

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: . Case No. 17-02316(EE)
. .
. .
FRANCHISE SERVICES OF . 501 E. Court Street
NORTH AMERICA INC., . Jackson, Mississippi 39201
. .
Debtor. .
. . October 5, 2017
. . 9:47 a.m.
.

TRANSCRIPT OF EVIDENTIARY HEARING ON MOTION TO DISMISS [188];
MOTION TO DISMISS DEBTOR FOR PETITION HAVING BEEN FILED WITHOUT
PROPER CORPORATE AUTHORITY, FILED BY CREDITORS DANIEL RAYMOND
BOLAND, MACQUARIE CAPITAL (USA) INC., MICHAEL JOHN
SILVERTON (121); JOINDER FILED BY STOCKHOLDER BOKETO LLC (168);
RESPONSE AND OBJECTION OF FRANCHISE SERVICES NORTH AMERICA TO
THE MOTION TO DISMISS (186); RESPONSE AND OBJECTION TO THE
MOTION TO DISMISS OF MACQUARIE (206); RESPONSE AND OBJECTION OF
FRANCHISE SERVICES NORTH AMERICA TO THE MOTION TO DISMISS (221)
BEFORE HONORABLE EDWARD ELLINGTON
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Butler Snow LLP
By: STEPHEN W. ROSENBLATT, ESQ.
CHRISTOPHER R. MADDUX, ESQ.
Renaissance at Colony Park
1020 Highland Colony Parkway
Suite 1400
Ridgeland, Mississippi 39157

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J&J COURT TRANSCRIBERS, INC.
268 Evergreen Avenue
Hamilton, New Jersey 08619
E-mail: jjcourt@jjcourt.com

(609)586-2311 Fax No. (609)587-3599

APPEARANCES:
(Continued)

For Macquarie Capital
(USA) Inc. and Boketo,
LLC:

Baker Donelson Bearman Caldwell
By: BROOKS EASON, ESQ.
ALAN LEE SMITH, ESQ.
4268 I-55 North
Meadowbrook Office Park
Jackson, Mississippi 39211

Marino, Tortorella & Boyle, P.C.
By: KEVIN H. MARINO, ESQ.
JOHN A. BOYLE, ESQ.
JOHN D. TORTORELLA, ESQ.
437 Southern Boulevard
Chatham, New Jersey 07928-1488

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1 THE COURT: The Court has before it today the case of
2 Franchise Services of North America, Inc., Case Number 17-2316.
3 This case was filed on June the 26th, 2017, pursuant to Chapter
4 11 of the Bankruptcy Code.

5 It's my understanding that these are the pleadings
6 and matters before the Court today. If I overlook something,
7 or misstate it, please do -- motion -- first, motion of the
8 Macquarie Parties to dismiss the Chapter 11 case for petition
9 having been filed without proper corporate authority; that's
10 filed by Macquarie Capital, Michael John Silver and Daniel
11 Raymond Boland, referred to as Macquarie Parties, that's Docket
12 Number 121;

13 Next pleading, Docket Number 168, is joinder of
14 Boketo, LLC to that motion;

15 The next one, Docket Number 186, response and
16 objection of Franchise Services North America to the motion to
17 dismiss;

18 The next one is Docket Number 206, the Macquarie
19 Parties' reply to the debtor's response and objection to the
20 motion to dismiss;

21 And finally, Docket Number 221, debtor's response to
22 the Macquarie Parties' reply to the debtor's response and
23 objection to their motion.

24 Are there any other pleadings that have been filed
25 that I've overlooked?

1 MR. ROSENBLATT: I don't believe so, Your Honor.

2 THE COURT: All right.

3 MR. ROSENBLATT: Steve Rosenblatt for the debtor.

4 THE COURT: All right. The Court, for the record,
5 would state that it takes judicial notice of its own files.

6 I would also mention that we do not have a court
7 reporter as such, we use electronic court reporters, which
8 means that everything is recorded. And then if anybody wants a
9 transcript, it has to be mailed off to some other part of the
10 United States.

