on February 9th as we all agreed. And we submitted the
20 transcripts to your office. And we also have copies here. And
21 there were a number of alarming facts that came to light during
22 the depositions.

23 THE COURT: Well, we'll get to the facts. But are you
24 satisfied that you had an opportunity to do discovery and learn
25 the facts?

1 MR. ALBER: We were limiting our discovery to failure
2 to disclose which we stuck as close as we could to the scope of
3 depositions as ordered by Your Honor. And we would like to,
4 based on some of the information that came to light during the
5 depositions, we would like to conduct further discovery.

6 THE COURT: Well, I'll reserve on this to the extent
7 it's asking for more discovery. I don't know yet.

8 MR. GARRITY: Thank you, Your Honor. Your Honor, with
9 regard to the two requests for relief under the Federal
10 Whistleblower Protection, one to CLI and the other to Steven
11 Haas. As Your Honor knows, the anti-retaliation or whistleblower
12 protection provisions exists in a number of federal statutes
13 declaring it unlawful to discharge or discriminatory treatment of
14 employees who file charges alleging that their employers' actions
15 violate the statutes and who otherwise initiate or participate,
16 assist or testify in investigations or proceedings brought under
17 those statutes against their employees.

18 I know Your Honor's familiar with the -- or perhaps is
19 familiar with the -- there are over 30 federal statutes that
20 include some form of whistleblower protection. And generally,
21 the Whistleblower Protection Act of 1989 that gives protection to
22 governmental employees from any retaliatory or improper personnel
23 action.

24 Your Honor, as a matter of law, CLI and Mr. Haas fall
25 outside of any federal whistleblower protection that we would be

1 aware of. They have not come forward with any support for the
2 requests. And they are, indeed, not employees of EToys in any
3 event. And accordingly, we respectfully request that the request
4 for relief under the Federal Whistleblower Protection, both to
5 Mr. Haas as well as to CLI, be denied as a matter of law.

6 THE COURT: Mr. Alber.

7 MR. ALBER: That would be an issue that was brought to
8 light by CLI concerning their whistleblower status. We haven't
9 requested such, Your Honor.

10 THE COURT: All right. Well, I do agree that it's not
11 applicable to this circumstance.

12 MR. GARRITY: Thank you, Your Honor. Your Honor, CLI
13 also asked for an order of the Court staying any further
14 settlements until a trustee is appointed or some other
15 independent party that the Court deems appropriate to give a fair
16 and impartial review of such settlement offers. We would request
17 that Your Honor deny that request in light of Your Honor's ruling
18 that there would not be a trustee appointed. But it's obviously
19 without prejudice to the parties making whatever case they make
20 in front of you at the time that the settlements are brought
21 before Your Honor.

22 MR. ALBER: Yes, Your Honor. Robert Alber. We do
23 respectfully request that the Court keep an open mind in regards
24 to the evidence that we bring forth later on that maybe
25 extraordinary circumstances do allow for extraordinary actions.

1 THE COURT: Well, all right. We'll reserve on that.

2 MR. GARRITY: Thank you, Your Honor. Your Honor, if I
3 could then -- I think the other items that have been raised by
4 CLI, and specifically the disqualification of Traub Bonacquist &
5 Fox as counsel to the committee; disqualification of Traub
6 Bonacquist & Fox as counsel to the PEDC; sanctions of Traub
7 Bonacquist & Fox of all fees retroactive to the filing date; the
8 removal of Barry Gold as an alleged illegal post-petition
9 professional; oh, and I'm sorry, Your Honor, I inadvertently
10 forgot one, the removal of Mark Kenney from the U.S. Trustee's
11 office, for failure to perform.

12 As I know Your Honor is aware, the last time we were
13 before you, Mr. Perch had indicated to Your Honor that the
14 Bankruptcy Code authorizes the Court to remove trustees or any
15 examiners who have been appointed. As I know Your Honor is
16 familiar with Section 324, that power does not extend to U.S.
17 Trustees who appear before the Court. So I would respectfully
18 submit that Your Honor lacks the authority to do that under the
19 Bankruptcy Code.

20 THE COURT: Does the U.S. Trustee want to be heard on
21 that?

22 MR. PERCH: Good morning, Your Honor. May it please
23 the Court, Frank Perch for the United States Trustee. Obviously,
24 Your Honor, we agree with Mr. Garrity's statement. And while Mr.
25 Kenney is not the U.S. Trustee, he's a trial attorney with the

1 U.S. Trustee's office.

2 The request either has to be taken as a request to
3 remove him in his status as a representative of the U.S. Trustee
4 in which case I think Section 324(a) applies; or, if it's not
5 taken in that request, then what we have here is simply an
6 internal staffing decision of the U.S. Trustee and the Assistant
7 U.S. Trustee. There's nothing in the motion that asserts any
8 conduct of an ethical nature that would mandate disqualifying Mr.
9 Kenney as -- in his role as an attorney appearing in this matter.

10 THE COURT: There's just a disagreement with what he
11 did.

12 MR. PERCH: Well, there's a disagreement --

13 THE COURT: Or for him to do.

14 MR. PERCH: There's -- it really is a disagreement
15 regarding his -- an alleged disagreement regarding his work
16 performance which he's -- why I would say I would distinguish it
17 from any allegation of anything of an unethical nature was
18 conducted. So there really is nothing --

19 THE COURT: A personal conflict, et cetera.

20 MR. PERCH: Exactly.

21 THE COURT: Just with work performance. All right.
22 Mr. Alber?

23 MR. ALBER: Thank you, Your Honor. Unless the Court
24 decides that this is the appropriate time for us to address what
25 we believe has been fraud committed upon the Court in this case,

1 then by the -- by certain representatives of the U.S. Trustee's
2 office, we will address that matter later. But we do -- we have
3 -- we know that Mr. Kenney was aware of the MNAT, Goldman Sachs
4 and GE Capital conflict from another case. And he want this --
5 which brought his attention in the EToy's case by us and as we
6 understand CLI.

7 THE COURT: Well --

8 MR. ALBER: -- digresses -- it's for a personal issue.
9 I don't --

10 THE COURT: You don't think he has stock or is a
11 director of Goldman Sachs or has any personal conflict in this
12 case.

13 MR. ALBER: No, we do not. We don't have any knowledge
14 of that, Your Honor.

15 THE COURT: You just disagree with what he's done.

16 MR. ALBER: We see -- to the best of our understanding,
17 U.S. Trustee's office has fiduciary responsibility to the estate
18 and to parties of interest. Not to the trustee's office as we
19 understand it. And Mark Kenney hasn't fulfilled any of these in
20 allowing certain failures to disclose to occur during this
21 bankruptcy case. For instance, MNAT --

22 THE COURT: Well, I know your allegations. Well, I am
23 without authority to tell the U.S. Trustee whom they may use to
24 staff their cases. So I'll hear your allegations, but I'm not
25 sure I can give you the specific relief of removing Mr. Kenney

1 from the case.

2 MR. ALBER: That's why I suggested in the beginning,
3 Your Honor, that we waive this as the proper venue. But --

4 THE COURT: Well, I'll -- you know, I'll hear the
5 allegations and to the extent the U.S. Trustee wants to act on
6 them if they have any merit whatsoever, that's up to them.

7 MR. ALBER: Okay. Well, we are communicating with
8 Lawrence Freeman and Kelly Stapleton in these regards.

9 THE COURT: All right.

10 MR. ALBER: If Your Honor would rather not address this
11 here. Which would be fine with us.

12 THE COURT: Well, I don't know -- I don't have the
13 authority, so.

14 MR. ALBER: Okay. Thank you, Your Honor.

15 MR. MINUTI: Your Honor, again, Mark Minuti from Saul
16 Ewing, here for Mr. Gold. Your Honor, I think we're coming to
17 the end of the issues that we believe Your Honor can decide as a
18 matter of law. With respect to Mr. Gold, I think there are two
19 that Your Honor can decide as a matter of law.

20 Number one, as I understand the request, they've asked
21 to remove Mr. Gold as the claim administrator. It is our
22 position, Your Honor, that you do not have jurisdiction to remove
23 him post-confirmation. He serves pursuant to the plan
24 administration agreement. And, therefore, it is our view that
25 it's beyond the Court's jurisdiction at this point.

1 The other issue, Your Honor --

2 THE COURT: Well, to remove him for cause, how would
3 one do that? What court would have jurisdiction?

4 MR. MINUTI: Well, Your Honor, I think that -- what I'm
5 saying is the way the issue has been framed by the movants, I
6 think that what would have to happen here is someone would have
7 to bring, frankly, a lawsuit against him to have him removed as
8 the plan administrator. Because what they've alleged, Your
9 Honor, is the non-disclosure, really, during the bankruptcy case.
10 And what I'm suggesting is that the argument that he had a duty
11 to disclose or he didn't disclose it during the bankruptcy case
12 would not be relevant to his service as the plan administrator
13 post-effective date.

14 THE COURT: Well, as I understand their allegations,
15 his failure to disclose at the time of confirmation made his
16 appointment as the plan administrator void ab initio.

17 MR. MINUTI: I see your point, Your Honor, if that's
18 the case. My other point, with respect to an issue that Your
19 Honor can deal with as a matter of law, the main thrust of the
20 emergency motions against Mr. Gold are that he violated 11 USC
21 327 and he violated Bankruptcy Rule 2014.

22 Your Honor, I believe the case law is crystal clear on
23 this. Mr. Gold was an employee of the debtor. As an employee of
24 the debtor, he was not subject to 327(a). He was not subject to
25 2014. That's not to suggest, Your Honor, that he didn't have a

1 duty to the debtor, he didn't have a duty to the estate. And I
2 understand we're going to deal with that issue later.

3 But the allegations that he had violated the 327 and
4 Bankruptcy Rule 2014, I think Your Honor can rule on that as a
5 matter of law now.

6 THE COURT: Do you understand that?

7 MR. ALBER: I understood, but I disagree, Your Honor.
8 We do believe that he has violated Rule 2014-1, employment of
9 professional persons which include retention of ordinary of
10 course professionals. Mr. Gold himself has -- excuse me. Mr.
11 Gold has, himself, advised that during depositions and here in
12 court that he was initially employed as wind-down officer. And
13 then became CEO/president. We have billing records where Mr.
14 Gold was considered as CEO/president when he was initially hired.
15 And the wind-down officer or CEO/president would come under the
16 category of ordinary course professionals.

17 THE COURT: Well, actually, no. Ordinary course
18 professionals are attorneys or accountants that are only doing
19 discreet matters, regulatory or personal injury defense,
20 insurance defense, items like that, who are not the main
21 professionals in the bankruptcy case, but may need to do some
22 things during the bankruptcy case.

23 I think professional is the key, i.e. attorney,
24 accountant, some courts have said real estate broker in our
25 circuit. I think an officer or employee of the debtor to the

1 extent it's an individual is not normally considered a
2 professional subject to 327. Does U.S. Trustee agree on this
3 point?

4 MR. PERCH: Your Honor, yes, we agree that Mr. Gold was
5 not serving in the role of a professional under Section 327 in
6 this matter. Mr. Gold was engaged as an officer of the debtor.
7 And, in fact, it's my understanding that the matter was vetted
8 out at the time of his employment that he was, indeed, retained
9 as an officer of the company pursuant to the appropriate
10 procedures of corporate governance.

11 And as Your Honor knows, while we have, from time to
12 time had concerns regarding parties who are retained as a type of
13 management professional or a management consultant, that we do
14 recognize that -- the case law recognizes that the debtor
15 corporation has the ability to employ officers during the
16 pendency of the Chapter 11 case. And our understanding is that
17 Mr. Gold served strictly as an officer, not as a professional.

18 MR. HAAS: Your Honor -- may I be heard?

19 THE COURT: No, Mr. Haas, you cannot be heard. All
20 right. I think I agree under those sections that Mr. Gold was
21 not a professional. But --

22 MR. ALBER: May I just say one more thing, Your Honor,
23 please? If I may?

24 THE COURT: Excuse me? Yes, Mr. Alber.

25 MR. ALBER: Yes. If I may make one more comment. Also

1 the way we read 327(a) is to include anybody employed by the
2 estate that has direct -- that can cause direct action in terms
3 of a monetary or material affect upon the estate and upon the
4 bankruptcy. And under that we would find Mr. Gold to be -- the
5 charges we made to be applicable. Mr. Gold in either position as
6 wind-down officer or CEO/president has -- does have the direct
7 ability to affect the estate in a material basis.

