"The ART of Presentation"
A Delaware Bankruptcy Inns of Court Production
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CREDITS

2011-2012 Coordinator:
Laurie Selber Silverstein

Co-Program Leaders
Douglas Candeub
Chad Toms

Subgroups (* indicates subgroup leader or co-leader)

Technology in the courtroom
Craig Martin*
Evan Miller
Kevin Capuzzi

Pertinent Rules of Procedure and Evidence
Victoria Counihan*
Pat Tinker
Tori Guilfoyle
Jane Bee
Michael Lastowski
Kimberly LaMaina
Matt Hinker

Motion Practice
Mark Desgrosseilliers *
Matt Ward
Chris Winter
Scott Leonhardt
Mona Parikh
Kristi Schubert
Peter Keane

Fact Witnesses
Ed Harron*
Simon Fraser
Eric Lopez Schnabel
Jeff Waxman
Johnna Darby
Damien Tancredi
Ryan Murphy
Alan Root
Justin Duda
Cory Falgowski

Expert Witnesses
Robert Stearn*
Tom Horan*
Bill Sullivan
David Powlen
Robert Weber
Marisa Terranova
Sarah Pugh
Anthony Saccullo
Patrick Jackson
Matt McGuire

Closing Argument
Jami Nimeroff*
Kerri Mumford
Tom Whalen
David Carickhoff
Dierdre Richards

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Technology in the Courtroom

THE ART OF PRESENTATION

Technology in Federal Courts in General

- "The wave of the future . . . lies in the use of electronic technology both in discovery and courtroom presentation.

  Fanelli v. Centenary Coll., 211 F.R.D. 268, 271 (D.N.J. 2002).

- "[I]n light of the federal court's general encouragement to lawyers in regard to use of technological tools in the courtroom, particularly where . . . it may result in a more efficient and more effective presentation."

  Turner v. Mukasey, 2008 WL 62261, *6 (D. Minn. Jan. 3, 2008) (noting that a party's use of technology in the courtroom was not excessive in a Title VII fee-shifting analysis).

Del. Bankr. L.R. 9036-1(b)

- Use of Technology in the Courtroom.

  Parties intending to use any technology in the Courtroom must give the Court three (3) business days' notice. Notice should be sent via email to debml_Courtroom_Technology@deb.uscourts.gov. Appropriate chambers should also be notified.

Technology Available at the Bankruptcy Court

- Courtroom Monitors
- Elmo Projector
- 60" Plasma Screens
- Videoconferencing
- Courtcall
- Any additional technology a party wishes to incorporate

Substantive Issues Raised by the Use of Technology in the Courtroom

- Is there a duty to disclose to an opponent that a party intends to use technology at a hearing or trial?
  - With regard to trials, should such disclosure be incorporated into pre-trial orders?
  - Should the Local Rules be revised to deal with such issue?
- If a technological consultant is retained to prepare courtroom presentations, must the consultant's retention be approved?
- How will the Court react to fees and expenses associated with courtroom technology in fee applications?

Substantive Issues Raised by the Use of Technology in the Courtroom

- Does the Court and/or an opponent need to approve the presentation of a witness by video (e.g., incarcerated witnesses; witnesses in foreign countries)
- How does the Court ensure that a video witness is not taking notes or otherwise using tools not available in the courtroom?
- How are exhibits or other documents presented to a video witness?
- And so on…

Practical Issues Raised by the Use of Technology in the Courtroom

- Cost issues
- Courtroom set up: can the Judge, opponent, and/or audience see the presentation?
  - Is the Judge's view obstructed?
- Courtroom lighting/acoustics
- How far in advance can the room be set up?
- Who will run the equipment?
- What's the back-up plan if the technology fails?

SELECTED RULES PERTINENT TO PRESENTATIONS IN BANKRUPTCY COURT

Federal Rules of Bankruptcy Procedure

Rule 7026. General Provisions Governing Discovery

Rule 26 F.R.Civ.P. applies in adversary proceedings.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26 (a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26 (f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26 (f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26 (a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26 (a)(2)(B), within 30 days after the other party's disclosure.

(D) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26 (e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26 (a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26 (a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26 (a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26 (a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26 (b)(2)(C).

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26 (b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26 (b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26 (b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37 (a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26 (a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35 (b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26 (b)(4)(A) or (B); and

(ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose

the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37 (a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26 (f), except in a proceeding exempted from initial

disclosure under Rule 26 (a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26 (a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26 (a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26 (a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26 (a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16 (b).

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26 (a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26 (a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26 (c) or under Rule 16 (b) and (c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for Rule 16 (b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16 (b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16 (b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26 (a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Rule 7032. Use of Depositions in Adversary Proceedings

Rule 32 F.R.Civ.P. applies in adversary proceedings:

(a) Using Depositions.

(1) ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

(5) ***Limitations on Use.***

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) ***Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) ***Objections to admissibility.*** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) ***Form of presentation.*** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the

testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) ***Waiver of objections.***

(1) ***To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) ***To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) ***To the Taking of the Deposition.***

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) ***Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

Rule 9013. Motions: Form and Service

A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee or debtor in possession and on those entities specified by these rules or, if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs

Rule 9014. Contested Matters

(a) **Motion.** In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.

(b) **Service.** The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R.Civ.P.

(c) **Application of Part VII Rules**. Except as provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, 7071. The following subdivisions of Fed. R. Civ. P. 26. as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3)(additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

(d) **Testimony of Witnesses**. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.

(e) **Attendance of Witnesses**. The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.

Rule 9017. Evidence

The Federal Rules of Evidence and Rules 43, 44, and 44.1 F.R.Civ.P. apply in cases under the Code. F.R.Civ.P. 43:

(a) **In Open Court.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) **Affirmation instead of an oath.** When these rules require an oath, a solemn affirmation suffices.

(c) **Evidence on a motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) **Interpreter.** The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

Federal Rules of Evidence

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim ; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

ARTICLE V. PRIVILEGES

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of waiver.

When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure.

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding.—

When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling Effect of a Court Order.—

A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling effect of a party agreement.—

An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule.—

Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions.—

In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

ARTICLE VI. WITNESSES

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.

For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the

adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.

The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court.

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination.

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions.

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court Appointed Experts

(a) Appointment.

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation.

Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment.

In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection.

Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII. HEARSAY

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.

A "declarant" is a person who makes a statement.

(c) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.

A statement is not hearsay if--

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is

(A) the party's own statement, in either an individual or a representative capacity or

(B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression**. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance**. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing mental, emotional, or physical condition**. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection**. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6)**. Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics**. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of public record or entry**. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations**. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates**. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records**. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property**. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property**. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents**. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market reports, commercial publications**. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned treatises**. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation concerning personal or family history**. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) **Reputation concerning boundaries or general history**. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in

the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to character**. Reputation of a person's character among associates or in the community.

(22) **Judgment of previous conviction**. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgment as to personal, family or general history, or boundaries**. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) [**Other exceptions.**][Transferred to Rule 807]

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) General provision.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations**.

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge*. Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting*. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness*. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like*. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations*. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports*. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation*. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or system*. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule*. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following.

(1) **Domestic public documents under seal**. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic public documents not under seal**. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign public documents**. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be

made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) **Certified copies of public records**. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) **Official publications**. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and periodicals**. Printed materials purporting to be newspapers or periodicals.

(7) **Trade inscriptions and the like**. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged documents**. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial paper and related documents**. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Presumptions under Acts of Congress**. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) **Certified domestic records of regularly conducted activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) **Certified foreign records of regularly conducted activity.** In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Local Rules for the United States Bankruptcy Court

Rule 4001-1 Procedure on Request for Relief from the Automatic Stay of 11 U.S.C.§362(a)

(c)(iii) The hearing date specified in the notice of the motion will be a preliminary hearing at which the Court may (A) hear oral argument, (B) determine whether an evidentiary or other final hearing is necessary, (C) set a date by which the parties shall exchange supporting documentation, (D) set a date by which the parties must produce the report of any appraiser whose testimony is to be presented at the final hearing and/or (E) set a date and time for a final hearing.

Rule 9013-1 Motions

(a) Application. This Local Rule applies to motions filed in bankruptcy cases. Motions filed in adversary proceedings shall be governed by Local Rule 7007-1.

(b) Requests for Relief. No request for relief (not otherwise governed by Fed. R. Bankr. P. 7001) may be made to the Court, except by written motion, by oral motion in open court or by certification of counsel. Letters from counsel or parties will not be considered.

(d) Evidentiary Hearing. All hearings on a contested matter will be an evidentiary hearing at which witnesses will be required to testify in person in Court with respect to any factual issue in dispute unless these Rules, the parties or the Court provides otherwise.

(i) Telephonic Appearance at Hearing. In extenuating circumstances where counsel cannot appear at the first hearing on a motion, a request can be made to the respective Judge's chambers for an appearance by telephone no later than 12:00 p.m. prevailing Eastern Time twenty four (24) hours prior to the scheduled hearing date. Upon the approval of such request by the Court, counsel shall follow the telephonic appearance procedures located on the Court's website. This Local Rule shall not apply to evidentiary hearings.

Rule 9018-1 Lodged Exhibits; Documents Under Seal; Confidentiality

(a) Lodged Exhibits. All models, diagrams, documents or other exhibits lodged with the Clerk that are admitted into evidence at trial shall be retained by the Clerk (unless required to be forwarded to an appellate court for purposes of an appeal) until expiration of the time for appeal without any appeal having been taken, entry of a stipulation waiving or abandoning the right to appeal, final disposition of any appeal or order of the Court, whichever occurs first.

Rule 9036- 1 Electronic Transmission of Court Notices; Use of Technology in the Courtroom

(a) Court Notices. To eliminate redundant paper notices, all registered electronic filing participants will receive notices required to be sent by the Clerk via electronic transmission only. No notices from the Clerk's Office will be sent in paper format, with the exception of the Notice of Meeting of Creditors, which will be sent in both paper and electronic format. The electronic transmission of notices by the Clerk will be deemed complete upon transmission. The Court has established "opt-out" procedures to ensure that any registered electronic filing participant may receive paper notices in addition to electronic notices by requesting such notices in writing to the Clerk's Office.

(b) Use of Technology in the Courtroom. Parties intending to use any technology in the Courtroom must give the Court three (3) business days' notice. Notice should be sent via email to debml_Courtroom_Technology@deb.uscourts.gov. Appropriate chambers should also be notified.

CHAMBERS PROCEDURES

GENERAL CHAMBERS PROCEDURES

4. Hearings:

a. General

i. A first day hearing will be scheduled no sooner than 24 hours after receipt of the first day binder.

ii. If requesting an expedited hearing, a motion for expedited hearing shall be filed and a hard copy, together with a copy of the underlying motion to be heard, shall be delivered to chambers for review. The Court will then determine the appropriate hearing date.

b. Telephone and Video Conferencing Requests

i. All requests for telephonic participation must be made through the Court-approved teleconferencing facilitator. Please visit the Court's website for information, instructions and fees.

ii. Video conferencing requests shall be made to the courtroom deputy no later than one business day prior to the scheduled hearing.

c. Proposed Orders

i. Counsel presenting matters at a hearing shall bring to the scheduled hearing one unstapled copy of each proposed order with the related document number to be handed up for signature. The copy is to be the same as the proposed order filed with the motion and in the hearing binder. If the proposed order has been revised, counsel shall also present to the Court a blacklined copy showing the changes made and shall make available additional copies of both the proposed order and blacklined copy for parties in interest.