11 So two things: One, if you want whatever say to be
12 part of the record, you'll need to speak into one of the
13 microphones;

14 And, two, I ask you to be very careful, thoughtful,
15 whatever. Try not to talk when someone else is talking. I
16 know it's hard to be patient sometimes, but if you'd let the
17 other party finish, then you will be certainly given your
18 chance.

19 Are there any other -- have the parties reached any
20 other agreements or stipulations? Anything that needs to be
21 stated into the record?

22 MR. ROSENBLATT: I don't think so, Your Honor.

23 MR. MARINO: No, Your Honor.

24 THE COURT: I understand that there are a goodly
25 number of exhibits, and oftentimes we'd have the person say

1 exhibit number so and so, and read off what it is. But I think
2 they're right extensive, if agreeable with y'all, however you
3 want to do it, we might just take the list of exhibits
4 themselves to go along with the exhibits, and save having to
5 read those in, if y'all would consider that.

6 MR. ROSENBLATT: That's fine with us, Your Honor.

7 MR. MARINO: That's fine, Your Honor.

8 THE COURT: All right. I would also ask -- perhaps
9 now would be a good time -- if you're going to participate in
10 the hearing, state your name into the record, who you're
11 representing, and your firm name, starting with the movant.

12 MR. MARINO: Good morning, Your Honor. Kevin Marino,
13 Marino, Tortorella & Boyle, for the Macquarie Parties and
14 Boketo.

15 MR. EASON: I'm Brooks Eason, Baker Donelson, also
16 for the Macquarie Parties and Boketo.

17 MR. BOYLE: Good morning, Your Honor. John Boyle for
18 the Macquarie Parties and Boketo.

19 MR. TORTORELLA: Good morning, Your Honor. John
20 Tortorella for the Macquarie Parties and Boketo.

21 MR. SMITH: Yes, Your Honor; Alan Smith on Baker
22 Donelson on behalf of the Macquarie and Boketo.

23 THE COURT: All right. Appearances?

24 MR. ROSENBLATT: May it please the Court, Steve
25 Rosenblatt with the Butler Snow firm for the debtor, Your

1 Honor.

2 MR. MADDUX: Your Honor, Chris Maddux of Butler Snow,
3 also for the debtor.

4 Also with us today, we have Jon Nash, who is the
5 Chief Restructuring Officer of the debtor with us, as our
6 corporate representative.

7 THE COURT: All right; thank you very much.

8 At this time, if you -- the parties want to make a
9 brief opening statement, I'll permit that.

10 MR. EASON: Thank you, Your Honor. May it please the
11 Court; I'm here for Macquarie Capital, Boketo, LLC, Michael
12 Silverton, and John Boland. The lawyers who are with me have
13 introduced themselves. Also behind the rail, we have Toby
14 Bachteler, who is a Managing Director of Macquarie, and also a
15 Manager of Boketo; also Paul Sirkis, who is an in-house lawyer
16 at Macquarie.

17 We appreciate the opportunity to be heard on this
18 important motion. You wouldn't know it by the length of the
19 briefs, but this is a simple issue, the answer is clear, and
20 the facts are undisputed. The issue is whether FSNA's --
21 that's Financial Services of North America, which we'll call
22 FSNA -- FSNA's certificate -- excuse me. Whether certificate --
23 -- the petition -- the Chapter 11 petition was properly
24 authorized. The answer is that it was not properly authorized,
25 and here are the facts that support that conclusion:

1 In 2013, Boketo invested \$11 million -- excuse me --
2 \$15 million for an equity interest in FSNA. With the \$15
3 million, it bought just under half of FSNA's stock. In return
4 for the \$15 million, it received all of FSNA's preferred
5 shares, that if converted to common shares, would make Boketo
6 the owner of 49.76 percent of Boketo's common stock. It is far
7 and away the largest shareholder in FSNA, it has never loaned
8 any money to FSNA.

9 To protect its \$15 million investment, Boketo sought
10 a provision requiring shareholder consent for FSNA to undertake
11 liquidation event, including preparing for and filing a
12 voluntary bankruptcy petition. FSNA agreed, but Boketo did not
13 get any preferential voting rights.