8 THE COURT: Well, where does it say that in 327(a)?

9 MR. ALBER: That's what I was looking for here, Your
10 Honor. I have so much material here and I'm not an attorney.

11 (Pause)

12 MR. ALBER: Okay. Your Honor, if I may, I found the
13 appropriate paperwork I was looking for. 11 US Code 327(a),
14 individuals can be determined to be professional within the mean
15 of Section 327 of the Bankruptcy Code by either quantitative or
16 qualitative test. Under the quantitative test, only entities
17 whose duties are essential to the administration of the estate
18 will be considered professionals under Section 327. By contrast,
19 an entity is considered a professional if it is permitted to
20 exercise discretion and anatomy in addressing the administration
21 of the estate under the qualitative test.

22 The information I have is a non-exhaustive of factors
23 have been developed for determining an employed professional by
24 harmonizing a quantitative and qualitative standards. These
25 factors include (a) whether the entity controls, manages,

1 administers, invests, purchases or sells that are significant to
2 the debtor's reorganization; (b) whether the entity is involved
3 in negotiating terms of a plan of reorganization; (c) whether the
4 employment is directly related to the type of work carried out by
5 the debtor, of the routine maintenance of the debtor's business
6 operations; (d) whether the entity is given discretion to
7 exercise his or her own professional judgment on some part of the
8 administrative -- administration of the debtor's estate; (e) the
9 extent of the entities involvement in the administration of the
10 debtor's estate; and, (f) whether the entity's services involves
11 some degree of special knowledge and skill such that the entity
12 can be considered professional within the ordinary meaning of the
13 term.

14 Mr. Gold's duties both pre-confirmation and post-
15 confirmation meet this criteria.

16 THE COURT: Well, before you get into the facts, what
17 case are you quoting from?

18 MR. ALBER: I am quoting from information -- let's see.
19 This came from a document that was written up by entities within
20 the U.S. Trustee's office. And this was used in a case. It is
21 not part of actually 327(a) which I read at the beginning which
22 is -- but it was an opinion written up by members of the U.S.
23 Trustee's office. And that's where I gathered this information.

24 THE COURT: A pleading? A pleading submitted by the
25 U.S. Trustee's office. Oh, okay. In which case?

1 MR. ALBER: Yeah.

2 THE COURT: In which case?

3 MR. ALBER: I don't know what case it was in. It was a
4 -- it wasn't a pleading written up in response to a case. It was
5 a paper put out by several members of the U.S. Trustee's office.

6 THE COURT: And it was published in a law review
7 article or something?

8 MR. ALBER: Yes. It was published somewhere, yes.
9 This is a -- something that I had written up that I did not have
10 the time to -- but, are any of the facts here I've read off wrong
11 that anybody's aware of?

12 THE COURT: Well, if you're citing it for a legal
13 proposition, I'd like to know if any court has adopted that
14 standard.

15 MR. ALBER: Okay. No, not that I'm aware of, no.

16 MR. MINUTI: Your Honor, if I may respond?

17 THE COURT: Yeah, please.

18 MR. MINUTI: Your Honor, there's --

19 THE COURT: Talk into the mic.

20 MR. MINUTI: I'm sorry, Your Honor. Your Honor, Mark
21 Minuti again for Mr. Gold. Your Honor, I believe when he said is
22 a law review article or a paper that was written by someone at
23 Morgan Lewis, I think it's quoted in the emergency motion that
24 Mr. Alber had filed.

25 But I think the law in this jurisdiction, Your Honor,

1 is consistent with the general rule that comes right out of
2 Colliers. And this law is cited with approval and adopted by
3 this court in the Phoenix/Steel case, 110 BR 114. The facts in
4 that case are directly on point. He had professionals in that
5 case that were hired as employees or officers of the debtor. And
6 what Judge Benedict held in that case is as long as they're
7 serving, in fact, as employees, and performing the functions as
8 officers, that they are not 327(a) professionals subject to 2014.

9 I think the law on that is crystal clear, Your Honor.
10 It is clear that's what Mr. Gold's role was in this case and
11 again, Your Honor, whether he had a duty separate and apart from
12 that consistent with Your Honor's holding in quorum, I think
13 that's another issue we're going to get to later today.

14 Now the technical argument that he is subject to 327(a)
15 and 2014, I think the law is crystal clear on that and he is not
16 subject to abscession or that rule.

17 THE COURT: Well, I'm going to reserve on that until I
18 hear the evidence and consider if there is any case law to the
19 contrary.

20 MR. GARRITY: Your Honor, Jim Garrity.

21 THE COURT: Again, thank you.

22 MR. GARRITY: Your Honor, I think that we have
23 exhausted the items that we believe Your Honor can deal with as a
24 matter of law with regard to the CLI/Collateral Logistics motion.
25 We believe that there are other similar issues that can be dealt

1 with with regard to Mr. Alber's motion. If I could just list to
2 you our understanding of what they ask for, and just very
3 briefly, I think there are only two or three that we think can be
4 dealt with very quickly.

5 THE COURT: All right. Just deal with the ones you
6 think we can deal on a legal basis.

7 MR. GARRITY: Thank you, Your Honor. They request a
8 disgorgement of all fees paid to date to Mr. Paul Traub. It's
9 uncontroverted that Mr. Traub has not received any fees paid to
10 date other than in his capacity as a member of the Traub
11 Bonacquist & Fox firm. So we think that as a matter of law,
12 there's nothing that he should be directed to disgorge. That
13 would be one issue, Your Honor.

14 MR. ALBER: May we -- if I may, Your Honor? Will we be
15 direct -- will we be addressing these issues as Mr. Garrity
16 brings them up or does he intend to give them to --

17 THE COURT: Well, let's do it as he brings them up. I
18 think he thinks you can seek disgorgement from the firm, but not
19 from Traub because he only got it through his law firm is their
20 allegation.

21 MR. ALBER: Okay. The reason we wrote it up like that
22 because it even seem a little confusing to us why we would
23 address Mr. Traub separately than the law firm of Traub
24 Bonacquist & Fox is because we find out the law firm of Traub
25 Bonacquist & Fox is in a revoked status in the state of New York.

1 We're not sure how to address this. We have --

2 THE COURT: What do you mean a remote status?

3 MR. ALBER: Their corporation has been revoked. We
4 have the documentation here from the State of New York --

5 THE COURT: Well --

6 MR. ALBER: Would I present it as evidence?

7 THE COURT: I don't know if that's -- let me suggest
8 this. I don't know if, in fact, Mr. Traub only got fees through
9 Traub Bonacquist & Fox. So I'm reserving on that.

10 MR. GARRITY: Thank you, Your Honor. Then if I could
11 just turn your attention to one other request for relief. And
12 it's in -- again, it's the one Mr. Alber has sought, that Mark
13 Kenney be replaced due to his alleged failure to be proactive in
14 investigation the facts that the EToy shareholders group
15 allegedly presented to him --

16 THE COURT: Well, we already discussed that issue.

17 MR. GARRITY: Yes. Yeah, I was just going to make the
18 point that, Your Honor, I think you dealt with that. Thank you.

19 Your Honor, then with regard to those two motions, as I
20 said, I think those are the issues that we can deal with as a
21 matter of law. And I think we can -- obviously now should turn
22 our attention to the other items that have been raised by the
23 movants.

24 THE COURT: I'd like to have the testimony or evidence
25 presented. And let's hear from the movant then.

1 MR. GARRITY: Thank you, Your Honor.

2 THE COURT: Mr. Alber.

3 MR. ALBER: Thank you, Your Honor. Yes, during the
4 depositions it was revealed that the corporation in question, ABA
5 asset --

6 THE COURT: Well, before you do that, you have to
7 identify exactly what you want to offer into evidence.

8 MR. ALBER: Okay. The first item I'd like to introduce
9 into evidence was entered into evidence during the depositions.
10 May somebody approach the Court, Your Honor, with these
11 documents?

12 THE COURT: Is it marked as an exhibit?

13 MR. ALBER: Yes, it is, Your Honor.

14 THE COURT: All right. You may.

15 MR. GARRITY: Your Honor, could we get a copy of that,
16 too, please?

17 MR. ALBER: We have a copy. Go ahead.

18 THE COURT: Well, this is a two-page document. I'm
19 going to staple it together, okay.

20 (Pause)

21 THE COURT: Okay. Anything else?

22 MR. ALBER: During the depositions, Your Honor, one of
23 the questions I asked of Mr. Traub was --

24 THE COURT: Are you introducing the depositions into
25 evidence? I know you submitted them to chambers, but I --

1 MR. ALBER: Yes, yes, I would like to, Your Honor.

2 THE COURT: Any objection to that?

3 MR. GARRITY: Your Honor, what we would ask is that in
4 order to have the record as neat and orderly as possible, is to
5 the extent that Mr. Alber would like to cite Your Honor to
6 questions and the answers given, that he identify the page and
7 the line and we have no objection to proceeding that way. And if
8 Your Honor would like, unless Your Honor has the transcripts
9 before you, I can approach and give you a set.

10 THE COURT: I have them.

11 MR. GARRITY: Thank you very much.

12 THE COURT: All right. Then, yes, if you're referring
13 to testimony in the depositions, I'd like them to be considered
14 -- the entire deposition transcript to be part of the record so
15 that it's in context.

16 MR. GARRITY: Thank you, Your Honor.

17 THE COURT: Rather than one party reading one sentence.
18 But to the extent you're relying on anything specific in the
19 depositions, you should reference the page and line number. But
20 I'll consider -- the ones that I have, just to be sure, Mr.
21 Traub's, Mr. Fox, Mr. Gold's. I have Mr. Musicale's (phonetic),
22 but that's for a different motion.

23 MR. ALBER: Right, that's separate, okay.

24 THE COURT: All right. Then I'll consider those part
25 of the record.

1 MR. ALBER: Thank you, Your Honor.

2 THE COURT: I'm sorry to interrupt you.

3 MR. ALBER: Okay. This would be on page 64, Your
4 Honor, starting on line 15, extends over a period of several
5 pages.

6 MR. GARRITY: I'm sorry, Your Honor, I'm just not sure
7 which deposition transcript.

8 MR. ALBER: Oh.

9 MR. GARRITY: Thank you.

10 MR. ALBER: Pardon me, Mr. Garrity.

11 THE COURT: All right.

12 (Pause)

13 THE COURT: Can you go ahead?

14 MR. ALBER: As Mr. Traub and Mr. Gold stated in this
15 court and during their depositions, they were the two parties who
16 formed Asset Distribution, Advisors ADA. During the deposition,
17 I asked Mr. Traub who was Nancy Valenta (phonetic), who, as you
18 can see on the papers we submitted as evidence was signed as the
19 authorized person on behalf of ADA.

20 We had prior knowledge that Ms. Valenta worked for the
21 firm of Hutchins Wheeler and Mr. Traub verifies that fact that he
22 consulted with Hutchins Wheeler. Let me find the appropriate
23 page.

24 (Pause)

25 MR. ALBER: Mr. Traub confirms that Nancy Valenta may

1 have -- he doesn't -- he says he doesn't know who Nancy Valenta
2 is.

3 MR. GARRITY: Excuse me, Your Honor.

4 THE COURT: Yes.

5 MR. GARRITY: Most respectfully, we would just like
6 voice an objection. We understand that the transcript will be in
7 the record and we have no objection to that. What we would
8 request is that to the extent that Mr. Alber wants to refer to
9 the transcript, we have no objection to that, if he could read
10 the question and the answer so that we have that in the record if
11 he wants to make, obviously, argument from what's in there. We
12 understand that Your Honor will decide whether to hear that. But
13 we would respectfully request that rather than Mr. Alber
14 summarizing to you what he understands the transcript to say,
15 that he refer to the question and the answer so that we can move
16 forward.

