EXHIBIT "A"

[Werkheiser Declaration]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
KB TOYS, INC., et al.,	)	Case No. 04-10120 (WS)
	)	
Debtors.	)	Jointly Administered
	)	
	)	

DECLARATION OF GREGORY W. WERKHEISER

I, GREGORY W. WERKHEISER, declare:

I. INTRODUCTION

1. This declaration is made in opposition to the Motion To Disqualify Morris, Nichols, Arsht & Tunnell, dated December 12, 2005 (D.I. 3804) (the "Disqualification Motion"), filed by ASM Capital, L.P. and ASM Capital II, L.P. (together, "ASM"), and the related declaration of Douglas Wolfe (the "Wolfe Declaration"). By the Disqualification Motion, ASM seeks to disqualify Morris, Nichols, Arsht & Tunnell LLP ("Morris Nichols" or the "Firm") from acting as counsel to Bain Capital Fund VII and certain other persons and entities affiliated therewith (collectively, "Bain") in connection with the bankruptcy cases of KB Toys, Inc. and its affiliated debtors (collectively, the "Debtors"), jointly administered under Case No. 04-10120 (WS) (the "Bankruptcy Cases") and pending in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), and certain related litigation. Except as otherwise provided herein, I make this declaration upon personal knowledge and could competently testify to the matters set forth herein.

2. I have been a partner with Morris Nichols since January, 2005, and was an associate with the Firm since September 1997. I have been duly admitted to

practice in, *inter alia,* the State of Delaware, the United States District Court for the District of Delaware and the United States Court of Appeals for the Third Circuit.

II. MORRIS NICHOLS' ENGAGEMENT BY ASM

3. I first became aware of ASM's involvement in the Bankruptcy Cases on or about November 18, 2004, when I was called by an attorney at Traub, Bonacquist & Fox LLP ("TBF"), counsel to the Official Committee of Unsecured Creditors (the "Creditors Committee") in the Bankruptcy Cases.[1] I learned that ASM through its post-petition claims trading activities had acquired a substantial number and amount of unsecured claims against the Debtors and that ASM had been in contact with TBF on several occasions regarding the possibility of serving on the Creditors Committee and had been seeking more information about the status of the Bankruptcy Cases and likely recoveries for unsecured creditors. I was informed that ASM was considering hiring counsel to aid it in pursuit of these goals and that TBF was prepared to recommend my Firm to ASM if we were available to represent ASM in the Bankruptcy Cases. I heard nothing further about the possible representation of ASM for nearly two weeks.

4. In my experience, organizations like ASM that regularly engage in the trading of unsecured bankruptcy claims for profit are sophisticated enterprises. Such organizations generally have extensive experience with complex bankruptcy proceedings. When I ultimately met Adam Moskowitz, whom I understood to be ASM's President, and Douglas Wolfe, whom I understood to be ASM's General Counsel, it quickly became

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[1] Over the last several years, Morris Nichols and TBF have worked together with and opposite of one another on several Delaware bankruptcy cases. This information was shared with ASM at the outset of the representation.

clear to me that ASM would be a sophisticated client and that they possessed such expertise.

5. I and Morris Nichols were not actually engaged by ASM until December 1, 2004. On that date, Messrs. Moskowitz and Wolfe telephoned me and engaged Morris Nichols to assist ASM to obtain a voice on the Creditors Committee. I was the principle attorney assigned to this engagement.

III. ASM GIVES INFORMED CONSENT TO THE BAIN REPRESENTATION

6. To the best of my knowledge, Morris Nichols did not represent Bain in the Bankruptcy Cases before late February 2005. I personally have not represented Bain in any fashion in connection with the Bankruptcy Cases. Nor have I represented Bain in any other matter.

7. In late February 2005, one of my partners informed me that Bain's then lead counsel, Ropes & Gray LLP, had requested that Morris Nichols act as Bain's Delaware counsel in the Bankruptcy Cases. We discussed whether the Firm's concurrent representation of Bain and ASM was permissible under the Delaware Rules of Professional Conduct and concluded that there was no ethical impediment to undertaking both representations. Nevertheless, as a courtesy to ASM and out of an abundance of caution, I agreed to call ASM to disclose that Morris Nichols was undertaking the Bain representation.