CHAMBERS PROCEDURES FOR HONORABLE KEVIN J. CAREY

Hearings in Adversary Proceedings

- Counsel cannot reschedule or cancel a hearing without the consent of all interested parties and the courtroom deputy. This includes hearings where all matters have Certificates of No Objection filed. The Court will review those matters with Certificates of No Objection and determine if a hearing is necessary. Chambers will then notify counsel to file an Amended Agenda cancelling the hearing.

- Initial scheduling conferences in adversary proceedings **cannot** be continued. A preliminary hearing will be held and a Scheduling Order shall be presented.

- If requesting an expedited hearing, a Motion for Expedited Hearing shall be filed and a hard copy, along with a copy of the underlying Motion to be heard, should be delivered to Chambers for review. The Court will then determine the appropriate hearing date. This also applies to Emergency Motions.

- Each counsel presenting a matter at a hearing is to bring to the scheduled hearing the following:

    - One unstapled copy of each proposed Order to be handed up for signature. The copy is to be the same as the proposed Order filed with the Motion and in the hearing binder, unless counsel advises the Court that the Order has been revised and presents a blacklined copy showing the changes made.

Trials

- In all adversary proceedings filed after May 1, 2004 that include a claim for relief to avoid a preferential transfer, trial shall be held within ninety (90) days of Order Assigning the Adversary Proceeding to Mediation, or as soon thereafter as the Court's calendar permits. The trial date will be scheduled in the Order Assigning the Adversary Proceeding to Mediation. The parties do not need to contact Chambers for a trial date.

- Trials in all adversary proceedings that are on the same track will be conducted on a trailing docket. Adversary proceedings scheduled for trial on the same date and time will be called sequentially according to their adversary proceeding number starting from the lowest and continuing to the highest. Consequently, all parties are required to appear at the time scheduled without regard to the number of proceedings scheduled for trial that day or the number of their individual adversary proceeding.

- Trial briefs are optional but if a party chooses to submit a brief, it must be filed no later than three (3) business days prior to the day scheduled for trial. Trial briefs must be docketed and two (2) copies contemporaneously delivered to Judge Carey's Chambers.

- Counsel is required to notify Chambers as soon as possible if a matter has settled and will not be going forward. Counsel is required to file a notice of trial adjournment stating the reason(s) for adjournment of the trial. The parties shall also immediately advise Chambers, in writing, of any occurrence or circumstance which the parties believe may suggest or necessitate the adjournment or other modification of the trial setting.

CHAMBERS PROCEDURES FOR HONORABLE CHRISTOPHER S. SONTCHI

Trials

In all adversary proceedings filed after May 1, 2004, that include a claim for relief to avoid a preferential transfer or fraudulent conveyance, trial shall be held within one hundred twenty (120) days of Order Assigning the Adversary Proceeding to Mediation, or as soon thereafter as the Court's calendar permits. The trial date will be scheduled in the Order Assigning the Adversary Proceeding to Mediation. The parties do not need to contact Chambers for a trial date. The Court may, in its discretion, schedule a pre-trial conference in lieu of or in addition to the trial.

Trials in all adversary proceedings that are on the same track will be conducted on a trailing docket. Adversary proceedings scheduled for trial on the same date and time will be called sequentially according to their adversary proceeding number starting from the lowest and continuing to the highest. Consequently, all parties are required to appear at the time scheduled without regard to the number of proceedings scheduled for trial that day or the number of their individual adversary proceeding.

Trial briefs are optional but if a party chooses to submit a brief, it must be filed no later than three (3) business days prior to trial. Trial briefs must be docketed and two (2) copies contemporaneously delivered to Judge Sontchi's Chambers. Counsel is required to notify Chambers as soon as possible if a matter has settled and will not be going forward. Counsel is required to file a notice of trial adjournment stating the reason(s) for adjournment of the trial. The parties shall also immediately advise Chambers, in writing, of any occurrence or circumstance which the parties believe may suggest or necessitate the adjournment or other modification of the trial setting.

TRIAL PROCEDURES FOR HONORABLE KEVIN GROSS

Exhibits:

Counsel should have all exhibits marked before trial and two (2) days before trial, should deliver to the Courtroom Deputy a completed exhibit list for each party and two (2) sets of binders containing the exhibits.

Use of Lectern:

Counsel should conduct examination of witnesses from the lectern.

Examination of Witnesses:

Expect that examination of witnesses shall be limited to direct, cross examination, and re-direct.

Approaching the Witness:

Before approaching a witness, counsel should first ask the Court's permission. If leave is requested and granted to freely approach a witness, counsel does not seek further permission with respect to that witness.

Argument:

In all proceedings before the Court, counsel should direct arguments to the Court and not to opposing counsel.

Trial Schedule:

If possible, we will try to hold to the following trial schedule:

On the first day of trial, testimony will begin at 9:30 a.m., and on succeeding days, testimony will begin at 9:00 a.m.

There will be a brief mid-morning break, a one-hour lunch break, an afternoon break, and the trial day will conclude at 5:00 p.m. No one should be reluctant or embarrassed to request additional breaks.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraph (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate or cause another to communicate ex parte with such a person or members of such person's family during the proceeding unless authorized to do so by law or court order; or

(c) communicate with a juror or prospective juror after discharge of the jury unless the communication is permitted by court rule;

(d) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal.

ORAL ARGUMENT DOs AND DON'Ts

- General comments about oral argument
    - Prepare
        - Know your cases and arguments
        - Know the main / critical cases thoroughly
        - Know the facts
        - Know the procedural history
        - Know the exhibits
        - Know your witness(es) and their proffer(s)
    - Help the Judge navigate through the facts and law to your goal
        - Identify the elements that are necessary for the relief that you are trying to obtain, and be sure to demonstrate why each and every element is met (or, for the opposing party, why at least one of the elements is not met)
        - Clarity and brevity make your path seem to be the right path; otherwise the Judge will not be convinced to follow you
        - Your presentation skills will indicate to the Judge the reliability of the path you are asking her to follow
    - Tell a compelling story
        - Demonstrate that justice is on your side
        - Do not play to the Judge's sympathies
        - Do not insult the Court by pleading your cause if the cases are against you; instead, demonstrate why those cases do not and should not apply in your client's case
        - Find the passion in your side's story
- Practical tips
    - Speak slowly
    - Speak clearly and loud enough so that no one has to strain to hear you – strive for a conversational tone
    - Keep your hands out of your pockets and free of objects that might cause fidgeting

- Look at the Judge
- If possible, observe the Judge at another hearing – in all cases know your Judge
- Arrive at Court well in advance of argument with all materials organized and tabbed for easy reference
- If using technology, coordinate with the Court staff to make sure all is ready
- Remain attentive but do not respond to statements of opposing counsel (or answer questions for opposing counsel, unless asked by the Court to do so)
- Know when to stop arguing – avoid beating a dead horse (some dogs will never hunt with a particular Judge) and avoid snatching defeat from the jaws of victory – you are paid to win, not talk
- Do not speak when the Judge is speaking – if the Judge starts speaking while you are speaking, then stop
- Listen closely to any questions that the Judge asks (whether directed to you or to your opponent)
- Admit if you do not know something and move on

- Opening argument
  - Lead with the strongest argument – which is not always the argument that takes up most of your brief
    - Consider not raising every argument if time does not permit it
    - Let the Court know if you are relying on your brief for points
  - Prove your case
    - For an argument, understand what are all of the elements that you must prove in order to win on that argument
    - Explain why each of those elements is satisfied
    - For legal elements, explain during oral argument why those elements are satisfied as a matter of law
    - For factual elements, explain during oral argument how you will demonstrate that those elements are satisfied through the evidence that you will be presenting (through witnesses, expert testimony, submitted documents, etc.)
  - Do not simply recite your brief
    - Discuss only the facts that matter

        - Discuss only the cases that matter
        - Any attempt to cover everything will lead to shortchanging important arguments
    - Close with a summary of your arguments
    - Respond to any questions of the Court
    - Maintain a respect for the Court and also for your opponent – likeability matters
- Responsive argument
    - Pay attention to the argument made by the other side so that you can respond to any new points raised
    - Only respond to arguments that need a response
    - Disprove the opponent's case
        - For an argument, understand what are all of the elements that the opponent must prove in order to win on that argument
        - Explain why at least one of those elements is not satisfied
    - If the opponent is correct on a point, you may concede it; but then demonstrate why she takes the point too far in this case
    - Distinguish the opponent's most significant cases
    - Then focus on making your own argument – use the same rules as opening argument, all the while not forgetting that argument has already occurred from the other side, questions may have been asked and answers given, and additional clarification may (or may not) be necessary
    - Do not simply respond to the arguments made in the opening and do not end with a discussion of those arguments – instead, end on your own argument

FACT PATTERN – BANKRUPTCY INNS OF COURT

In re Forken Lifts, Inc.

Haling from a long line of heavy lifters, but with a pressing desire to ease his aching back, Ben Forken and his close friends Eugene Clark and Linus Yale, invented a mechanized lifting machine for use in warehouses in about 1917. Differences between the three friends, however, ultimately led each of them to form separate companies, centered around the Clark, Yale and Forken lifts, respectively.

Shortly after the split, in 1920, Mr. Forken incorporated Forken, Inc., as a Delaware company. Forken, Inc., was the parent company of two wholly-owned Delaware subsidiaries, Pick Me Up, Inc., a company that specialized in manufacturing fork-lift hydraulic systems and axles, and Forken Lifts, Inc., which assembled and sold the component parts received from Pick Me Up. The company survived the Great Depression, and its business increased dramatically during the Second World War and the boom immediately thereafter. By the time Mr. Forken handed the company over to his three children, Larry and his two brothers, both oddly named Daryl, he had established a successful and fully integrated company specializing in forklift manufacturing and sales with sales world-wide totaling in excess of $500 million per year. Larry, the eldest and marginally the smartest of the three Forken boys, was named CEO and Chairman of the Board of Forken, Inc. His brother Daryl served as CEO of Pick Me Up. His other brother Daryl served as CEO of Forken Lifts.

Forken's business continued to expand with the economy, particularly as the country came to rely increasingly on products from China. Forken Lifts were a big hit in China, and international sales soared. The ad campaigns initiated by the company at the urging of Larry Forken, including "They're Forken Great" and "Give Me a Forken Lift," proved particularly successful.

During this time, Pick Me Up and Forken Lifts operated essentially as two separate companies. Pick Me Up sold component parts to Forken Lifts and both companies had separate sets of employees and separate headquarters, although the Board of all three companies was composed entirely of the Forken brothers. By 2004, sales from Pick Me Up to Forken Lifts totaled in excess of $200 million. By this time, sales of Forken Lifts totaled in excess of $1 billion.

The sales by Pick Me Up to Forken Lifts were frequently not documented with purchase orders or invoices and would often simply be reflected as book entries on the records of each of Forken Lifts and Pick Me Up. At the end of each quarter, the two companies would true up their accounts. Payments generally were made by Forken Lifts to Pick Me Up on 60 day terms (although some invoices were paid more quickly because they were issued at the end of a quarter).