17 MR. ALBER: I agree, Your Honor.

18 THE COURT: All right.

19 MR. ALBER: Yes. Line 19 on page 66, I asked, "Who
20 filed the corporation registration papers in the State of
21 Delaware for ADA?" Mr. Sussman objects to the form to the extent
22 it incorporates the speech beforehand. He can answer the
23 question. The answer by Mr. Traub, "I assume the CT corporation
24 services who formed it. I believe that we hired a law firm to do
25 it. That firm was Hutchins Wheeler in Boston." I asked,

1 "Hutchins Wheeler?" Mr. Traub says, "In Boston. So any contact
2 they might have had would have been through them."

3 Okay. The -- it goes on, Question: "Is Hutchins
4 Wheeler a law firm? Are they located in Delaware?" by myself.
5 Mr. Traub answers, "No." I asked, "Where are they located?" Mr.
6 Traub answers, "Boston." I said, "Boston, Massachusetts? Okay.
7 Why would a Boston law firm be employed by TB&F to file these
8 papers when TB&F was actually closer to Delaware practices? Who
9 made that decision?" Mr. Sussman objected to the form of the
10 question, but states, you can answer. Mr. Traub said, "I did.
11 Traub Bonacquist & Fox has a -- or I have a lot of contacts over
12 the country. I was comfortable going to this particular lawyer
13 in Boston to discuss it and he was agreeable to do it."

14 What I would like to bring up at this time is we're
15 unclear as to Mr. Traub says at the beginning of what I read that
16 he had never heard of Nancy Valenta before. He didn't know who
17 she was. Then he --

18 THE COURT: Well, why is that relevant?

19 MR. ALBER: Well, it's relevant because what I'd like
20 to -- what I'm trying to, perhaps not in as sufficient manner as
21 I can, show -- prove to the Court it's that third party forum
22 asset distribution advisors. And that Mr. Traub and Mr. Gold are
23 not the primary -- they may be the principals of the corporation,
24 but it was formed by a third party who is as yet unknown to the
25 Court or to ourselves. We know that Hutchins Wheeler had --

1 their larger clients were Highland Capital, for instance, who's a
2 direct party in the EToys case. And in EToys prior to the
3 bankruptcy filing.

4 But they're -- a third party had to have filed these
5 papers on behalf of Traub Bonacquist & Fox and Barry Gold and Mr.
6 Traub. Yet Mr. Traub is not aware of who Nancy Valenta is. And
7 he states the only two people that formed it were him and Mr.
8 Gold.

9 THE COURT: All right.

10 (Pause)

11 THE COURT: What else do you want to introduce?

12 MR. ALBER: On page 68 line 17, Mr. -- I should go back
13 to the question. The question was posed on line 5 by myself.
14 "You went to the law firm. You say you sent to him at the law
15 firm and capable of doing it. I didn't hear your answer, I
16 apologize." Mr. Traub in line 17 answers the question, "Asset
17 Disposition Advisors hired this law firm, not Traub Bonacquist &
18 Fox." I asked, "Are you personally the professional of Asset
19 Disposition Advisors?" Mr. Traub says, "Correct."

20 I don't know if I need to go through reading the entire
21 deposition. Would that be appropriate?

22 THE COURT: No.

23 MR. ALBER: I don't think so.

24 THE COURT: I'll consider the entire deposition part of
25 the record. Do you have any other exhibits?

1 (Pause)

2 MR. ALBER: Not at this time, Your Honor. I would like
3 to address that one issue, if we could get clarification and find
4 out what the exact relationship was which we were not able to
5 determine during depositions between who hired --

6 THE COURT: Well, do you want to call a witness?

7 MR. ALBER: If I could call Mr. Traub again, if we
8 could clear this up.

9 THE COURT: All right.

10 MR. GARRITY: Your Honor, if I could suggest, perhaps
11 in order to move this along --

12 THE COURT: All right. But please talk into the --

13 MR. GARRITY: We would suggest that in calling Mr.
14 Traub, we would then ask to put his declaration that all of the
15 parties have had in this matter for several months now, put that
16 into evidence. We have a couple of followup questions to ask him
17 and then --

18 THE COURT: Well, let's let Mr. Alber --

19 MR. GARRITY: Thank you, Your Honor.

20 THE COURT: -- call him in his case.

21 MR. GARRITY: Thank you, Your Honor.

22 THE COURT: Take the stand. Please remain standing so
23 you can be sworn.

24 THE CLERK: Place your hand on the Bible. Please state
25 your full name and spell your last name for the Court.

1 THE WITNESS: Paul Traub, T-r-a-u-b.

2 PAUL TRAUB, DEBTOR'S WITNESS, SWORN

3 THE CLERK: You may be seated.

4 THE COURT: And I'll ask you to speak into the mic,
5 too.

6 THE WITNESS: I'm bringing it closer to my mouth. Is
7 that -- can you hear that?

8 THE COURT: That's fine.

9 THE WITNESS: Okay.

10 THE COURT: All right. Mr. Alber.

11 DIRECT EXAMINATION BY MR. ALBER:

12 Q Good morning, Mr. Traub.

13 A Good morning, Mr. Alber.

14 Q If I may ask to get some clarification on the deposition
15 answers, you did state that you did not know a Nancy A. Valenta?
16 Is that correct?

17 A I did not know -- did not recognize that name, that is
18 correct.

19 Q Okay. Then who was your contact at Hutchins Wheeler?

20 A The attorney's name was Mark Berman.

21 Q Mark Berman?

22 A Yes.

23 Q Was it yourself or Mr. Gold or ADA or Traub Bonacquist & Fox
24 that paid a fee to Mark Berman at Hutchins Wheeler? Or who was
25 it that paid that fee?

1 A I believe I did.

2 Q Okay. You did personally?

3 A I believe so.

4 Q Okay. I know the name Mark Berman, I can't -- and I need to
5 phrase this correctly. Maybe you can refresh my memory. Who is
6 Mr. Berman represent? Who did he represent? I'm not asking you
7 to reveal any attorney/client privilege, but who else did he
8 represent at Hutchins Wheeler?

9 A I really don't understand the question.

10 Q All right. Do you know who else Mr. Berman represented at
11 Hutchins Wheeler? Mr. Berman was an attorney at Hutchins Wheeler
12 as I understand.

13 A Yes. I met Mr. Berman many years ago in a case called -- in
14 Dallas call Fitz and Floyd I believe. And I was impressed with
15 him at that time. I have a lot clients in the Boston area. I'm
16 not sure who he represented. A lot of different people, banks,
17 other parties that I may have known. But I don't specifically
18 know -- I think he may have done some work for the Ozer Group,
19 which is a liquidation firm. Other than that, I wouldn't know.
20 I think he may have represented a gentleman called Tommy Lee, but
21 that's the best I recall.

22 Q I see.

23 A Would you mind if I take a drink of water?

24 THE COURT: No.

25 Q You stated you've been friends or at least close

1 acquaintances with Mr. Berman all these years?

2 A I've known Mr. Berman for a number of years. I wouldn't say
3 we're close acquaintances or friends. I'd see him at various bar
4 association events, maybe a party here and there. I don't
5 believe I've ever socialized between my wife and he and something
6 like that, but I know who he is.

7 Q Can you tell me when the breakup of Hutchins Wheeler in
8 2002, what law firm he went to?

9 A I don't recall. If you tell me the name, I would -- I might
10 recognize it.

11 Q Would it be Weil Gotshal?

12 A No, I don't believe he went to Weil Gotshal.

13 Q Nixon Peabody?

14 A I think so. But I'm not sure. I know he didn't go to Weil
15 Gotshal. Some of the Hutchins who were partners went to Weil
16 Gotshal. I don't believe he was one of them.

17 THE COURT: All right. Could you make sure you're
18 speaking into the microphone. I don't think the recording is
19 picking you up.

20 THE WITNESS: Is that better?

21 THE COURT: It has to be right into it, yeah.

22 THE WITNESS: Oh. Put it right next to my mouth.

23 Q Okay. So to the best of your knowledge, Mr. Berman went to
24 the Nixon Peabody firm when Hutchins Wheeler broke up.

25 A I couldn't swear to it to a certainty. I mean, I know he

1 didn't go to Weil Gotshal. I know that Hutchins Wheeler broke
2 up. He may very well have gone to Nixon Peabody, but I haven't
3 had a professional engagement with Mr. Berman since he left that
4 firm.

5 Q Okay. So you don't have any contact with him since 2002?

6 A I didn't say that. I think I wished him luck at his new
7 firm, wherever that was. And I may have run into him, you know,
8 at a bar association convention or something like that. But, no,
9 I -- no professional contact.

10 Q Has your firm TB&F ever had a connection with the Ozer
11 Group? Or Gordon Brothers. We understand that they are -- they
12 work together on most every case?

13 A Yes.

14 MR. GARRITY: Your Honor, we just object. We're just
15 not clear how any of this is relevant to the issues before the
16 Court today.

17 THE COURT: Why is that relevant?

18 MR. ALBER: Well, because we have a -- I'm asking for
19 Mr. Traub to clarify the information we have that in another
20 cases that Traub Bonacquist & Fox represents the Ozer Group and
21 Gordon Brothers.

22 THE COURT: Well, why is that relevant? That they
23 represent the -- they have connections with the Ozer Group?

24 MR. ALBER: Because I hope to find out during Mr.
25 Traub's testimony, who the third party was that actually

1 formed --

2 THE COURT: Well, ask him the question.

3 Q Who was -- was there a third party who actually formed ADA?

4 A After reading my deposition, I asked -- and I testified that
5 I believe, as would be normal practice, that a corporate law firm
6 has formed a corporation would use one of the corporate services
7 such as CT Corporations, Service, et cetera. I was advised that
8 Ms. Valenta was a paralegal at Hutchins Wheeler. And I believe
9 my testimony fairly says that the only two principals of ADA was
10 and is Barry Gold and myself. I don't believe the question was
11 who formed it. I did not form them. A law firm that we hired
12 formed the corporation. So when you asked me who was Ms.
13 Valenta, I apologize for not knowing at that time exactly who it
14 was when you showed me that document. But I wouldn't know the
15 incorporator of any company that I was involved with unless I --
16 it was very recent and I specifically did it.

17 MR. ALBER: Now, -- yes, Mr. Berman was the individual
18 we were trying to obtain the name of.

19 THE COURT: Could you speak into the mic. I didn't
20 hear what you said.

21 A I couldn't hear what you said.

22 Q I apologize. Mr. Berman was the individual we were
23 attempting to gain the name of. We make no references that you
24 knew Nancy Valenta.

25 MR. ALBER: The reason we believe this is relevant is

1 because the main connections between Traub Bonacquist & Fox --

2 THE COURT: Well, don't make arguments. Do you have
3 another question of --

4 MR. ALBER: Yes, I do.

5 Q In the Gatz's (phonetic) case, Gatz's bankruptcy case that
6 was filed in Dallas, Texas, are there any members of Traub
7 Bonacquist & Fox firm working on my case?

8 MR. GARRITY: Objection, Your Honor. That's a case
9 that was filed in either 2004 or 2005. It has no --

10 THE COURT: Please, I can't hear you. If you --

11 MR. GARRITY: I'm sorry. Objection, Your Honor. That
12 case was filed in 2004 or 2005. It has no bearing on any of the
13 issues that are before you today.

14 MR. ALBER: We believe it does have a bearing because
15 based on Mr. Traub's answer, we may be able to form a closer
16 connection between the Traub Bonacquist & Fox firm, ADA and
17 Gordon Brothers/Ozer Group.

18 MR. GARRITY: Your Honor, the relationship between ADA
19 and the Traub Bonacquist firm has been fully disclosed. Mr.
20 Alber had an -- a day of depositions with Mr. Traub and Mr. Fox.
21 Any relationship with the Gordon Brothers or Ozer Group is
22 absolutely no bearing on the issues before you today which go to
23 whether or not it is appropriate to sanction the Traub Bonacquist
24 & Fox firm and others in accordance with the relief requested in
25 these emergency motions.

1 THE COURT: Yeah, I think that relationships that are
2 relevant are from those in 2001, 2000 -- well, 2002. So let's
3 limit it to that.