8. On February 25, 2005, I called Mr. Wolfe and disclosed to him that my Firm was undertaking the representation of Bain in the Bankruptcy Cases. The timing of the call was significant because Bain's then lead counsel had requested that Morris Nichols assist with the filing later that same day of an objection on behalf of Bain

to the Creditors Committee's motion seeking authority to prosecute claims against Bain. I explained to him that Bain also was a client of my Firm in matters unrelated to the Bankruptcy Cases. I also discussed with him my beliefs that my Firm's representation of Bain was not directly adverse to ASM's interest and that it would not materially limit my Firm's representation of ASM because I would have no part of the Bain representation. Additionally, in my conversation with Mr. Wolfe, I reminded him that Bain was connected with potential claims related to certain stock redemption and recapitalization transactions involving the Debtors which occurred in 2002 (such transactions, the "Recapitalization Transactions," and such claims, the "Recapitalization Claims") and might be the target of claims by the Creditors Committee or other parties. After hearing all of this, Mr. Wolfe did not object to the Bain representation.

9. I note that the date that my discussion with Mr. Wolfe concerning the Bain representation occurred was my last work day before my wife gave birth to our first child. Thereafter, I was out of the office for approximately two weeks on paternity leave. Regretfully, it escaped my attention to send a follow up written communication to Mr. Wolfe confirming the substance of our conversation.

10. From the very outset of my Firm's representation of ASM, Messrs. Moskowitz and Wolfe were aware of the Recapitalization Claims and that Bain was the potential target thereof. For instance, in an email to Messrs. Moskowitz and Wolfe dated December 1, 2004 – the very first day of my Firm's engagement with ASM – I summarized a conversation with Susan Balaschak, Esquire, of TBF in which she generally described the Recapitalization Transaction and made reference to the existence of claims arising therefrom and the fact that they were viewed as a potential substantial

source of recoveries for unsecured creditors. See Exhibit "A-1" hereto. Moreover, on February 14, 2005, I had emailed Mr. Wolfe copies of the Creditors Committee's motion for authority to prosecute the Recapitalization Claims against Bain and the complaint of Big Lots Stores, Inc. ("Big Lots") against Bain asserting claims related to the Recapitalization Transactions.[2] See Exhibits "A-2" and "A-3" hereto. These pleadings made clear that Bain was the target of the Recapitalization Claims and that Creditors Committee considered them an important potential source of recoveries.

11. Not only did I directly disclose to ASM the context of Bain's involvement in the Bankruptcy Cases, but the existence of potential Recapitalization Claims and their perceived importance to the Creditors Committee also was evident to ASM from documents publicly available on the Bankruptcy Court's docket.[3] The Bankruptcy Court's Order, dated September 27, 2004 (D.I. 1473), and Order, dated November 15, 2004 (D.I. 1668), both made reference to the Recapitalization Claims and contained provisions intended to preserve the Recapitalization Claims. Similarly, by the filing of their Verified Complaint for Declaratory and Injunctive Relief on February 18, 2005, the Debtors commenced the adversary proceeding against Big Lots captioned *KB Toys, Inc., et al. v. Big Lots Stores, Inc.,* Adv. Pro. No. 05-50475 (WS). By the adversary proceeding, the Debtors sought to enjoin Big Lots from prosecuting claims relating to the

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2 On or about the time Big Lots filed its complaint against Bain, it resigned from the Creditors Committee. Big Lots' resignation from the Creditors Committee was of interest to ASM because it created a vacancy that ASM potentially could fill. Furthermore, I thought this dispute might be of general interest to ASM as a creditor.

3 In my experience, bankruptcy claims traders such as ASM actively monitor bankruptcy dockets to keep abreast of developments that might bear on the anticipated recoveries available on claims they hold.

Recapitalization Transactions against Bain on the theory, among others, that the claims belonged to the Debtors' estates and had value. As reflected on the docket, the Creditors Committee moved to intervene in this adversary proceeding.