14 FSNA's certificate of incorporation requires the
15 approval of a majority of its preferred stock, as well as a
16 majority of its common stock to consent before it can file a
17 bankruptcy petition.

18 Boketo's consent is required, not because it has
19 preferential voting rights, but because it owns so many shares;
20 it's far and away the largest shareholder. But the owners of
21 a majority of the common shares also were required to consent
22 to the bankruptcy filing.

23 In the new brief they filed Tuesday night, FSNA's
24 counsel accused the Macquarie Parties of creating -- and I
25 wrote this down because I found it interesting -- "an elaborate

1 mechanism filled with confounding subtleties for the purpose of
2 creating a scheme to prevent the debtor's Board from managing
3 its affairs."

4 To the contrary: The provision in FSNA's certificate
5 to which FSNA agreed creates a simple mechanism with no
6 subtleties for the purpose of requiring the consent of FSNA's
7 owners before the business they invested in and owned can be
8 placed in bankruptcy. The requirement of shareholder consent
9 is simple, common, and fully enforceable, but it is undisputed
10 that FSNA's Board did not comply with the requirement. In
11 fact, it did not even try to comply with it. It did not obtain
12 Boketo's written consent, and did not even ask Boketo to
13 provide written consent.

14 In their two briefs, which total 57 pages, including
15 the one they filed Tuesday night, FSNA does not claim that it
16 satisfied the requirement. Instead, FSNA offers a series of
17 excuses for ignoring the requirement; none of them is valid.

18 First, FSNA argues that the requirement of
19 shareholder consent violates Federal public policy prohibiting
20 so-called "Gold Share Provisions." But courts invalidate such
21 provisions only when they are demanded by and imposed by
22 creditors, by lenders. Boketo was not a lender, and was not a
23 creditor, and the certificate of incorporation was made at a
24 time -- was filed at a time when it had invested \$15 million to
25 own nearly half of FSNA.

1 There is no authority for the proposition that the
2 owners of a business are barred from reserving for themselves
3 the right to decide whether to seek bankruptcy protection. In
4 fact, the decisions on the issue that we've cited confirm that
5 business owners have every right to reserve that decision for
6 themselves.

7 Second, FSNA argues that the requirement of
8 shareholder consent violates Delaware public policy because it
9 restricts the power of FSNA's Board of Directors. FSNA's
10 argument on this point is circular. Although Section 102 of
11 the Delaware Corporate Law expressly authorizes a corporation's
12 certificate to restrict the power of its Board, FSNA argues
13 that any such restriction would violate Delaware law because it
14 would restrict the power of the Board. Not surprisingly, there
15 are no cases that support that proposition.

16 In fact, Delaware Corporate Law specifically requires
17 shareholder consent for important decisions to be made for a
18 corporation: whether to merge; whether to sell or
19 substantially all of the corporation's assets; whether to
20 dissolve. All under Delaware law require a shareholder vote.

21 And Delaware law plainly permits a corporation to
22 require a shareholder vote for other key decisions, such as
23 whether to file a voluntary bankruptcy petition. And FSNA
24 decided to require such a vote, and included it in its
25 certificate of incorporation.

1 Third, FSNA argues that the Macquarie Parties somehow
2 ratified the bankruptcy filing by not objecting sooner, and by
3 participating in the bankruptcy.

4 Here is the relevant sequence of events: Because
5 FSNA's Board ignored the requirement of shareholder consent,
6 the Macquarie Parties were blindsided by the bankruptcy filing,
7 and by FSNA's attempt to get authority for a 2004 examination
8 of Bruce Donaldson on a first day motion. Initial immediate
9 efforts were, understandably, had to be focused on that.

10 Immediately after that, Alan Smith brought to your
11 attention, and to FSNA's attention, that we were exploring
12 whether to file a motion to dismiss based on the lack of proper
13 authorization; I believe that was two weeks after the
14 bankruptcy petition was filed.

15 Over the next several weeks, we researched the issue,
16 both legally and factually, and drafted the motion, and then
17 filed it promptly, 30 days after Alan brought it to your
18 attention in chambers; Boketo joined the petition shortly after
19 that.