4 MR. ALBER: Yes, Your Honor. We do have -- I'm
5 speaking of ongoing relationships.

6 THE COURT: All right. Again, you're -- nobody's
7 talking directly into the microphone. Can you pull it closer,
8 Mr. Alber?

9 MR. ALBER: Pardon me.

10 THE COURT: Thank you. It's not a good system.

11 MR. ALBER: Yeah.

12 THE COURT: All right. You want to ask further
13 questions then related to that period?

14 MR. ALBER: Yes, yes.

15 Q We should be back on -- earlier, prior to the bankruptcy,
16 when was the first time you and your firm represented or had
17 anything to do with the Ozer Group?

18 MR. GARRITY: Objection, Your Honor. I don't
19 understand how the Ozer Group has any bearing on the issues
20 before the Court today.

21 THE COURT: I don't either, but I'll find out. So,
22 overrule.

23 MR. GARRITY: Thank you.

24 A I can't give you the specific date. I can tell you the
25 circumstances under which I represented them. It could have been

1 2000, 2001, 2002. It would have been in conjunction with, as is
2 common in this court, the liquidator purchasing recal (phonetic)
3 inventory for purposes of acting as an agent for a debtor. And I
4 probably represented them on a few different occasions. Is this
5 -- can you hear us?

6 THE COURT: Um-hm.

7 A Okay.

8 Q Thank you.

9 MR. ALBER: If I may, enter into another problem that
10 we have with some of the responses that has direct relevance, we
11 believe, to failure to disclose is in the -- if I may ask Mr.
12 Traub questions --

13 THE COURT: You can ask him any questions you want.
14 Now we're in the -- you can ask any questions. We'll hear
15 argument later.

16 MR. ALBER: Okay.

17 THE COURT: Okay.

18 Q Mr. Traub, with the loan -- or with the payments made by
19 Traub Bonacquist & Fox and Barry Gold, and Mr. Gold says were
20 treated as a loan, when did those payments begin as far as we can
21 understand at the formation of ADA, is that correct?

22 A It started in January/February of 2001.

23 Q So it started several months prior to the formation of ADA?

24 A Correct, correct, yes.

25 Q And Mr. Gold was an employer of ADA. I mean -- excuse --

1 pardon me. Mr. Gold was an employee of Traub Bonacquist & Fox,
2 he was actually an employee of Traub Bonacquist & Fox since ADA
3 had been formed?

4 A Absolutely not correct. And it's --

5 Q Okay. He explained it different. Tell me I don't
6 understand.

7 A Sure. As I stated in my declaration, in the end of 2000 or
8 early 2001, having seen Mr. Gold work on a couple of engagements,
9 I thought that his particular service was going to be helpful to
10 certain of the clients that we were representing.

11 Q If I may interrupt, my question --

12 THE COURT: Let him finish his answer.

13 MR. ALBER: Okay.

14 A At no time was Mr. Gold an employee of Traub Bonacquist &
15 Fox. As I -- the relationship was such that if a particular
16 client who was using Traub Bonacquist & Fox services felt that
17 Mr. Gold's services were for inventory related -- understand the
18 inventory had a price, it had to a count, it had a supervisor --
19 were germane, and I think I used the analogy earlier, much like a
20 private investigator, we would say, look, we think you could use
21 some supplemental services. This is Mr. Gold, he can provide
22 these services. And we would -- if they thought that that was
23 agreeable, we would have him render an invoice which we would
24 present to the client for payment. If they had an argument with
25 Traub Bonacquist & Fox invoice, they would argue about that,

1 which they never did. Or if they had an argument with Barry
2 Gold's invoice, they would argue with that. But absolutely at no
3 time was Mr. Gold an employee of Traub Bonacquist & Fox.

4 Q Perhaps not the legal expert, I have a problem understanding
5 the differentiation between the two, but we would at least
6 concern him an agent of Traub Bonacquist & Fox? Would that be
7 agreeable?

8 A Not to me.

9 Q Okay. You explain why, please?

10 A Yeah. I believe that the analogy that I make is that if I
11 felt it was important to take somebody's testimony in a case,
12 would conduct an auction as we often do, and I felt that we
13 needed that auction, not everybody feels that they need to be
14 transcribed, we do. So we would hire a court reporter and have
15 that party -- I'm sorry, have that party transcribe the
16 proceeding. If I felt that there was a matter in which we needed
17 a private investigator, we would recommend a private investigator
18 and they would render a bill to us and we would pass it on to a
19 client. Same thing with Mr. Gold. If they felt that that
20 particular service was appropriate, we would suggest it, a bill
21 would be rendered and they could quibble with my bill and they
22 could quibble with that bill. It wasn't an agency relationship
23 as far as I understand it.

24 Q In the Home Life bankruptcy which we referred to in our
25 motion for disqualification of disclosure of fees against TB&F,

1 ADA and I believe yourself did -- you did put in the disclosure
2 about your relationship with Mr. Gold in ADA. So at that time,
3 you considered it, me or a legal -- lawful to submit a disclosure
4 that the two of you were principals in ADA.

5 A As I understand your question, the -- and I'm not sure I
6 understand it completely, but I'll try to respond as best I can,
7 which is at the time of the Home Life bankruptcy which occurred
8 in this district before Judge Farnan in July of 2001, it was a
9 matter that was -- the debtor's counsel was Kirkland and Ellis,
10 the lender was Congress Financial Corporation. And they were
11 having a -- as is -- I don't know if Your Honor is aware of it,
12 but in furniture inventory cases, there are often large disputes
13 and there are questions of unfilled customer deposits and a lot
14 of complicated issues.

15 The lender, Congress Financial, contacted us, contacted
16 me and said we are very uncomfortable with the collateral
17 position. And this was the first opportunity for what I had
18 envisioned from the very beginning of a multiple disciplinary
19 approach to what ADA does. And it was the first significant
20 engagement. It was a large matter. And we -- ADA was retained.
21 There was a written retention agreement attached to the
22 application to retain us. On the ADA letterhead it says very
23 clearly principal Barry Gold, Paul Traub.

24 And given that it was a situation where nationally
25 known liquidation firms were going to be asked to bid on

1 inventory and given the Traub Bonacquist & Fox, as it routinely
2 discloses in other cases, was going to be asked -- I'm sorry, was
3 ADA was going to be asked to be involved in a situation to
4 solicit bids, I felt that it was appropriate to cause a
5 disclosure that I, Paul Traub, a member of Asset Disposition
6 Advisors was also a member of Traub Bonacquist & Fox and that
7 Traub Bonacquist & Fox had relationships with those liquidation
8 firms. If that's not in response to your question, that's the
9 best I understand your question.

10 Q As far as the --

11 A Was that too loud or is that good?

12 THE COURT: It's not too loud.

13 MR. ALBER: The sounds fine here. I'm hard of hearing.
14 Thank you. Now, we mentioned this docket, Home Life, Docket 133
15 in our motion. Do we need to introduce it into evidence or would
16 it be --

17 THE COURT: Yes.

18 MR. ALBER: Okay. Okay. May we approach, Your Honor,
19 with a copy?

20 THE COURT: You may.

21 MR. GARRITY: I'm sorry, could they just identify the
22 document, Your Honor.

23 MR. ALBER: The document is Home Life Docket 133. Do
24 you need the case number?

25 MR. GARRITY: Do you have a copy for us, please?

1 MR. ALBER: No, I don't. It was mentioned in our
2 motion. I brought two copies with me.

3 MR. GARRITY: Your Honor, could --

4 THE COURT: The application to employ Asset Disposition
5 Advisors in the Home Life bankruptcy.

6 MR. GARRITY: Can we just take a quick look at it?

7 THE COURT: Yes. I'll mark it as Exhibit A2.

8 THE WITNESS: Your Honor, I've readjusted the
9 microphone to this position. Is this one that you can hear? Or
10 can you take this -- this is good?

11 THE COURT: That's fine.

12 THE WITNESS: Sorry.

13 THE COURT: Thank you.

14 MR. GARRITY: Your Honor, to the extent, I don't know
15 if Mr. Alber is going to be asking questions about this document.
16 Could we approach and show it to Mr. Traub if that's going to be
17 the case?

18 MR. ALBER: Yes, I will be asking questions about that.

19 THE COURT: All right. You should have a copy.

20 (Pause)

21 MR. GARRITY: Your Honor, we have an extra copy of that
22 document. Could we approach and give the copy to Mr. Traub, and
23 then we'll return the other document to Mr. Alber?

24 THE COURT: Yes, you may.

25 MR. GARRITY: Thank you.

1 THE COURT: Mark it as A2 if you will. And you do have
2 a question about that document?

3 MR. ALBER: Yes. I was giving Mr. Traub a little time
4 to look it over.

5 THE COURT: All right.

6 A Well, I don't need to -- do I need to read the whole thing
7 or do you want to direct me to some particular part of it?

8 Q No, I don't think you need to read the whole thing. I
9 presume you did that before you filed it.

10 THE COURT: Please talk into the microphone, Mr. Alber.
11 Thank you.

12 Q No, I don't believe you need to read the whole thing right
13 now. I presume you did that before you filed it.

14 A I don't -- I didn't file this document. It was filed by the
15 lawyers who represented the debtor. So I can't say I read
16 everything that was in it, but I -- if you'll direct me to what
17 you're asking about, I'd be happy to answer it.

18 Q Yes, we have several -- well, there's several documents
19 enclosed. We have -- I'm referring to an affidavit by yourself,
20 affidavit by Paul Traub in support of debtor's application under
21 11 US Code Section 327, Rule 2014.

22 A Excuse me just one minute while I turn to that, if you don't
23 mind.

24 Q I think it's about half or two-thirds of the way through the
25 documents.

1 A Yes, I see that.

2 Q I'm trying to determine the date that this was filed by
3 yourself. It was signed -- do you recall when this document was
4 signed? It's not dated?

5 A As I sit here today, I don't know.

6 Q Now, you state that the relationship between -- pardon me,
7 the relationship between Traub Bonacquist & Fox and Barry Gold
8 was -- and yourself, was that Mr. Gold was considered like some
9 sort of an outside entity that you hire from time to time to do
10 certain activities within certain cases.

11 A Can you point me to where I say that? I'd be happy to look
12 at --

13 Q No, was that -- does that go on with your testimony earlier?
14 Because we're still unclear. You filed this which is a statement
15 disinterested in this according to Rule 2014 --

16 A Yes.

17 Q -- and 327(a) on behalf of ADA with Barry Gold as a
18 principal. Yet, at the same time, you say there wasn't really a
19 connection there, that Mr. Gold was being paid, according to your
20 own testimony, from January/February of 2001, I believe it was
21 like \$30,000 a month for a period of four months. This runs
22 prior to the formation of ADA up to the -- Mr. Gold's employment
23 by EToys?

24 MR. GARRITY: Your Honor, we're just going to object to
25 the form. I'm not sure what question he wants to ask.

1 THE COURT: Ask questions. If you want him to confirm
2 facts, ask it in the form of a question. Did he get paid, when.

3 Q Okay. When did Mr. Gold start being paid by ADA?

4 A He started getting paid from ADA --

5 THE COURT: No, you can't be heard.

6 A I can lean forward. Is that better?

7 THE COURT: You have to talk right into the microphone.

8 A I'll just grab it. Is that --

9 THE COURT: That's it.

10 A You can hear that?

11 THE COURT: Yes.

12 A He started getting paid from ADA when ADA started to receive
13 money. It's first substantial engagement, as I've stated before,
14 was in the matter of Home Life.

15 Q But you stated earlier he started getting paid in January or
16 February by TB&F.

17 A I --

18 MR. GARRITY: Objection, is that a question, Your
19 Honor?

20 THE COURT: Did you state earlier that he started
21 getting paid by ADA in January?

22 A No, I did not.

23 Q No, I believe Mr. Traub's response was he started getting
24 paid by Traub Bonacquist & Fox in January and February of 2001?

25 A That was my testimony, yes.

1 Q So we don't understand how, one, Mr. Gold became -- went
2 from being paid by Traub Bonacquist & Fox to being paid by ADA
3 since it seems to be the same payment period. What is the
4 differentiation there?