12. Despite the foregoing, Mr. Wolfe now contends that I disclosed only my Firm's representation of Bain in matters unrelated to the Bankruptcy Cases and never disclosed or obtained ASM's consent concerning my Firm's representation of Bain in the Bankruptcy Cases. Mr. Wolfe's account of our conversation is simply wrong. My call to Mr. Wolfe was directly prompted by the fact that Bain was requesting Morris Nichols to file a pleading on its behalf in the Bankruptcy Cases later that same day. The express point of my contacting ASM on February 25, 2005 was to confirm that there was no impediment to Morris Nichols representing Bain in the Bankruptcy Cases prior to making that filing. But for the fact that Morris Nichols was undertaking a representation of Bain in the Bankruptcy Cases, there would have been no reason to contact ASM regarding Bain at that time.[4]

IV. LEGAL SERVICES RENDERED BY MORRIS NICHOLS TO ASM

13. ASM did not engage Morris Nichols until December 1, 2004, nearly a year after the Bankruptcy Cases were commenced. The bulk of the legal services I and Morris Nichols performed for ASM related to ASM's efforts to gain representation on the Creditors Committee. Over time, ASM also asked Morris Nichols

[4] It is my understanding that counsel for the Creditors Committee was aware nearly from the outset of Morris Nichols' concurrent representation of Bain and ASM, but voiced no concern about it and took no steps to challenge it.

to assist it with certain other matters, none of which were related to the prosecution of the Recapitalization Claims.

Morris Nichols Assists ASM In Its Efforts To Obtain Representation On The Creditors Committee

14. When Morris Nichols was first engaged by ASM on December 1, 2004, Messrs. Moskowitz and Wolfe explained that the immediate matter for which they sought assistance was to attempt to arrange for ASM to address the existing members of the Creditors Committee at a telephonic meeting that was scheduled to occur later that day. Later on December 1, 2004, I contacted Ms. Balaschak of TBF to inquire whether ASM could address the members of the Creditors Committee. Ms. Balaschak was noncommittal, but did share some general information about the status of the Bankruptcy Cases.[5] Among the topics Ms. Balaschak touched on briefly was an order recently entered by the Bankruptcy Court which extended the deadline through February 2005 for the Debtors to file a plan of reorganization and solicit acceptances thereof on the conditions that the Debtors not seek to do anything to compromise or impair the Recapitalization Claims and that a plan would be filed only with the prior consent of the Creditors Committee.[6] Ms. Balaschak, however, shared no details about the Recapitalization Transactions or the Recapitalization Claims.

15. ASM requested that I attempt to locate copies of certain of the public documents referenced by Ms. Balaschak. Additionally, ASM asked that I attempt

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5 Ultimately, neither I nor ASM was invited to join the call.

6 In sharing this information, Ms. Balaschak was merely summarizing the terms of the Bankruptcy Court's Order, dated November 15, 2004 (D.I. 1668), which is publicly available on the Bankruptcy Court's docket.

to locate some additional information about the Recapitalization Claims. Because we had no access to nonpublic information in the Bankruptcy Cases, I asked one of my colleagues to review the publicly filed fee applications of the Creditors Committee's professionals and other documents publicly filed on the Bankruptcy Court's docket to determine what, if any, information was publicly available about the Recapitalization Transactions. These efforts produced virtually no information about the Recapitalization Transactions or the Recapitalization Claims.

16. In January and February 2005, at ASM's request, I continued my efforts on behalf of ASM in furtherance of its goals of obtaining representation on the Creditors Committee. The Creditors Committee was generally reluctant to include ASM in its deliberations or to share information with ASM, which had continued acquiring claims in the Bankruptcy Cases.

17. During this period, Messrs. Moskowitz and Wolfe and I also discussed various strategies by which ASM might leverage its position as a large unsecured creditor to obtain representation on the Creditors Committee.[7] We eventually concluded that ASM could best press its point by objecting to the joint motion of the Debtors' and the Creditors Committee to extend the period during which only the Debtors and the Creditors Committee had a right to file a plan of reorganization (the "Exclusivity Motion"). Accordingly, during mid to late February 2005, I, with the

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[7] The Wolfe Declaration references my entries recording time on behalf of ASM with the description "litigation strategy." See Wolfe Dec. ¶ 12. It is obvious to me from review of the surrounding time entries that the only "litigation strategy" at issue was the best means for ASM to secure a position on the Creditors Committee.

assistance of an associate, prepared several iterations of an objection to the Exclusivity Motion.