In 2004, Larry Forken decided to run for Governor of Delaware against then Governor Minner. Unable to muster sufficient outside sources of funding for his campaign, Larry decided he would need a little extra personal liquidity. Accordingly, Larry increased his personal salary as CEO by a factor of ten. Not satisfied with this new-found wealth, Larry Forken decided to leverage up Forken Lifts and Pick Me Up with some additional debt, thereby allowing the

companies to make some distribution to their parent company, Forken, Inc., and ultimately to the three Forken shareholders. By June 2004, the Forken companies, previously debt free, were saddled with a $50 million revolving loan and a $250 million term loan, obtained from Worst Bank of Market Street ("Worst Bank"). Both loans were secured by liens on substantially all of the assets of Forken, Inc., and its affiliates. The proceeds of these loans were used to make some improvements to the manufacturing facilities of both Pick Me Up and Forken Lifts, but the bulk of the proceeds went directly into the pockets of the Forken brothers in the form of dividends to the parent company Forken, Inc., which, in turn, provided a dividend to the Forken brothers.

Flush with cash, Larry Forken went on to run an initially impressive campaign for Governor in 2004. However, Mr. Forken was caught in a compromising position with one of his staffers. The News Journal published photos of the affair under the title "Larry Caught Forken; To Quit Race." The News Journal later apologized for the misplaced semi-colon, but the damage to Larry Forken and the Forken companies was done. Larry Forken lost the election, and the Forken companies struggled to meet their massive debt load.

Unable even in the relatively flush times in 2004 to meet their debt payment obligations, the Forken brothers quickly realized that something needed to be done promptly. Ultimately, the Board of Forken, Inc., decided that it was in the best interests of the company to sell Pick Me Up, and to use the proceeds of the sale to pay down the debt owed to Worst Bank. Forken, Inc., hired the law firm of Squeezem & Drye, LLP, and the investment banking firm colossus, Rolo Dex, to assist them in their efforts. Through the combined efforts of the companies, Rolo Dex, and Squeezem & Drye, over one hundred parties signed confidentiality agreements and sixty undertook due diligence, including numerous entities that conducted plant visits and spoke with management. Thirty interested parties submitted letters of intent, including the Corleone Family Hedge Fund. By a curious series of accidents, almost all of these interested parties subsequently withdrew from the bidding for the purchase of Pick Me Up. At least one of the bidders, when questioned by Larry Forken on its withdrawal from consideration in the sale process, was heard muttering that they had "received an offer that they couldn't refuse." An auction ultimately was conducted among the Corleone Family Hedge Fund, Sollozzo Liquidity Solutions, and Honey Badger Investments, a notoriously fearless private equity firm. The Corleone Family Hedge Fund was the successful bidder and purchased Pick Me Up for $50 million in cash and approximately $20 million in furs that had fallen off of trucks. Worst Bank acquiesced to the sale (after the untimely death of Khartoum, the horse owned by the president of Worst Bank, Jack Woltz), applying the $50 million in cash and $20 million in furs against the balance of the loans and releasing all liens on assets of Pick Me Up.

The sale of Pick Me Up closed in April 2007. The Daily Squeal reported on the sale labeling it a "Big Forken Deal." Following the closing of the sale, relations between Pick Me Up and Forken Lifts became more formalized and credit terms tightened up substantially. Each sale was now evidenced by a purchase order from Forken Lifts, Inc., and a corresponding invoice from Pick Me Up. Initially, payment terms remained 60 days from the date of invoice. However, faced with increasingly late payments from Forken Lifts, which was the customer with the largest past-due amounts on a regular basis, in April 2008, Pick Me Up instituted special procedures for addressing the Forken Lifts accounts. Initially, Pick Me Up assigned one of its senior executives, Peter T-Bone, to monitor the Forken account and apply pressure as necessary to keep the account current.

Notwithstanding the paydown of its secured debt, Forken continued to experience business difficulties and could only barely meet its obligations to Worst Bank. The worldwide recession that began shortly after the closing of the sale of Pick Me Up only furthered the decline of Forken Lifts. Between April 2008 and August 2008, the average past due amount from Forken Lifts increased from approximately $7 million to as much as $15 million. In response, Pick Me Up tightened the terms of credit for Forken Lifts to 30 days net starting August 1, 2008. At the same time, Mr. T-Bone turned for additional collection help to Salvatore Tessio. If Forken Lifts at any time failed to pay within 60 days of the invoice date, Pick Me Up would issue a stop shipment and would not continue to ship goods unless and until the account became current. After Pick Me Up threatened to (but ultimately did not) issue two stop shipments in the fall of 2008, it insisted that all payments be made by wire. Following the change in terms in the summer and fall of 2008, any time that Forken Lifts was late in its payments, T-Bone or Tessio would reach out by phone to the accounts payable manager for Forken Lifts, Shek S. Endemail.

On September 21, 2008, when another large monthly payment was late, Messrs. T-Bone and Tessio called Mr. Endemail. After a long and contentious conversation, and hoping to avoid an "in person" meeting, Mr. Endemail agreed to a repayment plan pursuant to which Forken Lifts would pay an additional $500,000 per week to bring its account current. Forken Lifts made a few weekly payments in this amount and then requested that the repayment amount be reduced to $300,000 per week. In response, Mr. Endemail was informed by Mr. Tessio that he would pay the $500,000 per week or the Forken lifts would be placed somewhere he did not believe they would fit. Thereafter, Forken Lifts continued to make the additional payments in the amount of $500,000 per week and had paid down any past due amounts owed to Pick Me Up by April 2009.

Between April 2009 and January 2010, Forken Lifts paid all of its invoices no more than thirty days late, sufficient time to avoid any more contacts by phone or otherwise between Mr. Tessio and Mr. Endemail. However, like many other creditors, Pick Me Up became aware of the precarious financial condition of Forken Lifts beginning in November 2009 and reduced the accounts receivables owed by Forken Lifts by declining certain purchase orders and producing less product. In addition, in late November 2009/early December 2009, Pick Me Up further decreased the credit terms for Forken Lifts to 15 days net.

Following the sale of Pick Me Up and the collapse of the world economy, desperate to recover market share and make their forklifts appealing to a younger, more socially connected consumer, Larry, Daryl, and Daryl, along with a few dozen newly unemployed marketing professionals, developed the i-Fork. The i-Fork was fully compatible with the i-Phone and the i-Pad and indeed had a windshield that permitted information to stream across the bottom of the windshield, while the operator displayed internet content, Facebook, Twitter, etc., on the windshield itself. The i-Fork, released in early 2009, was initially a smashing success, effectively cornering the forklift market within the first few months of 2009. However, after several catastrophic dockyard mishaps, one involving a forklift operator who drove his lift into the side of a cruise ship packed with senior citizens heading for a wild cruise to Mazatlan while watching "Charlotte Takes a Tumble," the lawsuits against Forken Lifts, for designing an inherently dangerous product, loss of all you can eat buffet time, etc., began to be filed. As a final blow, Forken Lifts received a cease and desist letter from the good people of Apple who had not authorized Forken to use its intellectual property in the i-Fork.

With sales of its forklifts now essentially non-existent, unable to make its payments to Worst Bank, and lawsuits threatening to overwhelm Forken Lifts, the Board of Forken, Inc., decided to file bankruptcy on behalf of Forken, Inc., and its remaining subsidiary, Forken Lifts, Inc. On April 1, 2010, Forken filed for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware. At the time of the bankruptcy filings, Pick Me Up was owed $5 million from Forken Lifts and had received payments totaling in excess of $15 million in the ninety days prior to April 1, 2010.

After contentious litigation, the Forken debtors were able to confirm a liquidating plan that became effective upon the closing of a sale of all of its assets to Apple. Apple was convinced that it could make the i-Fork work by, among other things, just having any purchaser agree to the terms and conditions as part of any sale of Apple products and including in these terms and conditions an agreement that any user or owner of the Apple product could never, under any circumstances, sue Apple and would generally consent to anything that Apple did or failed to do.[1]

The plan in the Forken bankruptcy cases provides for the formation of a Liquidation Trust. The Liquidation Trust is charged with pursuing all available causes of action, including recoveries under chapter 5 of the Bankruptcy Code, and reconciling and, if necessary, objecting to all proofs of claim filed in the Forken bankruptcy cases. The Liquidation Trustee, Picken M. Drye, has objected to claims filed by Pick Me Up totaling in excess of $5 million on the grounds that such claims cannot be allowed under Bankruptcy Code section 502(d) unless and until any amounts recoverable under chapter 5 are in fact paid by Pick Me Up to the Liquidation Trust. Mr. Drye has also filed suit against Pick Me Up seeking to recover all amounts paid by Forken Lifts, Inc., to Pick Me Up in the 90 days prior to the April 1, 2010 petition date. In connection with this lawsuit, Pick Me Up has retained Dewitt Nesse, CPA, as its expert witness with respect to its ordinary course defense.

[1] Thanks to Trey Parker and Matt Stone (creators of SouthPark) for this idea.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Forken, Inc., et al.[1]	Case No. _____ (___)
Debtors.	Jointly Administered
	Response Deadline: **Hearing Date:**

OBJECTION OF PLAN ADMINISTRATOR TO CLAIMS OF PICK ME UP, INC. PURSUANT TO SECTIONS 105 AND 502(d) OF THE BANKRUPTCY CODE AND RULE 3007 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Picken M. Drye (the "Plan Administrator"), by and through its undersigned counsel, hereby objects (the "Objection") to the claims of Pick Me Up, Inc., pursuant to sections 105 and 502 of Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended and applicable to these bankruptcy cases, the "Bankruptcy Code"), and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of the Objection, the Plan Administrator relies upon and incorporates by reference the accompanying memorandum of law (the "Memorandum") and Declaration of Picken M. Drye in Support of Objection of Plan Administrator to Claims of Pick Me Up, Inc. Pursuant to Sections 105 and 502(d) of the Bankruptcy Code and Rule 3007 of the Federal

[1] The Debtors are Forken, Inc. and Forken Lifts, Inc.

Rules of Bankruptcy Procedure (the "Declaration") and respectfully states as follows:

1. This Court has jurisdiction to consider this Objection under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Objection in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory and legal predicates for the relief requested herein are Bankruptcy Code sections 105 and 502. The relief is also appropriate under Bankruptcy Rule 3007.

The Bankruptcy Cases

3. On April 1, 2010 (the "Petition Date"), the debtors (collectively, the "Debtors") commenced their respective cases by filing petitions for relief under Chapter 11 of the Bankruptcy Code.

4. No trustee or examiner was appointed in these chapter 11 cases.

5. The Debtors filed and this Court has confirmed the Liquidating Plan of the Debtors.

6. Under the Plan, the Plan Administrator has the authority to object to claims, and to settle, compromise, withdraw or litigate to judgment such objections.

C. Pick Me Up Litigation and Claims

7. The Plan Administrator has brought suit (the "Avoidance Action") against Pick Me Up under sections 547 and 550 of the Bankruptcy Code in connection with preferential transfers made by the Debtors to Pick Me Up in the 90 days preceding the Petition Date. The Avoidance Action is pending before this Court. The Plan Administrator seeks to avoid and recover $4,803,132.13 (the "Avoidable Transfers") in transfers made to Pick Me Up. See the Declaration, par. 3.

5. During these cases, Pick Me Up filed a motion and proofs of claim asserting claims under section 503(b)(9) of the Bankruptcy Code against the Debtors' estates in aggregate amounts in excess of $5 million (the "PMU Claims"). The PMU Claims assert claims with respect to goods that were delivered to the Debtors not fewer than 35 days before the Petition Date. See the Declaration, pars. 4-5.

RELIEF REQUESTED

20. The Plan Administrator respectfully requests that this Court enter an order disallowing the PMU Claims (i) pending resolution of the Avoidance Action and Pick Me Up's return of the Avoidance Amounts to the estates, or, in the alternative, (ii) because Pick Me Up has failed to meets it burden under section 503(b)(9) of the Bankruptcy Code.