20 Since then, the Macquarie Parties and Boketo have
21 consistently taken the position that the Court does not have
22 jurisdiction because the filing was not properly authorized,
23 and the bankruptcy must be dismissed.

24 In the new brief they filed Tuesday night, they cited
25 a case in which they've said that a court had found

1 ratification based on delay in raising an objection to a
2 bankruptcy filing that was only 15 days. And that surprised me
3 because there were no cases anywhere close to that, no cases
4 close to our case in the ratification cases that they had cited
5 earlier. So I read the case, and the name of the case is In
6 Re: Tara, and found, as I expected, that it was completely
7 distinguishable from our case. There, a creditor had filed a
8 motion to dismiss based on lack of authorization. The court
9 scheduled a hearing on the motion to dismiss, provided notice
10 to the non-consenting owner, the owner that the creditor said
11 had not consented to the bankruptcy filing, and an -- provided
12 notice and an opportunity to appear, and to object to the
13 bankruptcy; the non-consenting owner neither appeared nor
14 objected.

15 The Macquarie group have appeared, and have objected,
16 they've ratified nothing.

17 The FSNA Board filed this bankruptcy without the
18 consent of its owners, as its certificate of incorporation
19 plainly requires, and it must be dismissed.

20 Thank you, Your Honor.

21 THE COURT: Thank you.

22 MR. ROSENBLATT: May it please the Court, Steve
23 Rosenblatt for the debtor.

24 Your Honor, our -- our position is primarily that the
25 Boketo use of the golden shares is void as against public

1 policy, Federal bankruptcy policy. The Intervention Energy
2 case that Judge Carey decided a year ago is not only on point,
3 but it's even more appropriate because that was an LLC. And in
4 an LLC, you've got greater flexibility than you do under
5 Delaware corporate law to restrict rights of parties.

6 The Macquarie Parties are creditors in this case. It
7 wasn't Boketo that filed the motion to dismiss, it was the
8 Macquarie Parties.

9 And the actions of the Macquarie Parties and Boketo
10 all -- put together all represented by the same firm advocating
11 the same interest are as creditors, and not as equity; equity
12 would not act like this in a bankruptcy case.

13 Whether FSNA is eligible to be a Chapter 11 debtor is
14 not a question of subject matter jurisdiction. We've cited a
15 number of cases to that point, and we believe the facts show
16 that we are properly before this Court. One of the key factors
17 is the Boketo and Macquarie Parties seek to avoid any fiduciary
18 obligations. The Board of Directors of a corporation are
19 charged with governing the corporation and have fiduciary
20 duties, duties of care, duties of loyalty. Boketo seeks to
21 look after its own interest here. The Macquarie Parties are
22 looking after their own interest, and not the interest of any
23 other parties.

24 And just like that Lake Michigan case, that's an
25 essential element of this case. We believe Delaware corporate

1 law imposes a fiduciary duty on minority shareholders with
2 blocking positions, such as Boketo, and Boketo denies that
3 fiduciary responsibility.

4 And finally, we believe the actions of this -- of the
5 Macquarie Parties in this case, including Boketo, indicate that
6 they have waived the right to assert this claim, or they have
7 ratified it, or are barred by laches.

8 Now Boketo is saying that we were exploring whether
9 to file back in July of 2011 (sic). Well, they waited a month
10 to explore, and a lot went on in the case. This -- this is a
11 Chapter 11 case, this is not a lawsuit, Your Honor, with a
12 plaintiff and a defendant where the court can put litigation on
13 hold; this is a living viable Chapter 11. Things happen,
14 things move quickly, and unlike Intervention Energy where the
15 holder of the golden share came in two business days after the
16 bankruptcy filing and filed a motion to dismiss, and asked for
17 an expedited hearing, Macquarie Parties and Boketo laid in the
18 grass and waited 45 days to file the motion, 66 days, and then
19 I think it was August 31st, over two months after the
20 bankruptcy filing before Boketo even came in the case. And we
21 believe that those facts show that they have waived their right
22 to assert the authority to file issues.