18. Contemporaneous with the preparation of the objection to the Exclusivity Motion, I continued to negotiate on ASM's behalf with counsel for the Creditors Committee and others. One particular point of contention with the Creditors Committee was ASM's belief that the Creditors Committee was conflicted because it was dominated by a few large toy manufacturers. Eventually, ASM and the Creditors Committee reached an understanding pursuant to which ASM agreed to file a more limited objection to the Exclusivity Motion and the Creditors Committee agreed to grant ASM *ex officio* status on the Creditors Committee, to support ASM's request to the United States Trustee for the District of Delaware (the "US Trustee") to be made a formal member of the Creditors Committee and, subject to ASM's execution of an appropriate confidentiality agreement, to share information regarding the Debtors' reorganization, sale and liquidation prospects that had been made available to the other members of the Creditors Committee. At no point during these discussions were the Recapitalization Claims ever placed at issue, and I received no confidential information related to the merits of the Recapitalization Claims through these discussions.

19. Around the time of my return to the office on March 14, 2005, I learned that, notwithstanding ASM's agreement with the Creditors Committee, the Creditors Committee was refusing to allow ASM to participate in meetings of the Creditors Committee or to receive information distributed to the members of the Creditors Committee. I was told by the Creditors Committee's counsel that the Debtors were objecting to ASM's participation on the Creditors Committee, arguing that ASM

should be subject to heightened confidentiality obligations because of its status as a party engaged in the active trading of claims in the Bankruptcy Cases. What followed was an arduous, month long negotiation with the Debtors and the Creditors Committee over the terms of a confidentiality agreement which continued until a confidentiality agreement and related consent to the Creditors Committee's bylaws were finalized and signed by ASM on or about April 8, 2005. During this period, neither I nor, to the best of my knowledge, ASM received any confidential information relating to the Bankruptcy Cases, including, without limitation, relating to Bain or the Recapitalization Claims.

20. Thereafter, on April 8, 2005, Ms. Balaschak emailed copies of certain documents that she indicated had been assembled for ASM in anticipation of it joining the Creditors Committee as an *ex officio* member. At the time I did not review the documents, but immediately forwarded them to Messrs. Moskowitz and Wolfe without comment. Subsequently, in the context of preparing this declaration, I have examined such documents and determined that they principally contain financial information about the Debtors' business operations and discussions of the Debtors' going forward business plans. The documents do not discuss the substance of the Recapitalization Claims.

21. Shortly thereafter, I helped arrange a meeting between Mr. Moskowitz and Mr. Traub of TBF, which I understood at the time was for the purpose of helping ASM to get up to speed on matters being considered by the Creditors Committee. I did not attend or participate in the meeting, and did not discuss the substance of the meeting with any of the participants. In fact, I have never attended or participated in any

meeting of the Creditors Committee, or the Post-Confirmation Committee or the Residual Trust Advisory Board which succeeded it under the Debtors' chapter 11 plan.

22. On a few isolated occasions in late April and early May 2005, following our conversations concerning the US Trustee's inaction on ASM's request to be appointed as a full member to the Creditors Committee, Mr. Wolfe forwarded to me, without comment, emails he received from counsel to the Creditors Committee. These emails in general discussed the Creditors Committee's ongoing plan negotiations with the Debtors. My understanding was that Mr. Wolfe forwarded these emails to emphasize that the Creditors Committee had important upcoming business. Mr. Wolfe expressed concern that ASM, which did not have a right to vote on Creditors Committee matters as an *ex officio* member, would not have an adequate voice in the Creditors Committee's decision making process. Given the context in which they were received, I did not read the emails or any of their attachments closely at the time and provided no meaningful advice to ASM concerning the substance thereof.

ASM Asks Morris Nichols To Assist
It With Discrete Plan Issues Unrelated To
Bain Or The Recapitalization Claims

23. ASM next requested legal services from Morris Nichols in early to mid June 2005 when it elicited my assistance in connection with discussions it was having about the possibility of funding the acquisition of convenience class claims using the chapter 11 plan as a vehicle and certain other plan issues unrelated to Recapitalization Claims. Shortly after contacting me regarding this issue, ASM apparently determined that the proposal was not workable and did not seek any further legal services from me related to this matter.