OBJECTION

A. The PMU Claims Should Disallowed Pursuant to Bankruptcy Code Section 502(d)

24. As more specifically stated in the accompanying Memorandum, the PMU Claims should be disallowed pursuant to Bankruptcy Code section 502(d). Pursuant to the Plan, the Plan Administrator is expressly permitted to use any available defense under Bankruptcy Code section 502, including the assertion of an avoidance action to setoff or otherwise reduce all or part of any claim.

25. Bankruptcy Code section 502(d), provides, in pertinent part, as follows:

> the court shall disallow any claim of any entity from which property is recoverable under section.. . 550 . . . of this title or that is a transferee of a transfer avoidable under section . . . 547 . . . of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section . . . 550 . . . of this title.

11 U.S.C. § 502(d). As the legislative history makes clear, Bankruptcy Code section 502(d) "requires disallowance of a claim of a transferee of a voidable transfer **in toto** if the transferee has not paid the amount or turned over the property received as required under the sections under which the transferee's liability arises." H.R. Rep. No. 599, 95th Cong. 1st Sess. 354 (1977) (citing S. Rep. No. 989, 95th Cong., 2d Sess. 64 (1978)) (emphasis added).

26. Bankruptcy Code section 502(d) mandates that "any claim of an entity," be disallowed pending that entity's return of property to the estate. See

11 U.S.C. § 502(d). In that regard, the language of Bankruptcy Code section 502(d) draws no distinction among claims for which proofs of claims are filed, scheduled claims, or claims for which a request for administrative expense priority treatment has been sought.

27. Therefore, the PMU Claims should be disallowed pending resolution of the Avoidance Action and payment or turnover of the Avoidable Transfers to the estates.

28. The Plan Administrator reserves the right to amend, modify or supplement this Objection, and to file additional substantive and non-substantive objections to any surviving claim of the claimants, including, without limitation, objections as to the amount, priority, validity, or timeliness of filing of the claims.

29. Moreover, should the grounds of objection stated in this Objection be dismissed, overruled, or withdrawn or should the claimants submit additional information supporting their respective claims, the Plan Administrator reserves the right to object further to the claims on any non-substantive and/or substantive grounds in the future.

B. The PMU Claims Should be Disallowed Because PMU Has Failed to Meet Its Burden Under Bankruptcy Code Section 503(b)(9).

30. Bankruptcy Code section 503(b)(9) provides that a prepetition seller of goods will have an administrative expense for "the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course

of such debtor's business." 11 U.S.C. § 503(b)(9). Administrative claimants bear the burden of establishing that their claims qualify for priority status. In re Goody's Family Clothing, Inc., 401 B.R. 131, 137 n.27 (Bankr. D. Del. 2009).

31. To establish entitlement to an administrative expense pursuant to Bankruptcy Code section 503(b)(9), each Claimant must prove, by a preponderance of the evidence that: (1) the Claimant sold "goods" to the Debtors; (2) the goods were received by the Debtors within twenty days prior to the Petition Date; (3) the goods were sold to the Debtors in the ordinary course of business. 11 U.S.C. § 503(b)(9).

32. Here, PMU has not and cannot establish that it delivered goods to the Debtors within the requisite 20-day period prior to the Petition Date. See Declaration, pars. 4-5. The PMU Claims fail under section 503(b)(9) of the Bankruptcy Code. Therefore, the PMU Claims should be disallowed, or, for any PMU Claim for which PMU did not submit a separate general unsecured claim, reclassified as a general unsecured claim.

NO PRIOR RELIEF

33. No previous request for the relief sought herein has been made to this Court or any other court.

CONCLUSION

WHEREFORE, the Plan Administrator requests that the Court enter the proposed form of order attached hereto sustaining this Objection and granting such other and further relief as the Court deems appropriate.

Dated: _____
Wilmington, Delaware

_____

_____

Attorneys for Picken M. Drye,
Plan Administrator

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Forken, Inc., et al.[1]	Case No. _____ (___)
Debtors.	Jointly Administered
	Response Deadline: **Hearing Date:**

MEMORANDUM OF LAW IN SUPPORT OF OBJECTION OF PLAN ADMINISTRATOR TO CLAIMS OF PICK ME UP, INC. PURSUANT TO SECTIONS 105 AND 502(D) OF THE BANKRUPTCY CODE AND RULE 3007 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Dated: _____

Attorneys for Picken M. Drye,
PLAN ADMINISTRATOR

[1] The Debtors are Forken, Inc. and Forken Lifts, Inc.

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Picken M. Drye, LLC (the "Plan Administrator"), by and through its undersigned counsel, submits this opening memorandum of law in support of its Objection of Plan Administrator to Claims of Pick Me Up, Inc. Pursuant to Sections 105 and 502(d) of the Bankruptcy Code and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Objection").

PRELIMINARY STATEMENT[2]

In the Objection, the Plan Administrator objects to the claims of Pick Me Up, Inc. ("Pick Me Up"), the defendant in a very substantial preference action brought by the Plan Administrator. As a matter of law, while that preference action is pending and until PMU repays the estate the substantial amounts that are the subject of that action, the claims of PMU, even if properly brought under section 503(b)(9) of the Bankruptcy Code, are subject to disallowance under Section 502(d) of the Code.

BACKGROUND

The Plan Administrator has brought suit (the "Avoidance Action") against Pick Me Up under sections 547 and 550 of the Bankruptcy Code in connection with preferential transfers made by the Debtors to Pick Me Up in the 90 days preceding the Petition Date. The Avoidance Action is pending before this Court. The Plan Administrator seeks to avoid and recover $4,803,132.13 (the "Avoidable Transfers") in transfers made to Pick Me Up. See the

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[2] Capitalized terms not defined in this Preliminary Statement shall have the meanings ascribed to such terms in the remainder of this memorandum.

contemporaneously filed Declaration of Picken M. Drye in Support of Objection of Plan Administrator to Claims of Pick Me Up, Inc. Pursuant to Sections 105 and 502(d) of the Bankruptcy Code and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Declaration"), par. 3.

During these cases, Pick Me Up filed a motion and proofs of claim asserting claims under section 503(b)(9) of the Bankruptcy Code against the Debtors' estates in aggregate amounts in excess of $5 million (the "PMU Claims"). The PMU Claims assert claims with respect to goods that were delivered to the Debtors not fewer than 35 days before the Petition Date. See the Declaration, pars. 4-5.

ARGUMENT

I. THE PMU CLAIMS ARE SUBJECT TO MANDATORY DISALLOWANCE UNDER BANKRUPTCY CODE SECTION 502(d).

Bankruptcy Code section 502(d), provides, in pertinent part, as follows:

> the court shall disallow any claim of any entity from which property is recoverable under section. . . 550 . . . of this title or that is a transferee of a transfer avoidable under section . . . 547 . . . of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section . . . 550 . . . of this title.

11 U.S.C. § 502(d). As the legislative history makes clear, Bankruptcy Code section 502(d) "requires disallowance of a claim of a transferee of a voidable transfer **in toto** if the transferee has not paid the amount or turned over the property received

as required under the sections under which the transferee's liability arises." H.R. Rep. No. 95-595, at 354 (1977).

As this Court well knows, when a "statute's language is plain . . . the sole function of the courts is to enforce it according to its terms." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989); see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (stating that a fundamental principle of statutory interpretation is that "Congress 'says in a statute what it means and means in a statute what it says there'") (citation omitted).

Bankruptcy Code section 502(d) mandates that "any claim of an entity," be disallowed pending that entity's return of property to the estate. See 11 U.S.C. § 502(d). In that regard, the language of Bankruptcy Code section 502(d) draws no distinction among claims for which proofs of claims are filed, scheduled claims, or claims for which a request for administrative expense priority treatment has been sought.

Applicable authority provides that the claims should be disallowed pending the return of preferential transfers. Specifically, in Katchen v. Landy the United States Supreme Court determined that:

> Subsection g [of § 57 of the Bankruptcy Act] forbids the allowance of a claim when the creditor has 'received or acquired preferences . . . void or voidable under this title' absent a surrender of any preference.

Katchen, 382 U.S. 323, 330 (1966)(citation omitted). More importantly, the Supreme Court went on to conclude that:

> Unavoidably and by the very terms of the Act, when a bankruptcy trustee presents a s 57, sub. g objection to a claim, the claim can neither be allowed nor disallowed until the preference matter is adjudicated.

Id. (emphasis added).

Accordingly, as the majority of courts have held, pursuant to Bankruptcy Code section 502(d), a claim may not be allowed if there is an outstanding unresolved objection to the allowance of such claim based upon the claimant's alleged receipt of a transfer avoidable under Bankruptcy Code section 547, among others. See, e.g., Weber, 480 F.2d at 749 (when objection to claim raised under section 57(g) of Bankruptcy Act, claim is held in "abeyance" until preference is surrendered); In re Am. West Airlines, Inc., 217 F.3d 1161 (9th Cir. 2000) (judgment of liability in preference action not prerequisite to 502(d) objection); In re Sierra-Cal, 210 B.R. 168, 173 (Bankr. E.D. Cal. 1997) (citing Katchen for the proposition that "the mere assertion of a prima facie § 502(d) defense is sufficient to place the claim in a status in which it is neither allowed nor disallowed").

Pick Me Up was the recipient of the Avoidable Transfers, which transfers were made on account of antecedent debts, made within 90 days of the Petition Date and while the Debtors were presumed insolvent, that allowed Pick Me Up to receive more than it would had such transfers not been made, and are likely not subject to any new value or other defense. See Declaration, par. 3. Based on these facts, there is a more than colorable claim that the Preferential Transfers are

avoidable under Bankruptcy Code section 547. See 11 U.S.C. § 547(b) (setting forth the requirements of an avoidable transfer thereunder). Furthermore, an adversary proceeding has been initiated against Pick Me Up to recover the Avoidable Transfers which are in an amount in excess of the Pick Me Up Claims. See Declaration, par. 3.

Therefore, the PMU Claims should be diosallowed pursuant to section 502(d).

II. SECTION 502(D) DISALLOWANCE IS NOT LIMITED WITH RESPECT TO CLAIMS UNDER SECTION 503(b)(9) OF THE BANKRUPTCY CODE.

Bankruptcy Code section 502(d) expressly and unequivocally applies to "any claim of any entity." 11 U.S.C. § 502(d). See also Central Virginia Community College v. Katz, 546 U.S. 356, 271 (2006).

A. Section 503(b)(9) Administrative Expenses Are Claims

Section 101(5) defines "claim" to include, among other things:

> (A) a right to payment, whether or not such right to payment is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . .

See 11 U.S.C. § 101(5)(A). As the Supreme Court has held, the definition of "claim" is to be broadly construed and applied. See Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 558 (1990) ("Congress chose expansive language" in defining "claim"); In re Circuit City Stores, Inc., 2010 WL 56076, at * 4 (Bankr.

E.D. Va. Jan. 10, 2010). It is not case dispositive that the Bankruptcy Code section 503(b) refers to "administrative expenses." 11 U.S.C. § 503.

That Bankruptcy Code section 503(b) uses the phrase "administrative expense" as opposed to the word "claim" is irrelevant. Indeed, an administrative expense can be both a claim and an administrative expense. In re Circuit City Stores, Inc., 2010 WL 56076, at * 4 ("[a]dministrative expenses appear to be a subset of "claims"). Nothing in the Bankruptcy Code provides that such term are or should be deemed to be mutually exclusive.