5 MR. GARRITY: Objection to the form.

6 THE COURT: You have to ask a more direct question.
7 When was he paid by Traub Bonacquist & Fox?

8 A He was paid by Traub Bonacquist & Fox which were -- the
9 monies were advanced by Traub Bonacquist & Fox in the early part
10 of 2001. As ADA was being formed, it got its first substantial
11 engagement in the matter of Home Life. Thereafter, ADA paid
12 Barry Gold for services for matters in which ADA was retained.

13 Q So, Mr. Gold was being paid by Traub Bonacquist & Fox when
14 he was promoted for a position as CEO/president of EToys in early
15 May -- which started in early May 2001? When he was hired --

16 A Monies -- I'm sorry, is that -- are you finished?

17 Q Yeah, that's fine.

18 A Monies were advanced by Traub Bonacquist & Fox for the
19 entity that was formed of ADA. The -- there were -- monies -- as
20 we -- as I said, there were four -- there was a period of time in
21 which Mr. Gold was available to provide consulting services to
22 Traub Bonacquist & Fox which he did. During which time, we
23 formed ADA. That's my answer.

24 Q So Mr. Gold was being paid by Traub Bonacquist & Fox on the
25 day that he gained employment by EToys?

1 A My -- no. Traub Bonacquist & Fox agreed to cede money to
2 ADA for the purpose of getting it started. Those monies were
3 passed through to Mr. Gold for his living -- for his basic
4 expenses. And Traub Bonacquist & Fox treated the monies that
5 were advanced as a loan to ADA and ADA treated the monies that
6 Mr. Gold received as a loan from Traub Bonacquist & Fox to ADA.
7 That's what happens.

8 Q Who did Barry Gold pay the money back to directly?

9 A Barry Gold never paid the money back to anybody. He wasn't
10 obligated to pay the money back to anybody.

11 Q And ADA paid the money back to TB&F?

12 A ADA subsequently reimbursed monies that were advanced as a
13 result of the start up by Traub Bonacquist & Fox. Barry Gold had
14 zero obligation to ever repay any monies.

15 Q In the continual relationship between Traub Bonacquist & Fox
16 and ADA, which we covered during deposition, were a number of
17 TB&F employees or partners work for ADA or part-time or on a
18 part-time basis?

19 MR. GARRITY: We object to the form, Your Honor.

20 THE COURT: Ask a question directly.

21 Q What is -- what Traub Bonacquist & Fox employees are
22 involved in the Gadzooks (phonetic) case?

23 MR. GARRITY: Objection, Your Honor.

24 THE COURT: Yeah. The current time's not relevant.

25 2001, 2002.

1 Q Did member of the Traub Bonacquist & Fox firm ever work with
2 Barry Gold consulting?

3 A Never.

4 Q Did they ever work with Barry Gold in any capacity prior to
5 the formation of ADA?

6 A I'm not sure I understand the question. What is the
7 question?

8 Q Did any Traub Bonacquist & Fox employees or the law partners
9 or whatever work directly with Barry Gold prior to the formation
10 of ADA?

11 A I did. The matters in which I've just testified earlier,
12 Drug Emporium, Office Max, there may have been some incidental
13 services provided by people at Traub Bonacquist & Fox, but the
14 principal person involved in that was myself.

15 MR. ALBER: I think that's all we have for Mr. Traub.
16 We don't understand the legal differentiation.

17 THE COURT: Well, I have some questions.

18 DIRECT EXAMINATION BY THE COURT:

19 Q What was paid by Traub Bonacquist & Fox to ADA and when?

20 A Over the early part of 2001, approximately \$120,000 of seed
21 money was paid for ADA to get started.

22 Q And when was it paid?

23 A I'm sorry?

24 Q When was it paid?

25 A I believe it is February, March, April and May. I believe

1 that's right.

2 Q And during that time, Mr. Gold drew 30,000 a month from ADA?

3 A No. The way the relationship worked, Your Honor, was that
4 the -- we were -- I was interested in seeing that Mr. Gold and I
5 could form this venture for ADA. Of ADA. I -- we were testing
6 out whether or not, through my contacts, enough business could be
7 generated --

8 Q I understand the --

9 A But nothing was paid -- I mean, so --

10 Q Mr. Gold got nothing from ADA?

11 A Correct.

12 Q Between January and May?

13 A Correct.

14 Q Mr. Gold got funds from Traub Bonacquist during that time?

15 A Correct.

16 Q That's in addition to the \$120,000?

17 A No, absolutely nothing in addition to that. Not a penny in
18 addition to that.

19 Q All right. You said \$120,000 was advanced by TBF to ADA?

20 A In the following manner; \$30,000 a month was given to Mr.
21 Gold --

22 Q Directly?

23 A Directly.

24 Q All right.

25 A The -- as -- with the idea that if Mr. Gold rendered

1 services during that period of time on consulting projects and if
2 he rendered \$120,000 worth of services, that would have been a
3 good thing. We would have -- I mean, it would have been a
4 neutral deal. If he rendered \$160,000 worth of services, it
5 would have been a good deal. If he rendered less than \$120,000
6 of services, we would have made a bad deal. It was a -- much
7 like a furniture salesman, Your Honor, who was being given a
8 draw. We hoped that he generated enough business, but that's the
9 amount of money that was paid.

10 Q And this was paid by your -- by TBF --

11 A Correct.

12 Q -- to Mr. Gold?

13 A Correct.

14 Q It had nothing to do with ADA?

15 A No. It -- the -- what it had to do with ADA was during that
16 period of time, ADA was in the process of being formed. During
17 that period of time that I have testified before --

18 Q Yeah.

19 A -- ADA was formed and ADA started to do and take over the
20 engagements that had been Barry Gold consulting jobs at ADA. ADA
21 succeeded to those engagements as it started to go forward. If
22 I'm not being clear, I'd be happy to try to be more clear.

23 Q No. I want to know the facts.

24 A I want to give you all the facts.

25 Q When was -- what -- was the \$120,000 paid by TBF to Mr. Gold

1 ever repaid?

2 A ADA reimbursed the money to Traub Bonacquist & Fox.

3 Q When?

4 A It finished making the payments by the fall of 2001.

5 Q By the fall of what?

6 A 2001.

7 Q And what was the source of ADA's income to pay that?

8 A The principal source of income was the Home Life engagement
9 in which ADA made a substantial fee. And by offsets of monies
10 that Barry Gold consulting would have had -- would have gotten as
11 a consultant on Traub Bonacquist & Fox engagements.

12 Q And what work was done by Mr. Gold on any of those
13 engagements after May of 2001?

14 A I don't believe anything.

15 Q So he performed no services for Traub Bonacquist & Fox after
16 May of '01?

17 A That's my understanding, correct?

18 Q Did he perform any services for ADA after May of '01?

19 A Yes.

20 Q What services?

21 A As ADA started to evolve, which as I said earlier, the
22 principal matter which should have got it going was he -- Home
23 Life bankruptcy. Thereafter, ADA --

24 Q Did he do anything on the Home Life engagement?

25 A Yes, he did.

1 Q Did he file -- did ADA file fee applications in that case?

2 A Yes, it did.

3 Q And his services are described in those fee applications?

4 A I believe so, yes.

5 Q All right. What else did he do?

6 A As it picked up other engagements, Mr. Gold would render the
7 services that were required or asked that the position advisors
8 to do. For example, let's pick one.

9 Q Well, confine your answer to 2001 and 2002. What cases did
10 he work on?

11 A I believe he worked on Strauds (phonetic), which was a
12 California bankruptcy. I believe he worked on Farmwall
13 (phonetic) which was an Ohio bankruptcy. I believe he worked on,
14 well, Home Life I've testified to. I believe he worked on a case
15 called Goth America (phonetic). That's what I can recall.

16 Q Any others?

17 A Not that I can recall.

18 Q Okay. All right. Any further questions? Mr. Alber first,
19 I guess.

20 MR. ALBER: Yes, I do.

21 REDIRECT EXAMINATION BY MR. ALBER:

22 Q Concerning ADA's employment and payment in the Home Life
23 case, you state that ADA filed fee schedules or billing schedules
24 in the Home Life case?

25 MR. GARRITY: Objection, Your Honor. I think he

1 testified that they filed fee applications.

2 THE COURT: All right. They filed fee applications.

3 A May I comment on that because I'm not 100 percent sure how
4 it worked. But I -- the way it worked was ADA received a flat
5 fee of \$125,000 a month for two months. To the extent that their
6 -- our time was required thereafter, which I believe there was
7 some amount of time, we submitted a supplement statement. If I
8 were to re-review exactly how this retention worked, I would
9 recall whether we actually filed a fee application. I really
10 don't -- as I sit here, I'm not 100 percent sure that's correct.
11 I know that the terms of how we were getting paid were disclosed
12 in the retention application. And whether the trustee in that
13 case asked us to file a fee application, I could look at it and
14 refresh my recollection, but I don't recall.

15 Q So you're not clear on whether or not they did actually file
16 a fee schedule or whether they were paid --

17 MR. GARRITY: Objection, Your Honor.

18 THE COURT: Fee application, not schedule, fee
19 application.

20 Q Fee application. And you're not clear -- you don't remember
21 them, whether or not ADA submitted a fee application or whether
22 they were paid just a certain flat rate per month?

23 A If I could take a moment to review what the application
24 says, it might refresh my recollection. I do recall that the
25 court approved a monthly -- oh, that's better -- a monthly

1 payment and there was some overage. How that was handled, I do
2 not recall.

3 THE COURT: Well, to the extent fee applications were
4 filed, I'll make the request that those be provided by counsel
5 and make them part of this record.

6 MR. GARRITY: I'm sorry, Your Honor? I beg your
7 pardon, I didn't hear you.

8 THE COURT: To the extent that fee applications were
9 filed by ADA in that case, I'd ask that they be submitted and
10 made a part of the record here.

11 MR. GARRITY: That would be fine, Your Honor.

12 MR. ALBER: If I may inquire, Your Honor, if they're
13 going to be providing us fee applications, will we receive a
14 copy?

15 THE COURT: Yes.

16 MR. ALBER: Then we reserve the right to question the
17 witness further after we've received and had time to gone through
18 such --

19 THE COURT: Well, I'll deal with that later. I don't
20 know.

21 MR. ALBER: Okay. Thank you, Your Honor.

22 THE COURT: Do you have any other questions?

23 MR. ALBER: Once we've received the applications we
24 will. We have --

25 THE COURT: I'm sorry, I can't hear you.

1 MR. ALBER: I apologize. Once we receive the fee
2 applications, we will. All we have are objection by Sears to the
3 flat rate they were paid and to the \$125,000 a month they were
4 paid. So we're rather confused as to Mr. Traub's answer. It
5 doesn't seem to go along with the documents we have in Home Life.

6 THE COURT: All right. Just ask a question of the
7 witness.

8 MR. ALBER: I have no more questions until we receive
9 the applications.

10 THE COURT: All right.

11 A Just to be clear, Your Honor, I'm not sure that they're -- I
12 was quickly was reading this. I'm not sure there was a fee
13 application filed.

14 THE COURT: All right. If there was, I want it.

15 A Fine.

16 THE COURT: Any redirect?

17 MR. GARRITY: Your Honor, what I would like to do would
18 be the following. As I -- we can either wait and put it on as
19 part of our case or perhaps in the nature of cross examination, I
20 would like to mark Mr. Traub's declaration that he filed in
21 support of the objection. Then ask a couple of follow-on
22 questions to him if that would be acceptable to Your Honor.

23 THE COURT: Okay. Go ahead.

24 MR. GARRITY: Thank you, Your Honor.

25 THE WITNESS: May I get -- I'm going to take one more

1 water if you don't mind.

2 THE COURT: As much as you want.

3 MR. GARRITY: Your Honor?

4 THE COURT: Yes.

5 MR. GARRITY: Yes, the declaration that we are going to
6 ask to be admitted in evidence is attached to our objection, if
7 you'd like to refer to it from there. And if I --

8 THE COURT: All right. Let's mark it T1 though.

9 MR. GARRITY: Okay.

10 THE COURT: For the record.

11 MR. GARRITY: May I approach the witness, Your Honor?

12 THE COURT: You may.

13 THE WITNESS: Your Honor, are we done with this Home
14 Life?

15 THE COURT: Just leave it there.

16 MR. GARRITY: May I proceed, Your Honor.

17 THE COURT: Yes, you may.

18 MR. GARRITY: Sorry, for the delay.

19 CROSS EXAMINATION BY MR. GARRITY:

20 Q Mr. Traub, have you had an opportunity to review the
21 document that I have just handed to you?

22 A Yes, I have.

23 Q Did you -- would you look at the signature on that. Is that
24 your signature?

25 A Yes, it is.

1 Q And do you adopt the statement set forth in that declaration
2 as if it is your own testimony now on the -- at this particular
3 time in the hearing?