23 So we look forward to presenting our case before the
24 Court today.

25 Thank you, Your Honor.

1 THE COURT: Thank you. At this time, I recognize the
2 move to go forward.

3 MR. MARINO: Thank you very much, Your Honor.

4 The Macquarie Parties and Boketo call Tobias
5 Bachteler.

6 THE COURT: All right. Come forward, please. Come
7 around, stand in the witness box, raise your right hand. Raise
8 your right.

9 TOBIAS BACHTELER, MOVANTS' WITNESS, SWORN

10 THE COURT: All right. Please be seated, and then
11 you'll need to speak into that microphone. You might need to
12 rearrange it.

13 DIRECT EXAMINATION

14 BY MR. MARINO:

15 Q Good morning, Mr. Bachteler.

16 A Good morning.

17 Q Could you please -- have you spelled your last name for
18 the record already?

19 A I will, my last name is spelled B-A-C-H-T-E-L-E-R,
20 Bachteler.

21 Q Mr. Bachteler, by whom are you currently employed?

22 A By Macquarie.

23 Q And what is your position at Macquarie?

24 A I'm a Managing Director of Macquarie Capital, and I'm also
25 the co-head of our principal transactions group, and I'm based

1 in New York.

2 Q Are you familiar with an entity called Boketo, LLC?

3 A Yes.

4 Q Can you tell the Court what Boketo's relationship with
5 Macquarie is?

6 A Yes, Boketo is indirectly 100 percent-owned subsidiary of
7 Macquarie.

8 Q I'm sorry; can you just raise your voice a little bit?

9 A Yes. Boketo is a 100 percent-owned -- indirectly owned
10 subsidiary of Macquarie.

11 Q And what type of entity is Boketo?

12 A It's a limited liability company, LLC.

13 Q Can you tell the Court where Boketo is incorporated,
14 please?

15 A In Delaware.

16 Q Who manages the business affairs of Boketo?

17 A Boketo has a Board of Managers of three individuals, of
18 which I'm one.

19 MR. MARINO: Your Honor, may I approach the witness,
20 please?

21 THE COURT: You may.

22 MR. MARINO: Thank you, sir.

23 BY MR. MARINO:

24 Q Mr. Bachteler, I have handed you a document that's been
25 marked Exhibit 32 for identification. Can you take a moment to

1 look at that document, please?

2 A Yes.

3 Q What is Exhibit 32?

4 A It is the limited liability company agreement of Boketo,
5 LLC.

6 Q Can you point out to the Court when that agreement was
7 made effective?

8 A In -- July the 12th, 2012.

9 Q I'm going to direct your attention to Article 2 at Page 2
10 of 11 of Exhibit 32, and ask you to turn to that page, please.

11 A Yes.

12 Q Specifically directing your attention to Article 2,
13 entitled "Management," can you please read the first sentence
14 into the record, please?

15 A "Management of the company shall be vested in a group of
16 individuals" --

17 Q Could you -- could you just slow down just a little bit.
18 If I can do it, you can do it.

19 A I can do it. "Management of the company shall be vested
20 in a group of individuals, which group is referred to in this
21 agreement as 'The Board of Managers'" --

22 Q Comma.

23 A -- comma, "each member of the Board of Managers is
24 referred to in this agreement as a Manager."

25 Q Can you tell the Court who the current managers of Boketo

1 are?

2 A Three individuals: Duncan Murdoch, Jin Chun, and myself.

3 Q Why did Macquarie create Boketo?

4 A Boketo was incorporated in 2012 in order to implement an
5 investment. Boketo invested \$15 million in FSNA in order to
6 allow FSNA to acquire a business called Advantage from Hertz at
7 the time.

8 Q Mr. Bachteler, although the parties are well-familiar with
9 this, I wonder if you could, for the Court's benefit, just
10 briefly describe the transaction by which FSNA acquired the
11 Advantage Company from Hertz.

12 A Yes. At the time, the car rental company, Hertz, was in a
13 transaction, was merging with Dollar Thrifty, another large
14 business in the same industry. And as a result of antitrust
15 matters, it was required to divest certain assets. One of
16 those assets was the car rental business, Advantage, doing
17 business as Advantage, very small in the context of those two
18 companies.