Rather, an administrative expense is simply a claim with higher priority. In fact, a number of Bankruptcy Code sections use the word "claim" when referring to administrative expenses. For example, under Bankruptcy Code section 1123(a) "a plan shall (1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2) . . . ." 11 U.S.C. § 1123(a)(1) (emphasis added). Section 507(a)(2) expressly refers to "administrative expenses allowed under section 503(b) of this title . . . ." 11 U.S.C. § 507(a)(2). See also Microage, Inc. v. Viewsonic Corp. (In re Microage, Inc.), 291 B.R. 503, 508 (B.A.P. 9th Cir. 2002) (citing statutory sections).

Moreover, the express text of Bankruptcy Code section 503(b) supports this interpretation. Specifically, Bankruptcy Code section 503(b) provides, in pertinent part, that "[a]fter notice and hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title . . . [.]" 11 U.S.C. § 503(b) (emphasis added); see also In re Circuit City Stores, Inc.,

2010 WL 56076, at * 4 ("§ 503(b) itself uses the terms "claims" and "expenses" interchangeably").

Based on the foregoing, it is evident that Congress did not intend the term "claim" and "administrative expense" to be mutually exclusive. Rather, Congress intended administrative expenses to be a subset of claims, those claims expressly identified in Bankruptcy Code section 503.

Congress' amendments to the Bankruptcy Code in 2005 did not alter this framework. Rather, as the Court is well aware, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") added new section 503(b)(9) to the Bankruptcy Code, which transformed certain pre-petition unsecured claims arising within the twenty days before the petition date into administrative expenses. Specifically, as previously stated Bankruptcy Code section 503(b)(9) provides, in pertinent part, that a court shall allow as an administrative expense:

> the value of any goods received by the debtor within 20 days before the commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 503(b)(9). Thus, by definition, section 503(b)(9) administrative expenses are pre-petition claims that have been deemed to have an administrative priority.

Additionally, Bankruptcy Code section 503(b)(9) was enacted as part of section 1227 to amend the provisions of the Bankruptcy Code that addressed

reclamation claims, which are nothing more than a particular class of pre-petition claims. See BAPCPA, section 1227; see also In re Ames Dept. Stores, Inc., 582 F.3d 422, 424 n.2 (2d Cir. 2009). Thus, it is clear that Bankruptcy Code section 503(b)(9) administrative expenses are claims and thus subject to section 502(d) of the Bankruptcy Code.

B. The Court Should Adopt the Majority Position on Section 502(d)'s Applicability to Section 503(b)(9) Administrative Expenses Claims

Notwithstanding the express, clear, and unambiguous language of Bankruptcy Code section 502(d), a minority of courts has rejected Bankruptcy Code section 502(d)'s application to section 503(b)(9) claims. See In re Plastech Engineered Products, Inc., 394 B.R. 147 (Bankr. E.D. Mich. 2008). In Plastech, the court held that Bankruptcy Code sections 502 and 503 are mutually exclusive. See also, ASM v. Ames Dept. Stores, Inc. (In re Ames Dept. Stores, Inc.), 582 F.3d 422, 431 (2d Cir. 2009).

However, these holdings ignore the express text of section 503(b). See 11 U.S.C. § 503(b) (expressly carving out "claims allowed under section 502(f)" from administrative expenses). In short, the Plastech court's interpretation of section 503(b) renders the clause "claims allowed under section 502(f)" superfluous. Accord NextWave, 537 U.S. at 302 (rejecting a statutory interpretation that renders provisions of a statute superfluous). The Supreme Court has made it abundantly clear that such an interpretation "must be rejected". Id. Indeed, the Supreme Court recently reaffirmed its holding that this Court should interpret statutes, including

Bankruptcy Code sections 502 and 503, "so that effect is given to all [their] provisions, so that no part will be inoperative or superfluous, void or insignificant[.]" Corley v. U.S., 129 S.Ct. 1558, 1566 (2009).

The reasoning of the majority of cases addressing administrative claims under Bankruptcy Code section 503(b) in general further supports the conclusion that section 502(d) is properly applicable to claims under Bankruptcy Code section 503(b)(9). See In re Circuit City Stores, Inc., 2010 WL 56076, at * 6 ("goals of equitable distribution and efficiency support conclusion that § 502(d) may be employed to temporarily disallow [503(b)(9) claims]"); In re Larsen, 80 B.R. 784, 790-91 (Bankr. E.D. Va. 1987) (stating that "regardless of [the claims'] priority status, this Court further finds that . . . [claimant] has failed to return unauthorized post-petition preferential transfers avoidable under § 549, for which she would be liable under § 550, thus her claims are barred by the terms of § 502(d) . . . ." (emphasis added)); Microage, 291 B.R. at 512 (concluding that "section 502(d) should have been raised as an affirmative defense before the bankruptcy court entered an order allowing [the administrative] claim"); see also Weber v. Mickelson (In re Colonial Servs. Co.), 480 F.2d 747, 749 (8th Cir. 1973) (section 57g precludes allowance of administrative expense claims until repayment of preferential transfers); Movitz v. Baker (In re Triple Star Welding, Inc.), 324 B.R. 778, 794 (B.A.P. 9th Cir. 2005) (concluding that administrative expense sought for $12,993.75 could not be paid from estate until claimant returned preference); Tidwell v. Atlanta Gas Light Co. (In re Georgia Steel, Inc.), 38 B.R. 829, 839-40 (Bankr.

M.D. Ga. 1984) (concluding that claimant could not setoff an otherwise allowable administrative expense against preferential transfers recoverable by trustee).

Accordingly, this Court should decline to follow the minority view of Plastech and Ames and instead should side with the majority position that 503(b)(9) claims are subject to Bankruptcy Code sections 502(d).

III. PMU IS NOT ENTITLED TO 503(B)(9) PRIORITY IN ANY EVENT BECAUSE THE PMU CLAIMS ARE NOT FOR GOODS DELIVERED WITHIN 20 DAYS BEFORE THE PETITION DATE

Bankruptcy Code section 503(b)(9) provides that a prepetition seller of goods will have an administrative expense for "the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business." 11 U.S.C. § 503(b)(9). Administrative claimants bear the burden of establishing that their claims qualify for priority status. In re Goody's Family Clothing, Inc., 401 B.R. 131, 137 n.27 (Bankr. D. Del. 2009) (citing In re Insilco Techs. Inc., 309 B.R. 111, 114 (Bankr. D. Del. 2004)).

To establish entitlement to an administrative expense pursuant to Bankruptcy Code section 503(b)(9), each Claimant must prove, by a preponderance of the evidence that: (1) the Claimant sold "goods" to the Debtors; (2) the goods were received by the Debtors within twenty days prior to the Petition Date; (3) the goods were sold to the Debtors in the "ordinary course of business." See In re Goody's Family Clothing, 401 B.R. at 133; 11 U.S.C. § 503(b)(9).

Here, PMU has not and cannot establish that it delivered goods to the Debtors within the requisite 20-day period prior to the Petition Date. See Declaration, pars. 4-5. The PMU Claims fail under section 503(b)(9) of the Bankruptcy Code. Therefore, the PMU Claims should be disallowed, or, for any PMU Claim for which PMU did not submit a separate general unsecured claim, reclassified as a general unsecured claim.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Plan Administrator respectfully requests that the Court enter an order granting the Plan Administrator the relief requested herein and in the Objection and such other relief as is just and proper.

Dated: _____
Wilmington, Delaware

_____

_____

Attorneys for Picken M. Drye,
Plan Administrator

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Forken, Inc., et al.[1]	Case No. _____ (___)
Debtors.	Jointly Administered
	[Re D.I. ___]

DECLARATION OF PICKEN M. DRYE IN SUPPORT OF OBJECTION OF PLAN ADMINISTRATOR TO CLAIMS OF PICK ME UP, INC. PURSUANT TO SECTIONS 105 AND 502(d) OF THE BANKRUPTCY CODE AND RULE 3007 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

I, Picken M. Drye, hereby declare that the following is true and correct to the best of my knowledge, information and belief.

1. I am the Plan Administrator for Forken, Inc. and Forken Lifts, Inc. (together, the "Debtors"). In the course and scope of my employment, I have been personally involved in the processing and reconciliation of claims against the Debtors' estates.

2. Except as otherwise set forth herein, all statements in this declaration are based on my personal knowledge, my familiarity with the processing and reconciliation of the PMU Claims as defined in the Objection of Plan Administrator to Claims of Pick Me Up, Inc. Pursuant to Sections 105 and 502(d) of

[1] The Debtors are Forken, Inc. and Forken Lifts, Inc.

the Bankruptcy Code and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Objection"), my review and familiarity with the Debtors' books and records, or my review of relevant documents.

A. PMU Claims Disallowed Pursuant to Bankruptcy Code Section 502(d)

3. After inquiry and consultation with legal counsel, upon information and belief, the Debtors made over $4.8 million (the "Avoidable Transfers") in transfers to Pick Me Up, Inc. ("Pick Me Up"), which transfers were made on account of antecedent debts, made within 90 days of the Petition Date and while the Debtors were insolvent, that allowed Pick Me Up to receive more than it would had such transfers not been made, and are likely not subject to any new value or other defense. I have initiated an adversary proceeding against Pick Me Up under Section 547 of the Bankruptcy Code to recover the Avoidable Transfers and such action remains pending before the United States Bankruptcy Court for the District of Delaware.

B. PMU Claims for Goods Not Received Within Twenty Days of Petition Date

4. To the best of my knowledge, information, and belief, the Debtors did not receive any of the goods identified in the PMU Claims within twenty days before the Petition Date. Rather, the Debtors received the goods not fewer than 35 days prior to the Petition Date, and consequently the PMU Claims are not entitled to priority status under section 503(b)(9) of the Bankruptcy Code.

5. The Debtors received all shipments of goods, including from

PMU, at their primary loading dock. As set forth in the loading dock register, a copy of which has been submitted to the Court, all of the goods identified in the PMU Claims were received by the Debtors no fewer than 35 days prior to the Petition Date.

6. Therefore, the PMU Claims should be disallowed, or, for any PMU Claim for which PMU did not submit a separate general unsecured claim, reclassified as a general unsecured claim.

CONCLUSION

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: _____

/s/ Picken M. Drye
Picken M. Drye

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: FORKEN, INC. Debtors.	Chapter 11 Case No. 10-99999 (OMG) Jointly Administered **Objection Deadline: May 10, 2011 at 4:00 p.m. (ET)** **Hearing Date: May 17, 2011 at 5:30 p.m. (ET)**

PICK ME UP'S OPPOSITION TO OBJECTION OF LIQUIDATING TRUSTEE TO CLAIMS PURSUANT TO SECTIONS 105 AND 502 OF THE BANKRUPTCY CODE AND RULE 3007 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Pick Me Up ("PMU") opposes the Objection of Liquidating Trustee to Claims Pursuant to Sections 105 and 502 of the Bankruptcy Code and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Objection") on the following grounds:

Preliminary Statement

1. Picken M. Drye (the "Liquidating Trustee") seeks to "temporarily" disallow PMU's "administrative claims," until the Liquidating Trustee adjudicates with PMU an avoidance adversary proceeding (the "PMU Adversary Proceeding[1]") and this Court (and any appellate courts) rule on the Liquidating Trustee's claims against PMU (and PMU satisfies any adverse judgment). Yet, to the best of PMU's knowledge, the Liquidating Trustee is not paying administrative claims such as PMU's. Because the Liquidating Trustee apparently does not intend to pay PMU presently, it is unclear what relief the Liquidating Trustee seeks;.