4 A I do, Your Honor. I do, Mr. Garrity.

5 MR. GARRITY: Your Honor, I request to move -- that I
6 move into evidence the declaration of Paul Traub in opposition to
7 the emergency motions filed by or on behalf --

8 THE COURT: All right. It's admitted.

9 MR. GARRITY: Thank you, Your Honor. Your Honor, as I
10 indicated, I have just a couple of follow-on questions if I may.

11 Q Mr. Traub.

12 A Yes.

13 Q Please refer to paragraph 21 of your declaration. In that
14 paragraph you state among other things, and in substance, that it
15 did not occur to you at anytime in 2001 or 2002 that TB&F should
16 disclose the fact that you, a member of Traub Bonacquist & Fox,
17 also was a principal of Asset Disposition Advisors, LLC. Now,
18 Mr. Traub, as it relates to the firm's disclosure obligations
19 under Bankruptcy Rule 2014, what were you thinking about at the
20 time of Barry Gold's retention by EToys?

21 A I spent pretty much the last two months thinking about this.
22 I can tell you at the time I was not thinking that Traub
23 Bonacquist & Fox needed to make a disclosure obligation. As I've
24 spent the last two months reading everybody's laying out for the
25 record all the various facts and circumstances that existed, as

1 I've traced the -- what was then the early stage of ADA to what
2 has become pretty much in 2004 a successful company, I find it
3 difficult to understand what I was thinking at the time that did
4 not make me feel or give me reason to believe that Traub
5 Bonacquist needed to make a disclosure obligation.

6 But as I've sat here over the last two months thinking
7 about it and agonizing about it, thinking about who and what I
8 am, I know several things for sure. One, I would never, ever
9 intentionally not make such a declaration for any reason. I
10 would never, ever intend to deceive or injure anybody. In the
11 course of my 27 years in practice, I hope I've earned the
12 reputation with my colleagues and friends as being truthful and
13 honest.

14 So if you ask me what I was thinking today, I can't
15 answer -- I can only answer, it did not occur to me. And as I
16 sit here today, hopefully we'll get to other issues about what's
17 appropriate, I am embarrassed by how obvious it should have
18 seemed. But it did not seem obvious to me at the time and, as I
19 said, in addition to never, ever intending to not make such a
20 disclosure, I certainly -- well, I have come to like Mr. Gold
21 over these last several years. And all due respect to Mr. Gold,
22 I can't imagine ever having done anything to jeopardize Traub
23 Bonacquist relationship in the case because -- just because I
24 thought it would be a good idea, which I do, that Barry Gold be
25 involved in the case.

1 Q Mr. Traub, did there come a time when Traub Bonacquist &
2 Fox's role as counsel to the committee was expanded? In the
3 EToys case?

4 A Yes, there was.

5 Q And do you know when that occurred?

6 A I believe that was in January of 2002.

7 Q And do you know what the circumstances were surrounding the
8 expansion of Traub Bonacquist & Fox's retention?

9 A Yes.

10 Q Could you describe them briefly, please?

11 A The -- it's been identified that there were actionable
12 causes or colorable claims against Goldman Sachs for their
13 handling of the initial public offering of EToys. And I believe
14 several law firms were interviewed who do that kind of work. And
15 the committee was provided information on the various law firms.
16 One was selected and they asked that we -- Traub Bonacquist
17 continue as -- not local counsel, but as co-counsel to assist
18 them in some of the matters.

19 Q Now, at the time that Traub Bonacquist & Fox's retention and
20 role in the case was expanded, did Traub Bonacquist & Fox
21 supplement it's Bankruptcy Rule 2014 disclosure?

22 A No, it did not.

23 Q Did Traub Bonacquist & Fox file a supplemental Bankruptcy
24 Rule 2014 statement at that time?

25 A It did.

1 Q And in that statement, did Traub Bonacquist & Fox disclose
2 the relationship among Asset Disposition Advisors, Barry Gold and
3 yourself?

4 A No, it did not.

5 Q Now, as it relates to the firm's disclosure obligations
6 under Bankruptcy Rule 2014, what were you thinking about when
7 Traub Bonacquist & Fox filed its supplemental Bankruptcy Rule
8 2014 statement in or about January of 2002?

9 A Certainly nothing to do with Barry Gold's involvement in the
10 case. I was -- that was about the -- it was strictly that the
11 scope of retention was being expanded. And the context of Barry
12 Gold or ADA didn't occur to me. I was also not very much
13 involved with the case at that time. I was not very much
14 involved in the case at that time.

15 Q Now, Mr. Traub, in paragraphs 22 and 23 of your declaration,
16 if you turn to that, please.

17 A I have that.

18 Q Thank you. You state in substance that it was in the fall
19 of 2003 that you first thought about whether Traub Bonacquist &
20 Fox should disclose the relationship among ADA, Barry Gold and
21 yourself.

22 A That's correct.

23 Q Now, again, as it relates to your firm's disclosure
24 obligations under Bankruptcy Rule 2014, what were you thinking
25 about in the fall of 2003?

1 A Well, in the context of the Bonus Store's matter, I -- which
2 haven't appeared before Your Honor, I -- ADA made a disclosure of
3 its relationship with Traub Bonacquist & Fox. Traub Bonacquist &
4 Fox had -- well, let me back up. ADA had rendered services to
5 the pre-petition lender. The pre-petition lender was eventually
6 paid out shortly after inception of the case. And during the
7 course of ADA's involvement with the lender pre-petition, the
8 lender asked -- I'm sorry, the company asked if ADA could be
9 released from its representation of the lender and represent the
10 company.

11 That waiver was granted. And thereafter, the company
12 interviewed several law firms to represent it in its Chapter 11
13 case. They selected us. We filed pleadings with the court
14 disclosing the interrelationship of ADA and Traub Bonacquist &
15 Fox. The United States Trustee's office took the position that
16 because of the involvement of some attorneys from Traub
17 Bonacquist & Fox, I'm sorry, Traub Bonacquist & Fox in the ADA
18 representation pre-petition on behalf of the lender, that that
19 was a disqualifying event.

20 We did a considerable amount of research into it. We
21 consulted with the creditors committee who was supportive of both
22 ADA and Traub Bonacquist participating in the case. We engaged
23 in a good deal of discovery with the office of the United States
24 Trustee. And it became clear that, after appearing in court,
25 that ADA was not going to be retained for those reasons and that

1 that spillover was going to effect the retention of Traub
2 Bonacquist & Fox as general counsel. We thereafter worked out an
3 arrangement where given the liquidation phase of the case which
4 we were involved in of the assets, that TBF could continue as
5 special counsel.

6 It was at that time when I saw how other people viewed
7 the interrelationship of -- how if certain TBF personnel were
8 involved with ADA under certain circumstances, it could cause
9 issues. So we discussed in the firm whether or not -- all of
10 what I just said had to do with our disclosures in the Bonus
11 case. As we came to that conclusion, which I've just described,
12 we did have a discussion about whether we should make that
13 disclosure in the EToys case of the relationship. And we
14 concluded at that time that since it was a substantial period of
15 time post-confirmation, that that would -- that disclosure wasn't
16 necessary.

17 In the course of trying to fulfil the court's mandate
18 in December of having us look at the various issues that we had
19 been dealing with over the last several years, we retained
20 counsel to help us. And I believe after having had those
21 conversations, we came to the conclusion that our analysis was
22 misguided and that we should have made a disclosure of that
23 relationship. And in the course of my supplemental disclosure,
24 we have determined to make that disclosure.

25 Q Now, Mr. Traub, so I'm clear. Prior to the fall of 2003,

1 did it occur to you at anytime that Traub Bonacquist & Fox should
2 have disclosed the relationship between -- among yourself, ADA
3 and Barry Gold? Prior to that time?

4 A Not in the context of the EToys case. It occurred to me in
5 numerous cases in which we were retained, such as in Home Life
6 which was, I don't know, a couple months after the Barry Gold's
7 involvement in EToys. It somehow became clear to me that we
8 should disclose the relationship between ADA and Traub Bonacquist
9 & Fox. What I testified to earlier is I don't know why I didn't
10 see at that time that that should spill over into EToys but I did
11 not.

12 Q Now, Mr. Traub, you are aware that after Mr. Alber and
13 Collateral Logistics filed their emergency motions, the United
14 States Trustee filed a motion seeking to compel Traub Bonacquist
15 & Fox to disgorge fees paid as counsel to the committee? Is that
16 correct?

17 A Yes, I'm aware of that.

18 Q Now, is it true that Traub Bonacquist & Fox agreed to
19 settlement with the U.S. Trustee, a settlement, of course, that
20 is subject to the approval of this Court? Is that correct?

21 A Yes.

22 Q Now, will Traub Bonacquist & Fox be required to pay anything
23 to the estate under that settlement?

24 A If the Court approves the settlement as proposed, it would
25 require us to pay \$750,000 to the estate.

1 Q Now, what is your thinking now, today, as you sit here in
2 this courtroom with regard to Traub Bonacquist & Fox disclosure
3 obligations under Bankruptcy Rule 2014 as it relates to the EToys
4 case?

5 A I believe that we -- I believe that having viewed everything
6 laid out for me as it is, that we should have made a disclosure
7 at several junctures of the EToys case. The -- it's hard to
8 address, you know, what I was thinking because we made disclosure
9 in so many different cases in this and other courts of the
10 relationship. And I actively promoted the relationship of ADA.
11 But pretty much, I don't know if this is -- but pretty much for
12 the last two months, I have been consumed with the question of
13 how do I ever get this behind us.

14 We have some 25 people that work in our law firm. We
15 have had to bring this to the attention of numerous clients,
16 people who depend upon us. I've had to share this stress with my
17 family. I'm pleased to say my wife is here to be supportive
18 which I appreciate. But it has been -- it's caused me so much
19 self-examination and such, both, financial pain and lost
20 opportunity. The fees that my counsel is appropriately charging
21 us to get this straight.

22 And so, my feeling is that I told the United States
23 Trustee's office from the very beginning of December that we
24 would be cooperative in anything they asked. I recognize very
25 strongly that they have a policy which is very important. That

1 non-disclosure be discouraged. I can think of no other non-
2 disclosures I've made. And I -- while I was initially hopeful
3 that it wouldn't be as financially painful as they felt was
4 appropriate to settle the term policy, I feel so strongly that
5 all of the people who are being affected by this, including all
6 the members of my law firm and all the associates and people that
7 we work with, and our clients, I have to do whatever I can to get
8 this behind us.

9 So I hope the trustee will say, if asked, that we have
10 been cooperative and, you know, generally a good reputation and
11 that this will be a sufficient deterrent to satisfy their policy
12 and allow me and others to try to move on with my life and our
13 lives.

14 MR. GARRITY: I have no further questions, Your Honor.

15 THE COURT: All right. Any recross?

16 MR. ALBER: I would like to recross, Your Honor. I'd
17 like to introduce some more -- another document into evidence.
18 And excerpts from billing statements submitted by TB&F in the
19 EToys bankruptcy case. It has the appropriate docket number,
20 page number. And then concerning --

21 THE COURT: All right. Show them to counsel and --

22 MR. ALBER: They concerning Barry Gold's retention.

23 THE COURT: Do you want to submit a copy to me? I take
24 it this is Exhibit A3? Thank you.

25 MR. GARRITY: Your Honor -

1 THE COURT: And show --

2 MR. GARRITY: I'm sorry.

3 THE COURT: And show a copy to the witness, I guess.

4 MR. GARRITY: Your Honor, I understand that Mr. Alber
5 does not have another copy, but before we go forward with this,
6 we would respectfully request that there be some foundation made
7 for this. This appears to be some kind of a summary of
8 information contained in EToys docket 521 by TB&F. I'm not sure
9 what it is.