19 We made the investment in FSNA to allow FSNA to
20 acquire the business of Advantage. We invested \$15 million.
21 We, in consideration of that, received a 49.76 percent
22 shareholding in FSNA, and became the largest single shareholder
23 of the business. That was effectuated by us owning a preferred
24 -- convertible preferred equity instrument, which Boketo
25 acquired at the time and still owns today.

1 Q And just for clarity of the record, because you've used
2 the pronoun "we" several times, and you have positions both at
3 Macquarie and Boketo, for clarity of the record, can you tell
4 the Court, who is the equity owner to which you have been
5 referring of a 49.76 percent interest in FSNA?

6 A Boketo, LLC.

7 Q What was Macquarie's role as distinguished from that of
8 Boketo in the Advantage transaction?

9 A Macquarie acted as arranger and financial advisor in the
10 context of this M&A transaction. Macquarie is an investment
11 bank, and that's typical -- a typical role to play.

12 Q Is it common in your experience to have a company formed,
13 such as Boketo was formed, for purposes of accomplishing an
14 investment such as this?

15 A Very common.

16 Q And that -- just for the benefit of the Court, once again,
17 just a brief description of your experience in the investment
18 banking field.

19 A Generally, you mean?

20 Q Please.

21 A I've been at Macquarie for about 16 years, and have spent
22 the majority of that time making and managing investments on
23 behalf of Macquarie, both -- predominantly in New York, but
24 also overseas.

25 Q Can you tell the Court when you became a manager of

1 Boketo, please?

2 A In November, last year. November, 2016.

3 MR. MARINO: May I approach, Your Honor?

4 THE COURT: You may.

5 MR. MARINO: Thank you, sir.

6 BY MR. MARINO:

7 Q Mr. Bachteler, I've handed you a document that's been
8 marked Exhibit 33 for identification. I ask you to take a
9 moment to look at that document, please.

10 A Yes.

11 Q Can you tell the Court what Exhibit 33 is?

12 A It is an Action by Written Consent of the Members of
13 Boketo, LLC.

14 Q And can you -- can you tell the Court what specific action
15 was taken by Exhibit 33?

16 A It elected the three managers I referred to earlier:
17 Duncan Murdoch, Jin Chun, and myself, on November the 17th,
18 2016.

19 Q In making the investment that it made, the \$15 million
20 investment that you described in FSNA, what did Boketo receive
21 to represent that investment?

22 A We became the single largest -- Boketo became the single
23 largest owner of FSNA, representing a diluted interest in -- in
24 FSNA of 49.76 percent, and that is achieved by the ownership of
25 preferred stock, all of the preferred stock of FSNA all owned

1 by Boketo in the form of a convertible preferred equity
2 instrument.

3 Q As an owner of a 49.76 percent interest -- first of all,
4 can you tell the Court how that ownership interest was
5 reflected?

6 A It was reflected by the preferred equity instrument in a
7 series of documents typical for a transaction like this,
8 through equity commitment letters, to merger agreement, the
9 certificate of incorporation, and other documents.

10 Q Was there an equity commitment letter signed in this case?

11 A Yes.

12 MR. MARINO: May I approach, Your Honor?

13 THE COURT: You may.

14 BY MR. MARINO:

15 Q Mr. Bachteler, I have handed you a document that's been
16 marked Exhibit 34 for identification. I ask you to take a
17 moment to look at that document, please.

18 A Yes.

19 Q What is that document? What is Exhibit 34?

20 A Exhibit 34 is an equity commitment letter dated July 13,
21 2012.

22 Q And if you could, just read the first sentence of that
23 document, please.

24 A Of course. "Boketo, LLC, defined as 'Macquarie,' is
25 pleased to provide its commitment to purchase newly issued

1 capital stock, the class and series of which are to be agreed
2 upon, defined as the 'Equity Interest,' of Adreca Holdings
3 Corp., a Delaware corporation, defined as the 'Company,' for
4 the cash purchase price set forth opposite its name below under
5 the caption 'Defined Term Investment,' on the terms and subject
6 to conditions set forth herein and the attached Annex A for the
7 purpose of the Company, or an affiliate, or other designated
8 entity, consummating the 'Acquisition,' being a defined term,
9 of Simply Wheelz, defined as 'Advantage,' pursuant to a
10 purchase agreement to be entered into by the Company and the
11 Hertz Corporation, defined as 'Hertz,' pursuant to which the
12 Company shall purchase 100 percent of the outstanding equity
13 interest of Advantage from Hertz, defined as 'the Purchase
14 Agreement.'"