2. Similarly, it is unclear what relief the Liquidating Trustee seeks in the Objection that it does not seek in the PMU Adversary Proceeding, in which the Liquidating Trustee also seeks disallowance of PMU's claim—but after trial on the merits.

[1] Adversary Proceeding No. 10-59999 (OMG).

3. Further, the Liquidating Trustee's Objection is premised on the assumption that section 502(d) may be used to disallow a "claim" for administrative expenses under section 503(b)(9). There is no authority on that issue binding on this Court, and the majority of decisions on that issue hold that section 502(d) may not be used in that way.

4. Finally, even in a proper section 502(d) motion to disallow a claim, the movant (here, the Liquidating Trustee) must provide some evidence that there is a valid avoidance action against the creditor. In the Objection, the Liquidating Trustee has not even purported to try to provide any such evidence. Indeed, there is no valid avoidance action against PMU. In the PMU Adversary Proceeding, the Liquidating Trustee alleges that one of the debtors made some payments to PMU by check in the 90-day period before the debtors filed for bankruptcy. However, it appears the debtors made payments in the ordinary course and received subsequent new value. Hence, there is no valid avoidance action against PMU, and, therefore, no basis for disallowance under Bankruptcy Code section 502(d), even if Bankruptcy Code section 502(d) were applicable, which it is not.

Facts and Procedural Background

5. Before the Debtors filed their petitions in bankruptcy, PMU shipped goods to Forken Lifts, Inc. ("Forken"), one of the debtors. For certain shipments, PMU received payment. As to other shipments, PMU did not receive payment.

6. On April 1, 2010, the Debtors filed their petitions in bankruptcy.

7. Forken had received goods with an agreed (contractual) value of $5,100,000.00 in the twenty (20) days before the debtors filed their petitions in bankruptcy. (Declaration of Joe Blow ("Blow Decl.") ¶ 2).

8. On September 1, 2010, PMU filed its claim for administrative expenses under section 503(b)(9). (Blow Decl., ¶ 2).

9. On September 1, 2010, PMU also filed a proof of claim asserting priority in the amount of $5,500,00.00 under section 546 (reclamation). (Blow Decl., ¶ 3).

10. On August 24, 2010, the debtors filed their First Amended Plan of Liquidation (the "Plan"). In that Plan, the debtors did not propose to pay claims for administrative expenses under section 503(b)(9) on the effective date, as required by section 1129(a)(9)(A). Instead, the debtors referred to a "reserve" of $1 million for $5 million to $10 million of such claims. (The debtors claimed that they believe that the administrative claims were overstated, that the "reserve" would be sufficient to pay all such allowed claims, and that the debtors would replenish the reserve if it were insufficient.) (Plan at 36). The Court later confirmed the Plan. (Docket No. 849).

11. On November 1, 2010, the Liquidating Trustee filed the PMU Adversary Proceeding. In the PMU Adversary Proceeding, the Liquidating Trustee alleged that the debtors had made various transfers to PMU by check, and made various conclusory allegations for its preference claims under section 547(b) and section 548.

Argument

A. The requested relief is unnecessary.

12. In the Objection, the Liquidating Trustee seeks to "temporarily" disallow PMU' "administrative claims," apparently until this Court (and any appellate courts) rules on the Liquidating Trustee's claims against PMU (and PMU satisfies any adverse judgment). Yet, to the best of PMU' knowledge, the Liquidating Trustee is not paying administrative claims, such as PMU's. Therefore, it is unclear, as a practical matter, what relief the Liquidating Trustee seeks, as the Liquidating Trustee already is not paying PMU.

B. The requested relief is duplicative of the relief that the Liquidating Trustee seeks in the PMU Adversary Proceeding.

13. Similarly, it is unclear what relief the Liquidating Trustee seeks in the Objection that it does not seek in the PMU Adversary Proceeding, in which the Liquidating Trustee also seeks disallowance of PMU's claim —but after trial on the merits. The Liquidating Trustee does not explain why this Court should rule on the Liquidating Trustee's request for disallowance before (A) the Liquidating Trustee obtains a judgment in the PMU Adversary Proceeding against PMU and (B) PMU does not satisfy any such judgment, that is, the elements of section 502(d) are met (even assuming section 502(d) applies to PMU's administrative claims).

14. If the Liquidating Trustee's goal is to disallow PMU's claim so that the Liquidating Trustee may make distributions to other holders of administrative claims, without a "holdback" for PMU's claim, then the Liquidating Trustee's goal is improper. Even the Liquidating Trustee seems to acknowledge that any disallowance of PMU's claim would be "temporary" (albeit potentially for years). This is consistent with the principle that if (a) the Liquidating Trustee attempts to avoid any alleged transfers to PMU and (b) the Liquidating Trustee is successful in that attempt, PMU may return any avoided transfer, after which PMU will be entitled to the same distribution to which PMU would have been entitled if its claim had not be temporarily disallowed. In re Coral Petroleum, Inc., 60 B.R. 377, 383 (Bankr. S.D. Tex. 1986) (preference defendants "will be entitled to distribution after and to the extent [the preferences] have been returned to the estate."); see Scharffenberger v. United Creditors Alliance Corp. (In re Allegheny Health, Educ. & Research Found.), 292 B.R. 68, 94 (Bankr. W.D. Pa. 2003) ("§ 502(d) operates not as a forfeiture but rather as a temporary disability. 'It is temporary in the sense that the disallowance ceases when the creditor disgorges the property in question.'") (citations omitted)).

15. Further, any "temporary" disallowance that would permanently deprive PMU of a distribution it otherwise would receive would be contrary to the Plan's provision for *pro rata* distributions. (Plan at 3-4.)

16. Hence, the Liquidating Trustee must protect PMU's right to a distribution, even if there is a temporary disallowance. But the Liquidating Trustee does not offer any such protection, or provide a basis to deny distribution to PMU when the Liquidating Trustee makes other distributions.

C. PMU's claim for administrative expenses, including its claim under section 503(b)(9), cannot be disallowed under section 502(d).

17. In the Objection, the Liquidating Trustee assumes, but does not demonstrate, that a claim under section 503(b)(9) may be disallowed under section 502(d). PMU believes that this assumption is unwarranted.

18. The majority of cases hold that section 502(d) does not apply to section 503(b) administrative expenses, at least generally. COLLIER ON BANKRUPTCY ¶ 503.03[8] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010). As applied to section 503(b)(9) specifically, Collier notes that although cases have applied this rule to section 503(b)(9) claims, a recent case (In re Circuit City Stores Inc., 426 B.R. 560 (Bankr. E.D. Va. 2010)) deviated from those decisions, COLLIER ON BANKRUPTCY ¶ 503.16[2]. Collier's therefore states that "[i]t remains to be seen whether other courts will adopt [Circuit City's] view." Id.

19. There are no cases on this issue binding on this Court.[2] As Collier's notes, all but one of the cases concludes that a claim under section 503(b)(9) may not be disallowed under section 502(d). Compare In re Plastech Engineered Prods., Inc., 394 B.R. 147, 149-164 (Bankr.

[2] The Third Circuit apparently has not ruled on the issue of whether Section 502(d) can be used to disallow section 503(b) claims as a general matter, but another Delaware bankruptcy court has held that it cannot be so used. In re Lids Corp., 260 B.R. 680, 683-684 (Bankr. D. Del. 2001).

E.D. Mich. 2008) (a claim under section 503(b)(9) may not be disallowed under section 502(d)) and Southern Polymer, Inc. v. TI Acquisition, LLC (In re TI Acquisition), 410 B.R. 742, 748-751 (Banks. N.D. Ga. 2009) (same) with Circuit City, 426 B.R. at 573-579 (a claim under section 503(b)(9) may be disallowed under section 502(d)).

20. The cited cases set forth the arguments (based on statutory language, statutory structure, definitions of "claim" and "creditor," legislative history, and policy) in favor of and against each position in detail and eloquently, and PMU respectfully refers the Court to the discussion in each of the cases. PMU, however, notes one key error in the Circuit City decision.

21. The Court of Appeals decision that most nearly addresses this issue is ASM Capital LP v. Ames Dep't Stores Inc. (In re Ames Dep't Stores Inc.), 582 F.3d 422 (2d Cir. 2004). In Ames, the Court held that "claims" for administrative expenses under section 503(b) were not subject to disallowance under section 502(d). Id. at 423-424. The court in Circuit City correctly noted that the Court of Appeals in Ames expressly stated that the applicability of section 502(d) to section 503(b)(9) claims was not "specifically" before it. Circuit City, 426 B.R. at 570 n.12 (citing Ames, 582 F.3d at 424). The court in Circuit City then distinguished the facts in Ames by stating that in Ames, the "administrative claim" involved post-petition transactions, while the facts in Circuit City, as in all section 503(b)(9) scenarios, involved, by definition, pre-petition transactions. Id. Yet, this statement by the Circuit City court about the facts in Ames is simply wrong: In Circuit City, at least a portion of the "administrative claim" arose from reclamation, which, like a section 503(b)(9) claim, arises, by definition, from pre-petition transactions. Ames, 582 F.3d at 424. Yet, in Circuit City, the Court of Appeals held that section 502(d) could not be used to disallow such an administrative claim based on pre-petition transactions. Id. at 424, 432.

22. PMU respectfully submits that although the Ames court did not "specifically" address the issue of the interaction of section 502(d) and section 503(b)(9), the holding in Ames cannot be reconciled with the holding in Circuit City, and that this Court should apply Ames under section 546 [reclamation] — the precise type of claim that the Ames court held was not subject to disallowance under section 502(d) — to claims under section 503(b)(9).

23. Further, PMU's other administrative claims (including its claim for reclamation) are not subject to disallowance under section 502(d) under the express holding of Ames.

24. For the foregoing reasons, PMU respectfully submits that section 502(d) cannot be used to disallow PMU's administrative claims.

D. The Liquidating Trustee has not established a factual basis for disallowance under section 502(d).

25. In the Objection, the Liquidating Trustee merely alleges that it has filed the PMU Adversary Proceeding. The Liquidating Trustee does not attempt in the Objection to prove any claim against PMU. The Liquidating Trustee does not even disclose to this Court that the Liquidating Trustee has conceded that key factual allegations in the complaint in the PMU Adversary Proceeding (to wit, that debtor made payment by check to PMU) are inaccurate. Based on the Liquidating Trustee's bare allegation that it has sued PMU, the Liquidating Trustee asks this Court to disallow PMU's claim. Yet, the mere allegation of the filing suit is insufficient—and, in fact, the Liquidating Trustee will not succeed in its claims against PMU.

26. Section 502(d) provides that:

> Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property,

> for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(emphasis added). Hence, at a minimum, the objecting party must establish that the creditor is an entity from which property is "recoverable" or is a "transferee," not that the creditor "might be" such an entity, or is "alleged to be" such an entity. Yet, the Liquidating Trustee has not so established. See In re Mid Atlantic Fund, Inc., 60 B.R. 604, 609 (Bankr. S.D.N.Y. 1986) (section 502(d) merely "preclude[s] entities which have received voidable transfers from sharing in the distribution of the assets of the estate unless and until the voidable transfer has been returned to the estate.") (emphasis added).