10 THE COURT: Well, there are several it appears.

11 MR. GARRITY: Yes, thank you, Your Honor, it does refer
12 to several docket numbers.

13 THE COURT: Well, I'll allow him to cross on it subject
14 to your submitting anything to show that these are not, in fact,
15 accurate excerpts from what they purport to be rather than me
16 have all -- the entire fee applications incorporated in the
17 record.

18 MR. GARRITY: Okay, Your Honor.

19 THE COURT: Unless, as I say, I'll reserve for you the
20 right to ask that they be corrected --

21 MR. GARRITY: That -- yes, thank you.

22 THE COURT: -- or the entire application be submitted,
23 but I'm not sure it's necessary for this.

24 MR. GARRITY: Thank you.

25 THE COURT: All right. Do you want --

1 MR. MINUTI: Your Honor, I'm sorry, Mark Minuti. I
2 just wanted to note for the record the same objection, but I
3 appreciate Your Honor's ruling. Thank you.

4 THE COURT: All right.

5 MR. ALBER: May I approach the witness?

6 THE COURT: You may.

7 MR. GARRITY: Your Honor, we're at a bit of a
8 disadvantage. Mr. Alber doesn't have anymore copies. This is
9 not a document that is any document that we have. And just as a
10 practical matter, I find it difficult to go forward with regard
11 to this document.

12 THE COURT: Let's see what the questions are and
13 whether we can proceed.

14 MR. GARRITY: All right.

15 MR. ALBER: Thank you, Your Honor.

16 REDIRECT EXAMINATION BY MR. ALBER:

17 Q Mr. Traub, referring to page one of the document, towards
18 the bottom of the page, it says page 78 on 5/15/01, May 15th,
19 2001. It says, prepared for and participated in telephone
20 conference with Paul Traub, Michael S. Fox, Richard Cartoon
21 (phonetic) and Barry Gold regarding management issues. And this
22 is from Susan Balashak entered this. During that conversation,
23 was the relationship between yourself and Mr. Gold disclosed to
24 any but to Mr. Cartoon or anybody else?

25 MR. GARRITY: Your Honor, I just would object to the

1 form. This -- the relationship, I'm not sure what -- could he be
2 more specific?

3 Q Of the relationship between Paul Traub, TB&F and Barry Gold.
4 Richard Cartoon was a third party --

5 THE COURT: Okay. All right.

6 A I don't know in that specific conversation since I didn't
7 bill time for that. But I do recall telling Mr. Cartoon during
8 that period of time that we had worked with Mr. Gold, he'd done
9 consulting services with us. So, I can't tell you that it was on
10 the 15th or the 18th, but one of those periods of times sound
11 right.

12 Q Okay. And Mr. Cartoon was informed that Barry Gold was
13 receiving money from Traub Bonacquist & Fox during that period of
14 time prior to Mr. Gold's appointment?

15 A I don't think I told him that, no.

16 Q Okay. What would have been the nature, then, of the
17 disclosure you made to Mr. Cartoon in regards to your
18 relationship with Barry Gold? And Traub Bonacquist & Fox
19 relationship with Barry Gold?

20 A Well, I'd be speculating, but I would have said that we had
21 -- he was among the candidates being -- I believe they were
22 interviewing candidates. And I said that I thought, based upon
23 our experience with Mr. Gold and the consulting he'd done with us
24 and his previous experience, he'd be a good candidate for the
25 job.

1 Q Okay. Would you please turn to page 2 now, toward the
2 middle of the page, it says page 90.

3 A Yeah.

4 Q I'm referring to an entry 5/18/01, telephone conference with
5 Lee Castillo regarding officer selection.

6 A Yes.

7 Q What knowledge, if any, did Susan Balashak have of your
8 relationship with Barry Gold and the formation of ADA? Between
9 yourself and Mr. Gold?

10 A I don't know if she had any knowledge.

11 Q Okay. Then you're not aware if you had informed her of any
12 -- of the relationship, business relationship between yourself
13 and Mr. Gold at that time?

14 A I don't know that I had.

15 Q What is your first recollection of discussing with Ms.
16 Balashak the business relationship between yourself and Mr. Gold?

17 A I don't know when I had that discussion. I -- Ms. Balashak
18 was in Texas at the time. She was a partner in our Texas office
19 if I recall. I don't know that I had any conversation with her.

20 Q Did you ever reveal the business relationship between
21 yourself and Mr. Gold to Dave Gotto (phonetic) who was then
22 president of -- and CEO of EToys?

23 A Considering the relationship at that time, I mean, we had --
24 no, I never had a conversation with Mr. Gotto, ever.

25 Q You never had a conversation with Mr. Gotto?

1 A Never.

2 Q Mr. Haddad who was vice-president at that time?

3 A Never.

4 Q Did you ever speak to anybody at the Morris Nichols Arsht &
5 Tunnell firm of your business relationship with Barry Gold?

6 A I might have spoken with Rob Denny (phonetic) about having
7 done consulting work with Barry Gold. I don't specifically
8 recall. I remember at one point speaking with Mr. Denny about
9 who was -- I think it was him and Irella Minnella (phonetic),
10 they were principally doing the debtors work, about what
11 responsibilities Traub Bonacquist would have. But I don't
12 specifically recall any other conversation.

13 Q Then you don't recall whether or not you ever mentioned to
14 Mr. Denny the formation of ADA or the fact that Mr. Gold was
15 being paid Traub Bonacquist & Fox during that time period?

16 MR. GARRITY: Objection, it mischaracterizes his
17 testimony.

18 THE COURT: Overruled. You can answer.

19 A Traub Bonacquist & Fox was, at that point, not -- ADA was
20 being formed and, as I've said to you earlier, as I said earlier
21 in my earlier testimony, the monies that were advanced were on
22 account that the formation of Asset Disposition Advisors. I
23 looked at that as a separate entity and I did not discuss that.

24 Q Referring to page 3 of that document, Mr. Traub, the bottom.

25 A Yes.

1 Q It says from EToys docket 890 by TB&F.

2 A Yeah.

3 Q Page 13.

4 A Yes.

5 Q The first entry, revised draft --

6 MR. GARRITY: Excuse me, Your Honor, could we get the
7 date on that, please?

8 MR. GARRITY: Oh, excuse me. It's December 6th, 2001,
9 at the bottom of page 3.

10 Q These are all entries by Susan Balashak?

11 A Um-hm.

12 Q Revised draft, Gold letter agreement, memo to Barry Gold
13 regarding draft letter. Memo to Barry Gold regarding request for
14 compensation increase.

15 A Yep.

16 Q Memo to Barry Gold regarding compensation issues. Then
17 finally, revised Gold employment letter agreement in accordance
18 to Barry Gold's comments. Perhaps you can tell us how Mr. Gold's
19 employment letter agreement was revised?

20 A I would have no knowledge of that.

21 Q So it would be Susan Balashak that would have knowledge?

22 A It wouldn't be me. I had nothing to do -- I mean, I think
23 in the course of the EToys case, I spoke to Barry Gold about
24 EToys for 10 hours or 12 hours. That would be about the extent
25 of my involvement.

1 Q If we could refer back to the earlier document which was the
2 Home Life --

3 A Yeah.

4 Q -- retention which was submitted on, I believe, July 16th,
5 2001.

6 A Yes.

7 Q You make the disclosure according to Rule 327(a) and 2014 as
8 far as your relationship, the firm -- your relationship with
9 Barry Gold and the firm of Traub Bonacquist & Fox?

10 A Yes. Are you referring to a --

11 THE COURT: Which paragraph?

12 A Are you referring to a specific statement?

13 (Pause)

14 Q This would be on page 4 of your statement which is about
15 halfway through the document. Page 2, it starts off in --
16 there's a disinterestedness of professionals. It continues on
17 through page 4.

18 THE COURT: And what is this in?

19 MR. ALBER: This is in the Home Life docket --

20 THE COURT: In his declaration?

21 MR. ALBER: Docket 133.

22 THE COURT: In the motion or the declaration?

23 MR. ALBER: It's in the declaration by Mr. Traub.

24 THE COURT: Okay.

25 MR. ALBER: It's about halfway or a little past that,

1 but it's his document, Your Honor.

2 THE COURT: What page?

3 MR. ALBER: Page 4.

4 THE COURT: All right.

5 MR. ALBER: Actually it starts out on page 2,
6 disinterestedness of professionals.

7 THE COURT: All right.

8 Q All right. It states in paragraph 8, about third of the way
9 down the page, it is ADA's intent to expand it's ongoing conflict
10 search if and when additional parties in interest are known in an
11 expedient manner and shall update this information as necessary.
12 It goes on to say that, ADA will use reasonable efforts to
13 identify such further developments and will properly file
14 supplemental affidavit as Bankruptcy Rule 2014(a) requires. Was
15 there any supplemental affidavit filed in the EToys case ever by
16 Traub Bonacquist & Fox?

17 A Is that in response to paragraph 8?

18 Q I'm asking -- well --

19 THE COURT: Did you ever file a supplemental
20 declaration?

21 A No, I -- other than what's just been admitted into evidence.

22 Q Okay. But you were aware this section -- a supplemental
23 affidavit needed to be filed in the Home Life case?

24 A I am aware of that.

25 Q What I don't understand, perhaps you can clear it up for me,

1 is you were aware that these declarations had to be made in the
2 Home Life case which were going on concurrently with the
3 beginning of the EToys case in 2001, mid to late 2001. But you
4 weren't aware of it in the EToys case until 2003. I don't
5 understand. Can you please explain that for me.

6 A I looked at the job that Mr. Gold was doing in EToys as an
7 independent job that he has. It didn't have anything to do with
8 me. Didn't receive any fees from him. He did his job. We had
9 numerous cases, hundreds of cases, I'm happy to report, at Traub
10 Bonacquist & Fox had nothing to do with Mr. Gold. As EToys --
11 I'm sorry, as ADA was evolving, and ADA would be involved in
12 situations that could impact Traub Bonacquist & Fox clients,
13 people at Traub Bonacquist & Fox had represented, where there
14 could be a conflict in the ADA engagement, so, for instance, if
15 you turn to the exhibit at the end of my declaration in the Home
16 Life case, which is Exhibit A, it discloses that we had
17 represented various groups in other context. It lists about
18 eight of them. And that to the extent it became relevant in the
19 Home Life case, that other people that we at Traub Bonacquist &
20 Fox or ADA represented might bear upon the retention in Home
21 Life, we were going to make that disclosure. And that's what I
22 thought I undertook to do in my affidavit.

23 I've previously stated that it did not occur to me that
24 I needed to disclose the matter in EToys at that time. It would
25 have been a wonderful thing had I done it. I didn't see it. Mr.

1 Gold had been involved in the case for -- in EToys for some four
2 or six weeks or two months. And had I seen the need to do it, I
3 would have done it. And as I sit here today, as I testified
4 earlier, I looked at all what's happened over the last four years
5 and the various engagements that ADA's been involved in and the
6 disclosures that's made in all those cases, I find it difficult
7 to understand what I was thinking. I already said, one thing I'm
8 100 percent sure of of what I was thinking is that I had no
9 intention to conceal it intentionally from anybody or to defraud
10 anybody. It didn't occur to me.

11 It occurred to me that Home Life which was two months
12 later was something that I should put out for the world and this
13 court and Delaware that ADA, who was Barry Gold and Paul Traub,
14 was being retained in this case. Should a light have gone on in
15 my head at that time to say, you know, check everything else and
16 do that? I wish it did. I really am sad that it's caused me a
17 lot of pain and a lot of personal embarrassment. I'm very
18 embarrassed to be in the situation that I'm in. I look back and
19 I go, what was I thinking? I don't know other than I had too
20 much respect for this Court and every other court to ever think
21 that I would not make the disclosure to withhold it from anybody.
22 What I was thinking, I don't know.