24. Around the same, Mr. Wolfe called stating that he believed ASM was being improperly excluded from the post-confirmation governance of the creditors trust being established under the Plan. At Mr. Wolfe's request, during the period from June 14, 2005 through approximately June 27, 2005, I interceded on ASM's behalf and made some telephone calls in an attempt to help resolve the situation. Thereafter, I was instructed to take no further action on ASM's behalf with regard to this matter.

25. At no point in assisting ASM with these matters did I discuss or advise ASM with respect to any matters relating to Bain or the Recapitalization Claims or receive confidential information or documents relating to the Recapitalization Claims.

ASM Seeks Assistance From Morris Nichols Related To ASM's Post-Confirmation Claims Trading Activities

26. Following June 2005, I provided only limited legal services to ASM until late October 2005.[8] Mr. Wolfe's contention that he discussed with me the substance of his August 11, 2005 meeting with the Creditors Committee is false. I have never participated in any conversation with Mr. Wolfe in which we discussed the details of litigation against Bain, the selection of counsel to prosecute the Recapitalization Claims or a so-called "Recapitalization Claims Update" purportedly prepared for the Creditors Committee by Ernst & Young.[9] Moreover, I never discussed with Mr. Wolfe

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[8] On September 29, 2005, I did email Mr. Wolfe to bring his attention to the filing of a omnibus claims objection which challenged certain claims held by ASM. However, as the email expressly noted, I did so solely as a courtesy, because ASM had previously instructed me that Morris Nichols' representation of ASM was limited and did not extend to representing it in claims matters.

[9] Had we discussed this document, I would have expected to find a copy of it in my email, correspondence or other files related to the ASM representation. However, I can locate no record of such a document.

the substance of a meeting of the Creditors Committee that allegedly occurred on August 11, 2005.

27. Nor did I ever engage in discussions with Mr. Wolfe concerning the Recapitalization Claims in which the strengths and weaknesses of the Recapitalization Claims were addressed. Likewise, Mr. Wolfe never discussed with me the presentations made by the law firms who were seeking to act as counsel to prosecute the Recapitalization Claims or the litigation strategies such firms were advancing.

28. Contrary to the suggestions of the Wolfe Declaration, Wolfe Dec. ¶¶ 18-21, I never discussed with Mr. Wolfe or any other person any strategic or tactical matters related to prosecution of the Recapitalization Claims, let alone whether it would be better for the Post-Confirmation Committee to sue Bain in Massachusetts rather than Delaware. As such, I never could have disclosed such information to Bain or any other person or entity because I simply was not in possession of such information.

29. On or about October 26, 2005, Mr. Wolfe contacted me to request Morris Nichols' assistance with a dispute that had arisen with TBF, now apparently acting as counsel to the Residual Trustee, over whether ASM could simultaneously sit as a member of the Post-Confirmation Committee and engage in the trading of claims in the Bankruptcy Cases. Although a plan had been confirmed more than two months earlier on August 18, 2005, this was the first time ASM shared with me that it had been appointed to the Post-Confirmation Committee, which had responsibility for oversight of the prosecution of the Recapitalization Claims.

30. After reviewing the plan and the confidentiality agreement, doing some limited research concerning ASM's potential fiduciary obligations and making a

few telephone calls in late October 2005, I was instructed by Mr. Wolfe that ASM would handle the matter.[10] I heard nothing further about the matter from ASM. I had no access to confidential documents or information related to Bain or the Recapitalization Claims in connection with this matter and provided no legal advice to ASM relating to Bain or the Recapitalization Claims in connection with this matter.

V. ASM RENEGES ON ITS AGREEMENT TO WITHDRAW THE DISQUALIFICATION MOTION

31. I had no further contact from ASM until Mr. Wolfe called me on November 15, 2005. At that time, Mr. Wolfe falsely accused me of having misled him about my Firm's representation of Bain. I attempted to discuss the matter with Mr. Wolfe, but he abruptly terminated the telephone call.

32. Given Mr. Wolfe's refusal to communicate further with me, on November 17, 2005, I transmitted a letter to Mr. Wolfe confirming that Morris Nichols' representation of ASM had concluded. Thereafter, I filed a notice (Docket Item 3596) in the Bankruptcy Cases withdrawing Morris Nichols' appearance as ASM's counsel.