27. Similarly, section 502(d) "is designed to be triggered after a creditor has been afforded a reasonable time in which to turn over amounts adjudicated to belong to the bankruptcy estate." Holloway v. I.R.S. (In re Odom Antennas, Inc.), 340 F.3d 705, 708 (8th Cir. 2003) (emphasis added) (citations omitted); see In re Lids, 260 B.R. 680, 684 (Bankr. D. Del. 2001) ("[t]o disallow a claim under section 502(d) requires a judicial determination that a claimant is liable .... [A] debtor wishing to avail itself of the benefits of section 502(d) must first obtain a judicial determination on the preference complaint."). Surely, PMU's "reasonable time" "to turn over amounts adjudicated to belong to the bankruptcy estate" cannot commence until the Court has been presented and has considered some evidence, so that it may "adjudicate," at least tentatively, that PMU has moneys to be turned over to the estate. See In re Lids, 260 B.R. at 684 ("merely commenced an adversary proceeding . . . is not enough to determine that a [claimant] is liable. The fact that the Debtor states that it is confident that it will be successful in the preference action is immaterial. Until the Debtor obtains a judgment against [the claimant] upon which [the claimant] is liable for a preference, section 502(d) is not applicable.").

28. Although the cases have not stated the nature of a proceeding on a motion for temporary disallowance under section 502(d), if the intent of the objecting party, like the Liquidating Trustee's intent appears to be, is to deny, or at least delay, the creditor a distribution to which the creditor otherwise would be entitled, the order of temporary disallowance is in the nature of, or at least akin to, a preliminary injunction. If so viewed, the objecting party is obligated to make an evidentiary showing. See, e.g., KOS Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004) ("A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.").

29. Although the Liquidating Trustee therefore bears some burden of proof, section 502(d) is silent as to the nature of that burden. But, surely, mere allegations cannot be sufficient. Otherwise, a debtor could, for example, avoid section 363(c)(2)'s restrictions on use of cash collateral by merely alleging that the secured creditor received a preference or a fraudulent transfer. That clearly cannot be enough, and the objecting party must prove — not merely allege — something. Yet, no matter what the burden of proof on the Liquidating Trustee is, the Liquidating Trustee has not met that burden: The Liquidating Trustee has not purported to make any showing against PMU, other than that the Liquidating Trustee has sued PMU. That is not enough.

30. A proof of claim that alleges sufficient facts establishes a "prima facie case" that a party objecting to such claim must overcome. Fed. R. Bankr. P. 3001(f); In re Stock Bldg. Supply, LLC, 433 B.R. 460, 463 (Bankr. D. Del. 2010).

31. Once a creditor files a prima facie valid proof of claim, the burden of proof shifts to the objecting party "to produce evidence sufficient to negate the prima facie validity of the filed claim." In re Allegheny Inter., Inc., 954 F.2d 167, 173-74 (3d Cir. 1992); In re TIE/Communications, Inc., 163 B.R. 435, 440-41 (Bankr. D. Del. 1994).

32. Specifically, a prima facie valid proof of claim is allowed until any objecting party presents the Court an objection supported by substantial evidence. In re Radnor Holdings Corp., 353 B.R. 820, 846 (Bankr. D. Del. 2006); In re United Cos. Financial Corp., 267 B.R. 524, 527 (Bankr. D. Del. 2000) (a party objecting to a proof of claim must provide credible evidence that negates at least one of the allegations necessary for the claim's legal sufficiency).

33. "[W]hen a trustee raises a preference objection to a creditor's claim, the very nature of the statutory scheme requires the bankruptcy court to adjudicate the preference matter before allowing or disallowing the claim." Cambridge Indus., Inc. v. Saginaw Bay Plastics, Inc. (In re Cambridge Indus. Holdings. Inc.), 2006 U.S. Dist. LEXIS 7939, at *7 (D. Del. 2006) (emphasis added). Clearly, for this Court to "adjudicate" the preference matter, the Court must consider evidence.

34. Moreover, an objection to a proof of claim that is based on "vague allegations" or merely "general averments" is insufficient to overcome the prima facie validity of a proof of claim. In re Lehning, 2007 WL 1200820, at *4 (Bankr. N.D.N.Y. Apr. 20, 2007); In re America's Shopping Channel. Inc., 110 B.R. 5, 8 (Bankr. S.D. Cal. 1990) (even if an avoidance claim is to be resolved by motion, rather than adversary proceeding, the objection must be resolved by, "as necessary, an evidentiary hearing," and objecting party must "produce evidence and facts."). Further, the Liquidating Trustee will not prevail on its claims against PMU. The

Liquidating Trustee has sued PMU for alleged preferences and fraudulent transfers, but PMU has received neither.

35. The elements for a preferential transfer under section 547(b) are well-known: A preferential transfer is "any transfer of an interest of the debtor in property

(1) to or for the benefit of a creditor'
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made
    (A) on or within 90 days before the date of the filing of the petition; or
    (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if --
    (A) the case were a case under chapter 7 [of the Code];
    (B) the transfer had not been made; and
    (C) such creditor received payment of such debt to the extent provided by the Code]."

11 U.S.C. § 547(b). Further, section 547(c) provides various affirmative defenses, even if the Liquidating Trustee were to establish the elements under section 547(b). The Liquidating Trustee will not be able to establish all of the elements under section 547(b) or to avoid the affirmative defenses under at least section 547(c)(1), (2), and (4).

36. Further, it appears that PMU would have a number of affirmative defenses under section 547(c), such as substantially contemporaneous exchange (section 547(c)(1)), ordinary course of business (section 547(c)(2)), and subsequent new value (section 547(c)(4)).

37. Likewise, the Liquidating Trustee's fraudulent transfer claim against PMU will fail. The Liquidating Trustee alleges that by reason of the transfers, PMU received more than reasonably equivalent value. As discussed above, PMU did not receive the subject transfers. Further, PMU received only payment of the agreed amounts for commodities (goods) pursuant to

contracts into which parties entered in the ordinary course, in accordance with their long-standing relationship. Nothing in these facts suggests a "fraudulent transfer." (Blow Decl., ¶ 6.)

D. PMU's claim should be allowed under Bankruptcy Code section 503(b)(9)

38. Pursuant to Bankruptcy Code section 503(b)(9), PMU is entitled to an administrative expense claim in the amount of $5.1 million. As set forth in the claim by PMU, and as PMU will establish at a hearing on this matter, these amounts are for goods delivered to the Debtors within twenty (20) days prior to the Petition Date. See PMU Claim; see also Blow Decl. ¶ 3. Moreover, such goods were sent by PMU in the ordinary course of the Debtors' business. See Blow Decl. ¶ 10.

39. As noted above, a proof of claim that alleges sufficient facts establishes a "prima facie case" that a party objecting to such claim must overcome. Fed. R. Bankr. P. 3001(f); In re Stock Bldg. Supply, LLC, 433 B.R. 460, 463 (Bankr. D. Del. 2010). In addition, once a creditor files a prima facie valid proof of claim, the burden of proof shifts to the objecting party "to produce evidence sufficient to negate the prima facie validity of the filed claim." In re Allegheny Inter., Inc., 954 F.2d 167, 173-74 (3d Cir. 1992); In re TIE/Communications, Inc., 163 B.R. 435, 440-41 (Bankr. D. Del. 1994). Specifically, a prima facie valid proof of claim is allowed until any objecting party presents the Court an objection supported by substantial evidence. In re Radnor Holdings Corp., 353 B.R. 820, 846 (Bankr. D. Del. 2006); In re United Cos. Financial Corp., 267 B.R. 524, 527 (Bankr. D. Del. 2000) (a party objecting to a proof of claim must provide credible evidence that negates at least one of the allegations necessary for the claim's legal sufficiency).

40. The bare assertions of the Liquidating Trustee in the Objection that "PMU has not and cannot establish that it delivered goods to the Debtors within the requisite 20-day period

prior to the Petition Date," see Objection at 11, are insufficient as a matter of law to overcome the prima facie validity. To the extent that the Liquidating Trustee presents admissible at the trial of this matter, as set forth herein, PMU has already presented sufficient evidence to support its valid administrative expense claim. Moreover, to the extent necessary, PMU will provide additional documentary evidence and testimony that will demonstrate clearly that its 503(b)(9) claim should be allowed in full.

Conclusion

41. For the foregoing reasons, the Liquidating Trustee has not met its burden to establish that PMU received an avoidable transfer, and hence cannot use section 502(d) to disallow PMU's claim. Accordingly, PMU respectfully requests that the Court deny the Objection as against PMU.

Dated: April 14, 2011

DEWEY, SCREWEM & HOWE LLP

/s/ Gonna Screwem

Gonna Screwem (DE Bar No. 9999)
8000 Delaware Avenue, Suite 7800
Wilmington, DE 19801
Tel: (302) 555-5555
Fax: (302) 555-5556
Email: gscrewem@deweyscrewem.com
Attorneys for Pick Me Up

PROFFERS

- Know what a proffer is – it is simply a lawyer reading into the record what a witness (who is present in the courtroom) would testify if called to the stand and permitted to offer testimony

- Know what a proffer is used for

    - In the bankruptcy context, practitioners typically use a proffer to build a factual record without the cumbersome process of direct examination

    - (In other contexts, especially in state court, a proffer is more commonly used to put excluded evidence on the record in order to preserve appellate rights. Specifically, when a witness is testifying in person, if the opponent objects to a portion of the testimony, the attorney examining the witness may make a proffer (or sometimes called an "offer of proof") regarding what the witness would have testified if the court had permitted her testimony. The attorney will do so in order to have a complete record for appellate purposes, so that the appellate court will be able to determine the propriety of the trial court's decision to exclude the evidence.)

- Know when to use a proffer

    - A proffer is used to manage time and to make the presentation efficient

    - It can also be an effective means of introducing the testimony of a witness that might be challenging to question on direct examination

- Know how to use a proffer

    - Before proceeding with a proffer, confirm that the Court is agreeable to hearing testimony through the use of a proffer

    - The witness whose testimony is the subject of a proffer must be present in the courtroom and available for cross examination

    - Read into the record the fact that the witness is present in the courtroom and available for cross examination and, if called to testify, would testify as follows, and then proceed with reading the witness's testimony into the record

- Know what to include

    - Include only facts, not legal argument

    - Include only those facts that are necessary for the relief requested; e.g., if you need emergency relief, you must establish a sufficient basis in the record for such relief. Do not make the Judge do your work for you, and do not force the Judge to issue a decision on an incomplete record.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE FORKEN, INC., et al., Debtors.	Case 10-99999 (OMG) Chapter 11
FORKEN LIQUIDATING TRUST, L.P., Plaintiff, v. PICK ME UP, INC. Defendant.	Adv. Proc. No. 10-211

EXPERT REPORT
OF DEWITT NESSE, CPA

Submitted on behalf of
Defendant Pick Me Up, Inc.

1. Introduction

The plaintiff, a litigation trust (the "Trust") formed under a bankruptcy plan in the chapter 11 cases of Forken, Inc., and its affiliates ("Forken"), sued Defendant Pick Me Up, Inc. ("PMU") to recover 11 payments or transfers totaling $15,803,132.13 as preferential transfers pursuant to Section 547 of the Bankruptcy Code.

Forken's petition date was April 1, 2009; accordingly, the preference period was from January 1, 2009 to April 1, 2009.[1]

2. Summary of Engagement

My firm was engaged by PMU to analyze the payments or transfers at issue in this lawsuit and, in particular, to determine whether any such payments or transfers were made to PMU in the ordinary course of business. A copy of the engagement agreement is attached hereto as Exhibit A.