23 Q Another question concerning the same issue with the
24 retention of Barry Gold and the billing statement document.

25 A Yes.

1 Q On the last page of -- the portions that I read off
2 concerning Susan Balashak --

3 MR. GARRITY: I'm sorry, could we get a date on that,
4 Your Honor.

5 MR. ALBER: This is the bottom --

6 MR. GARRITY: Is that the December --

7 MR. ALBER: -- of EToys docket 890 by TB&F, the bottom
8 of page 3, page 13.

9 MR. GARRITY: Right. But see, we don't have the
10 document, so if you just tell me what the date is, it would be
11 helpful.

12 MR. ALBER: 12/06/01.

13 MR. GARRITY: Thank you.

14 MR. ALBER: Through 12/10/01. There are actually four
15 entries we're referring to. Anywhere from two-tenths of an hour
16 up to one hour and two-tenths. All by Susan Balashak.

17 Q Mr. Traub, you stated that you would -- you were embarrassed
18 at this time that all this is coming out.

19 A I didn't say that.

20 Q Okay. Well, can you please clarify that? I don't want to
21 put any words in your mouth.

22 A What I said is --

23 THE COURT: Just ask him a question.

24 Q Okay. What would have been your -- what would be your
25 opinion on members of your law firm working, as it appears,

1 unilaterally to revise Barry Gold's employment letter agreement
2 in EToys knowing of the relationship that you have with Barry
3 Gold?

4 MR. GARRITY: Objection, Your Honor. There's no
5 foundation. He's looking at some billing records, making a
6 statement that Traub Bonacquist & Fox is unilaterally doing
7 something. There's no basis for the question.

8 MR. MINUTI: Same objection, Your Honor.

9 THE COURT: All right. Sustained. Rephrase.

10 MR. ALBER: Okay.

11 Q Concerning what's the very last cite, bottom of that page,
12 the last entry, 12/10/01, revised Gold employment letter
13 agreement in accordance of Barry Gold's comments, by Susan
14 Balashak, six-tenths of an hour. What, in your opinion, would be
15 wrong with that considering the relationship between Traub
16 Bonacquist & Fox, yourself and Barry Gold?

17 MR. GARRITY: Objection, Your Honor. His opinion is
18 irrelevant.

19 THE COURT: All right. Sustained.

20 Q Do you concern anything wrong with the entire situation with
21 your firm revising Mr. Gold's employment letter agreement?

22 MR. GARRITY: Objection, Your Honor.

23 THE COURT: Sustained.

24 Q Would you have revised Mr. Gold's employment letter
25 agreement --

1 MR. GARRITY: Objection.

2 THE COURT: Yeah, it's not relevant what he would do.
3 Whether he thinks it's right or not.

4 MR. ALBER: Okay. Yeah, I'm just unable to phrase the
5 question correctly. That's all I have, Your Honor.

6 MR. GARRITY: We have no further questions, Your Honor.

7 THE COURT: Okay, good. All right. You may step down,
8 thank you.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: Leave the exhibits there if you will.

11 (Witness excused)

12 THE COURT: Mr. Alber, do you have any other witnesses
13 you want to call?

14 MR. ALBER: Not at this time. Will we be taking a
15 break during these court hearings today?

16 THE COURT: Well, I want to hear how many other
17 witnesses we may be considering hearing today. Do you have any
18 others? You have none others at this time, Mr. Alber?

19 MR. ALBER: I'd like to call Barry Gold, Your Honor.

20 THE COURT: All right. How long you think you'll be
21 with him?

22 MR. ALBER: Not very long I don't think.

23 THE COURT: All right. And do any other respondents
24 wish to call anybody?

25 MR. GARRITY: I think, Your Honor, once -- when -- we'd

1 just like to see how this comes out. We may indeed want to call
2 one witness.

3 MR. MINUTI: Your Honor, Mark Minuti again on behalf of
4 Barry Gold. I'm going to wait to see what the direct is. We
5 very well may want to call Mr. Gold back to the stand or cross
6 examine him in connection with this, but I want to wait and see
7 what the direct is. Thank you.

8 THE COURT: All right. Why don't we take a ten-minute
9 break and then let's proceed with Mr. Gold. I'd like to -- maybe
10 we can finish this before lunch. All right. Let's take a short
11 break.

12 (Recess)

13 THE COURT: All right. Mr. Alber, you may proceed.

14 MR. SUSSMAN: Your Honor, if I may, just for one
15 moment.

16 THE COURT: Yes.

17 MR. SUSSMAN: One procedural matter. Ronald Sussman,
18 Kronish Lieb Weiner & Hellman. On the break we did have the
19 opportunity to check with respect to the Home Life matter and so
20 the record is complete, we'd like the Court to know and I can
21 represent on behalf of ADA that the -- there were no fee
22 applications filed in that case on ADA's behalf, that it was a
23 monthly set fee and that to the extent it went over, there were
24 monthly billings subject to objections that were to be resolved
25 by the court. If there were objections that could not be

1 resolved and that at the end of the day there was nothing that
2 ended up in front of the court for resolution.

3 THE COURT: All right. But were the monthly billings
4 filed in the case though?

5 MR. SUSSMAN: I'll have to check that. If they were,
6 you'd like a copy of those?

7 THE COURT: Yes.

8 MR. SUSSMAN: I'll check that, Your Honor.

9 THE COURT: All right. Then, Mr. Alber, you may
10 proceed.

11 MR. ALBER: Yes. I wanted to ask Mr. Barry Gold some
12 questions.

13 THE COURT: Mr. Gold.

14 MR. ALBER: Yes.

15 THE COURT: All right.

16 THE CLERK: Place your hand on the Bible. Please state
17 your full name and spell your last name for the Court, please.

18 THE WITNESS: Barry Frederick Gold, G-o-l-d.

19 BARRY GOLD, DEBTOR'S WITNESS, SWORN

20 THE CLERK: You may be seated.

21 DIRECT EXAMINATION BY MR. ALBER:

22 Q Good afternoon, Mr. Gold. I presume you have the two
23 documents there in front of you I was addressing Mr. Traub which
24 would be the billing statement excerpts, a three-page document
25 and also the retention application for ADA in the Home Life case?

1 I'll be primarily dealing with the billing statement excerpts.

2 A Okay.

3 THE COURT: If you can pull the microphone in front of
4 you, thank you.

5 A I'm a slow learner.

6 THE COURT: Yeah. All right.

7 Q Okay. Mr. Gold, would you please state when the
8 relationship between you and Mr. Traub in the formation of ADA?

9 A Those are two different questions. When the relationship
10 started? Or when ADA started?

11 Q In reference to ADA? Let's try to establish a time line.

12 A We had a meeting after I left Stage Doors (phonetic) in
13 approximately the middle of January 2001.

14 Q Okay. Then the -- do you recall when the loan was paid --
15 when you were paid by TB&F the amounts for \$30,000 a month for
16 four months? I don't know how to characterize that since --

17 A Well, I can characterize it, if you'd like.

18 Q Please, please do.

19 A As part of our meeting and on the founding of the concept
20 which later became ADA, one of my concerns was a continuation of
21 income. I had some other expressions of interest in employing me
22 from other parties. And I wanted to maintain some continuity of
23 income. And what was agreed upon between Mr. Traub and myself
24 was I would receive advances for four months of \$30,000 each
25 while we explored whether the concept which became ADA was a

1 viable concept. The -- I received checks which bore the name
2 TB&F, but they were loans by TB&F to fund Asset Disposition
3 Advisors. At that time, there was no corporation, not even
4 agreement on a name. There was no banking account, there was no
5 checking account. So I received checks from TB&F which were
6 loans by TB&F to Asset Disposition Advisors which were paid back
7 by Asset Disposition Advisors.

8 Q Can you tell us -- please tell us when those checks -- for
9 what period in time those checks encompassed? When they started,
10 when they ended?

11 A Well, the checks -- I can't tell you when I physically
12 received the checks, but the checks were supposed to encompass
13 the four month periods from mid-January when we met until the
14 middle of May.

15 Q Okay. And then was Home Life the first venture by ADA?

16 A That was the first substantial venture of ADA. Prior to
17 that, there were two or three very small assignments which were
18 all completed, by the way, prior to my employment at EToys.

19 Q Okay. So then the period of time from May through the
20 middle of July when ADA was retained in the Home Life case, your
21 pay for EToys sufficed? That was the only source of income at
22 that time?

23 A Yes.

24 Q Okay. That was treated as a loan by TB&F to -- you were
25 paid by Traub Bonacquist & Fox but it was treated as a loan to

1 ADA. Can you please --

2 MR. MINUTI: Your Honor, I'm going to object to the
3 form of the question.

4 THE COURT: Well, overrule.

5 Q Can you please explain that relationship?

6 A Well, I was paid by TB&F, but again, that was money that was
7 being made to ADA. ADA, at that time, had not been fully formed.
8 There were no bank accounts. There were no checking accounts.
9 And when ADA was formed, that was reflected as a loan from TB&F,
10 both on ADA's books and TB&F's books. And as I mentioned
11 earlier, that was supposed to be paid back by approximately
12 October 2001.

13 Q When did you first inform Rich Cartoon of your business
14 relationship with TB&F, Paul Traub and the ADA venture?

15 A It was -- as far as I can recollect, no discussion of the
16 ADA venture. When I went out initially to be interview by a
17 number of people, including the officers of the company and
18 Crossroads and Richard Cartoon, one of the questions which I was
19 asked is I'd been recommended by TB&F along with other
20 applicants, by the way. But you're recommended by TB&F. What
21 had been your association with them. And I got into that I had
22 worked with and against them on an adversarial basis on three
23 different cases at that time. As a matter of fact, one other
24 pertinent point is that I asked Mr. Cartoon what his background
25 was. And he mentioned that a lot of his work experience was at

1 Ernst and Young. And I remember saying to him, asking him if he
2 knew Ben Evans. Ben Evans was one of the top executives at Ernst
3 and Young.

4 And I recommended to Richard, when he said that he knew
5 Ben Evans very well, I recommended to Richard that he call Ben
6 Evans because Ben Evans and I were both in Whitmark on an
7 adversarial relationship. He was representing the financial
8 interest of the creditors committee. And I urged him to speak
9 with Ben Evans although I hadn't spoken with Ben since the
10 Whitmark engagement and ask Ben about my performance and he later
11 said to me that Ben gave me a very good recommendation.

12 Q When did you first make -- excuse me. When did you first
13 make representation to Lee Castillo, the creditors committee,
14 about your relationship with Paul Traub or TB&F?

15 A I only met or spoke with Lee Castillo once to my
16 recollection and that was at a dinner meeting arranged by Steve
17 Haas. He seemed to have some very close relation with him
18 because they would refer to speaking with me a couple times a
19 week.

20 Q When did you first reveal to anybody connected with EToys as
21 far as the debtors go your relationship with Paul Traub or TB&F
22 and that you were receiving money from them at the time of
23 retention?

24 MR. MINUTI: Objection, Your Honor.

25 THE COURT: Sustained. Rephrase it.

1 Q Did you ever make representation to debtor's counsel, MNAT,
2 regards your relationship with TB&F?

3 A It -- my recollection, which is not 100 percent clear, is
4 that Greg Werkheiser was at the first meeting where I was
5 interviewed where I had discussed that I worked both with and on
6 an adversarial basis with Traub Bonacquist & Fox.

7 Q Did Mr. Werkheiser explore that relationship?

8 A Again, my recollection is that he was at the meeting and the
9 discussion was more on what I did at the three accounts and other
10 accounts. And it was in the context that I knew prior to going
11 out there -- I was told that it -- I was asked if I wanted to be
12 considered as a candidate, to be the CEO or wind-down officer.
13 And I asked the question is it a ADA assignment or a personal
14 assignment. And I was told ADA had nothing to do with it which
15 was the case. When I went out to the interview, that was the
16 seventh or eighth occasion where I was being interviewed and/or
17 hired to serve as an executive of a troubled or restructuring or
18 liquidating retailer. That -- it is not an ADA assignment.

19 Q Who was it at the TB&F firm that informed it wasn't an ADA
20 assignment?

21 A I first learned about the possibility when I received a call
22 from Paul Traub. And Paul said that TB&F has an account that
23 they're having some problems with. Everyone on a -- officer or
24 top executive basis has left the firm except for two remaining
25 officers. And I think the -- retention dates were May 18th. And