33. On December 2, 2005, I received a letter from David M. Friedman of Kasowitz, Benson, Torres & Friedman LLP ("Kasowitz Benson"), ASM's current counsel, that contained vague and unsupported allegations of ethical violations and demanded that my Firm immediately withdraw as counsel for Bain. Although I requested additional information concerning the alleged ethical violations and attempted to explore

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[10] My request to Mr. Wolfe to share a copy of the Post-Confirmation Committee's bylaws was made in furtherance of determining whether ASM (which had agreed to the bylaws without seeking my input or advice) had agreed thereby in any way to restrict its claims trading activities. Nothing in the bylaws is in any way germane to the Recapitalization Claims.

a consensual resolution of the matter with Mr. Friedman, I received no immediate response.

34. On December 12, 2005, my partner Robert Dehney received via email a copy of the Disqualification Motion from Michael Harwood, Esquire, of Kasowitz Benson. See Exhibit "A-4". Mr. Harwood's email stated that the Disqualification Motion would be filed with the Bankruptcy Court the next day.

35. It is my understanding that Mr. Harwood subsequently agreed with Morris Nichols on behalf of ASM to defer filing the Disqualification Motion to allow the parties an opportunity explore a consensual resolution of the dispute. The following day, however, Mr. Dehney was forwarded an email by Mr. Harwood indicating that the Disqualification Motion had, in fact, been filed. See Exhibit "A-5". The email forwarded by Mr. Harwood was from an attorney at Zuckerman Spaeder LLP, the law firm which represents the Post-Confirmation Committee in litigation with Bain.

36. Notwithstanding the fact that Morris Nichols believes the Disqualification Motion to be entirely without merit, Morris Nichols ultimately concluded that it would voluntarily withdraw from representation of Bain if, in so doing, the Disqualification Motion could be resolved without further distraction and consumption of resources. To this end, on December 30, 2005, I spoke with Mr. Harwood and we agreed that, conditioned upon ASM's withdrawal of the Disqualification Motion, Morris Nichols would withdraw as counsel for Bain. I confirmed this agreement to Mr. Harwood both in an email, dated December 30, 2005, and in a letter, dated January 6, 2006. See Exhibits "A-6" and "A-7".

37. In accordance with the parties' agreement, Morris Nichols substituted out as counsel for Bain in all matters in which Morris Nichols had appeared. ASM, however, did not follow through with its commitment to withdraw the Disqualification Motion despite several of my follow up inquiries.

38. Subsequently, ASM attempted to condition its withdraw of the Disqualification Motion on Morris Nichols' turnover to it of all documents related to the ASM representation. I agreed on behalf of my Firm to turnover those documents to which ASM was entitled under Rule 1.16(d) of the Delaware Rules of Professional Responsibility, but made clear that our undertaking to provide those documents was independent of ASM's obligation to withdraw the Disqualification Motion. See Exhibit "A-8". On January 12, 2006, I tendered to ASM all of the documents I understood it was entitled to under Rule 1.16(d).

39. Prior to January 24, 2006, the original hearing date for the Disqualification Motion, I and Morris Nichols had been lead to believe that nothing would go forward concerning the Disqualification Motion at that time. Mr. Friedman had previously provided me with assurances both in an email which accompanied his January 18th letter and in a prior telephone conversation that ASM would not proceed with the Disqualification Motion at the January 24th hearing. See Exhibit "A-9". Two agendas (Docket Items 4171 & 4237) were also filed in advance of the January 24th hearing that stated that the Disqualification Motion was resolved and would be withdrawn.

40. Notwithstanding these repeated assurances, I understand that Norman Eisen of Zuckerman Spaeder LLP, counsel for the Post-Confirmation Committee, attempted to discuss the merits of the Disqualification Motion with the Court

at the January 24th hearing and presented Judge Shapero with a binder of materials related thereto. Mr. Eisen's actions are detailed in a transcript of the January 24, 2006 hearing, attached as Exhibit "A-10" hereto.

41. In light of the foregoing, Morris Nichols has determined that it must file an opposition to the Disqualification Motion on the grounds that ASM has breached its agreement to withdraw the Disqualification Motion and because, given that the Firm has substituted out from representing Bain, there is no relief to which ASM is entitled.

Executed this 7th day of February and signed under penalty of perjury.

Gregory W. Werkheiser

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