3. Description of Work Performed, Information Considered, and Bases for Opinions

Upon the commencement of the engagement, I requested and obtained from PMU extensive data regarding the payment terms and payment history between PMU and Forken, including invoices, purchase orders, records of payments made, accounts receivable records, e-mails and correspondence between the parties, and PMU's bank records reflecting deposits from Forken. I reviewed and analyzed the salient data from the foregoing, and prepared written summaries reflecting my analysis and conclusions.

4. Opinions

Based upon my review and analysis of the foregoing data and information, it is my opinion that:

(a) The payment history between the parties from the beginning of 2008 through the end of 2009 shows that the average days outstanding was 39 days. *See* Exhibit B, Payment History Analysis.

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[1] There were 29 days in February 2000.

(b) The payment history for the preference period shows that the average days outstanding was 19 days. *See* Ex. B.

(c) Because the average days outstanding for the preference period payments was fully consistent with those made during the prior 2 year period, the preference period payments were unquestionably made in the ordinary course of business of the parties.

5. Compensation

My firm received a $10,000 retainer, to be applied to hourly charges and expenses. My hourly rate is billed at $450 per hour, and expenses incurred are reimburseable at their face amount. To date, I have expended 145 hours on this assignment, exclusive of in-court testimony, and my firm has incurred a total of approximately $4,325 in expenses. The compensation and expense reimbursement to be paid to my firm is not contingent on the outcome of this litigation or my testimony.

6. Qualifications

Ms. Nesse is the managing partner of the financial advisory services firm Locke Nesse, LLC, and supervises the firm's litigation advisory services group. She is a certified public accountant and a certified insolvency and restructuring advisor. She has been qualified as an accounting expert in the United States Bankruptcy Court for the District of Delaware on three prior occasions. Attached as Exhibit C is Ms. Nesse's current CV.

Dated: Wilmington, Delaware
May 17, 2011

/s/ DeWitt Nesse, CPA
DeWitt Nesse, CPA

EXHIBIT A:

CURRICULUM VITAE OF DEWITT NESSE

Education and Professional Licenses:

University of California, Santa Barbara (Bachelor of Arts in Business Economics, 1977)

Certified Public Accountant, Delaware (1986 to present)

Certified Insolvency and Restructuring Advisor (2002)

Employment History:

2006 – present
Lock Nesse, LLC
Co-founder and managing partner
Supervisor, Litigation Advisory Services

1991 - 2006
LitSupport, LLC
Director

1981-1991
Big Numbers Accounting, PLLC
Associate

Selected Prior Expert Testimony:

In re *Subprime Mortgage Investors, Inc.* (Bankr. D. Del. 2010)

In re *Outofstate Casinos, LLC* (Bankr. D. Del. 2010)

In re *Big Newspaper Conglomerate, Inc.* (Bankr. D. Del. 2011)

Selected Publications and Speaking Engagements

"Accounting and Financial Analysis In Preference Litigation," Turnaround Management Association (2006)

"Ordinary Is In The Eye Of The Beholder," American Bankruptcy Institute (2007)

"How Fuzzy Math Can Help You: The Lock Ness Monoline Sterterian©®™ Formula In Preference Litigation," Caribbean Insolvency Investors Symposium (2008)

EXHIBIT B:

PAYMENT HISTORY ANALYSIS

Exhibit 2

Ordinary Course of Business Analysis

Payment Dates (Prior to the Preference Period)

Invoice #	Order	Customer #	Customer Name	Invoice Date	Payment Date	Amount Paid	Payment Days from Invoice
#0000167	108	2941	Forken Lifts	10/25/2007	1/5/2008	$493,000.00	70
#0000168	109	2941	Forken Lifts	11/1/2007	1/16/2008	$651,710.60	75
#0000169	110	2941	Forken Lifts	12/1/2007	2/9/2008	$766,840.00	68
#0000170	111	2941	Forken Lifts	12/3/2007	2/18/2008	$766,840.00	75
X0000879	555	2941	Forken Lifts	1/14/2008	3/10/2008	$751,710.60	56
X0000882	556	2941	Forken Lifts	1/25/2008	3/20/2008	$685,520.00	55
X0000886	564	2941	Forken Lifts	2/11/2008	4/21/2008	$862,760.00	70
X0000869	552	2941	Forken Lifts	3/21/2008	5/18/2008	$807,420.00	57
X0000874	554	2941	Forken Lifts	4/3/2008	6/1/2008	$768,270.00	58
X0000906	576	2941	Forken Lifts	5/14/2008	7/11/2008	$766,840.00	57
X0000915	578	2941	Forken Lifts	5/25/2008	7/25/2008	$672,140.00	60
X0000916	579	2941	Forken Lifts	8/6/2008	8/31/2008	$735,610.70	25
X0000917	580	2941	Forken Lifts	8/7/2008	9/11/2008	$575,700.00	34
X0000918	579	2941	Forken Lifts	9/1/2008	9/29/2008	$1,229,750.00	28
X0000919	585	2941	Forken Lifts	9/9/2008	10/10/2008	$1,075,610.70	31
X0000920	578	2941	Forken Lifts	10/3/2008	11/17/2008	$1,171,700.70	44
X0000921	580	2941	Forken Lifts	11/1/2008	11/28/2008	$965,850.00	27
X0000922	579	2941	Forken Lifts	11/2/2008	12/1/2008	$894,700.00	29
X0000924	578	2941	Forken Lifts	11/20/2008	12/21/2008	$978,200.00	31
X0000925	580	2941	Forken Lifts	12/26/2008	1/12/2009	$875,700.00	16
X0000926	579	2941	Forken Lifts	12/19/2008	1/25/2009	$975,610.70	36
X0000927	585	2941	Forken Lifts	1/3/2009	2/1/2009	$775,610.70	28
X0000940	585	2941	Forken Lifts	1/10/2009	2/11/2009	$829,900.00	31
X0000941	586	2941	Forken Lifts	2/6/2009	3/12/2009	$866,000.00	36
X0000923	586	2941	Forken Lifts	4/1/2009	4/25/2009	$973,500.00	24
X0000936	590	2941	Forken Lifts	4/16/2009	5/10/2009	$778,200.00	24
X0000938	591	2941	Forken Lifts	5/1/2009	5/31/2009	$665,850.00	30
X0000939	593	2941	Forken Lifts	6/15/2009	7/12/2009	$849,900.00	27
X0000950	602	2941	Forken Lifts	6/30/2009	7/25/2009	$929,900.00	25
X0000952	601	2941	Forken Lifts	7/12/2009	8/14/2009	$873,410.70	32
X0000960	605	2941	Forken Lifts	8/23/2009	9/21/2009	$875,610.70	28
X0000960	605	2941	Forken Lifts	9/9/2009	10/2/2009	$977,000.00	23
X0000967	611	2941	Forken Lifts	11/5/2009	11/23/2009	$902,451.00	18
X0000969	612	2941	Forken Lifts	11/27/2009	12/14/2009	$829,900.00	17
X0000971	615	2941	Forken Lifts	12/7/2009	12/27/2009	$929,900.00	20
					Average	$29,528,617.10	39

Payment Dates (During the Preference Period)

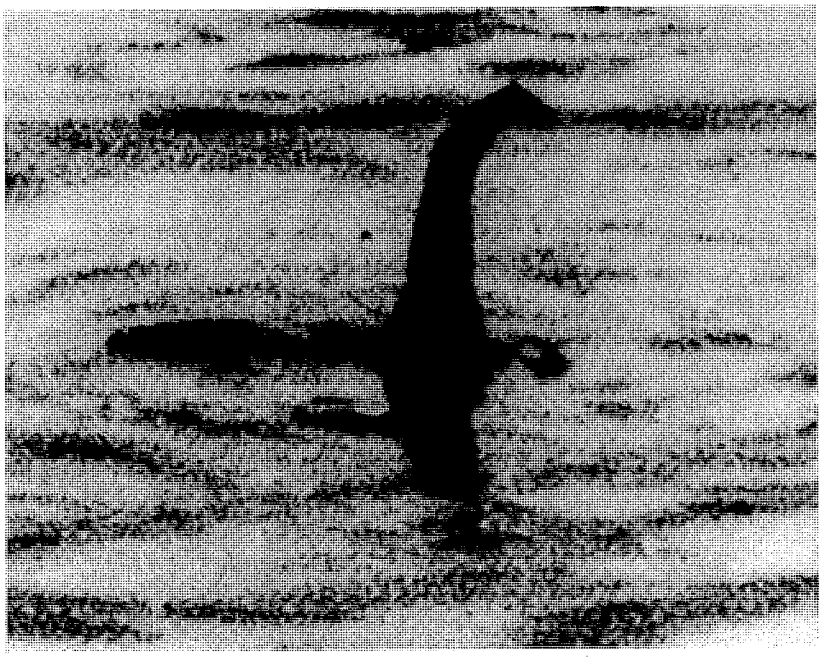
Invoice #	Order	Customer #	Customer Name	Invoice Date	Payment Date	Amount Paid	Payment Days from Invoice
X0000981	617	2941	Forken Lifts	1/2/2010	1/27/2010	$1,509,392.41	25
X0000984	626	2941	Forken Lifts	1/21/2010	2/3/2010	$1,415,241.88	12
X0000990	631	2941	Forken Lifts	1/23/2010	2/10/2010	$1,502,223.50	17
X0000999	639	2941	Forken Lifts	1/31/2010	2/17/2010	$1,477,000.00	17
X0001001	640	2941	Forken Lifts	2/3/2010	2/24/2010	$1,502,451.00	21
X0001007	640	2941	Forken Lifts	2/10/2010	3/2/2010	$1,500,038.77	22
X0001122	696	2941	Forken Lifts	2/19/2010	3/9/2010	$1,499,266.13	20
#0000199	133	2941	Forken Lifts	2/26/2010	3/16/2010	$1,496,020.16	20
#0000203	135	2941	Forken Lifts	3/2/2010	3/23/2010	$1,299,672.34	21
#0000173	114	2941	Forken Lifts	3/8/2010	3/30/2010	$1,299,452.94	22
#0000181	119	2941	Forken Lifts	3/13/2010	3/31/2010	$1,302,373.00	18
					Average	$15,803,132.13	20

Defendant's Exhibit 3

Invoice #	Customer Name	Invoice Date	Payment Date	Amount Paid	Payment Days from Invoice
X0000981	Forken Lifts	1/2/2010	1/27/2010	$1,509,392.41	25
X0000984	Forken Lifts	1/21/2010	2/3/2010	$1,415,241.88	12
X0000990	Forken Lifts	1/23/2010	2/10/2010	$1,502,223.50	17
X0000999	Forken Lifts	1/31/2010	2/17/2010	$1,477,000.00	17
X0001001	Forken Lifts	2/3/2010	2/24/2010	$1,502,451.00	21
X0001007	Forken Lifts	2/10/2010	3/2/2010	$1,500,038.77	22
X0001122	Forken Lifts	2/19/2010	3/9/2010	$1,499,266.13	20
#0000199	Forken Lifts	2/26/2010	3/16/2010	$1,496,020.16	20
#0000203	Forken Lifts	3/2/2010	3/23/2010	$1,299,672.34	21
#0000173	Forken Lifts	3/8/2010	3/30/2010	$1,299,452.94	22
#0000181	Forken Lifts	3/13/2010	3/31/2010	$1,302,373.00	18
			Average	$15,803,132.13	**20**

Application of Lock Nesse Monoline Sterterian©®™ Formula:

1. Pre-preference average days to pay = 39
2. 39 days X Locke Nesse Monoline Sterterian©®™ formula, as follows:



= 28 days

3. Conclusion: 28 is greater than 20, thus *no liability!!*