15 Q The very first couple of words of that sentence you read
16 for us say, "Boketo, LLC," and the defined term is "Macquarie."
17 Why is Boketo defined there as Macquarie?

18 A I didn't write it, but Boketo is 100 percent -- indirectly
19 a 100 percent owned subsidiary of Macquarie.

20 Q So just for clarity, Boketo was created by Macquarie as a
21 100 percent wholly owned subsidiary for the express purpose of
22 accomplishing this transaction, is that right?

23 A That's right.

24 Q Let me direct your attention to the last page of that
25 document, that is the last page before we get to Annex A.

1 A Yes.

2 Q And specifically to the box over there on the right, next
3 to the signature lines, for Boketo, LLC. Do you see that --

4 A Yes.

5 Q -- investment?

6 A Yeah.

7 Q For the benefit of the record, could you read that,
8 please?

9 A Yes. "The investment, 15 million U.S. dollars, subject to
10 redaction in the event of an assignment of its commitment in
11 accordance with the terms hereof, provided that the aggregate
12 commitments of Boketo, LLC and all such assignees shall be \$15
13 million."

14 Q And was that \$15 million investment, in fact, made?

15 A Yes.

16 Q Let me ask you to turn back for a moment to Exhibit 32.
17 You looked at Article 2, Management, providing that management
18 of the company shall be vested in a group of individuals known
19 as The Board of Managers, correct?

20 A Um-hum.

21 Q Yes?

22 A Yes.

23 Q And you've told us you are one of them, correct?

24 A Yes.

25 Q Just for a moment, take a look at Page 3 of that document,

1 and the very last line of that Article 2, Section 2.1, which
2 states, quote, "Persons dealing with the company are entitled
3 to rely conclusively upon the power and authority of the Board
4 of Managers," correct?

5 A Yes.

6 Q And, once again, for the benefit of the record, that's
7 yourself, and two other gentlemen?

8 A Correct.

9 Q And those two other gentlemen are?

10 A Duncan Murdoch and Jin Chun.

11 Q All right. Are you familiar with the merger agreement
12 that was entered into to effectuate the transaction we've been
13 talking about this morning?

14 A Yes.

15 MR. MARINO: May I approach, Your Honor?

16 THE COURT: You may.

17 MR. MARINO: Thank you.

18 BY MR. MARINO:

19 Q Mr. Bachteler, I've handed you a document that's been
20 marked Exhibit 35 for identification in this proceeding. I ask
21 you to take a moment to look at that document, please.

22 A Yes.

23 Q Can you tell the Court what that document is?

24 A It's an amendment to an Agreement and Plan of Merger,
25 dated March 26th, 2013.

1 Q Is this the document that memorializes the agreement
2 between Boketo and FSNA for Boketo to make a \$15 million
3 investment in return for a 49.76 percent share of the company?

4 A Yes.

5 Q I direct your attention, if I may, to Page 6 of that
6 document, specifically Section 4.1(a)(3).

7 A Yes.

8 Q The middle of that paragraph, you see the sentence that
9 begins, "The merger consideration"?

10 A Yes.

11 Q Can you read that into the record, please?

12 A Sure. "The defined term 'Merger Consideration' means for
13 each company share, (I) 622,126," paren, "Preferred Shares,
14 defined term, such that the Eligible Holders, defined term,
15 shall own," paren, "Preferred Shares representing 49.76 percent
16 of the," paren, "Common Shares outstanding on a non-diluted
17 basis as of the first closing date."

18 And, "(ii) in accordance with the final structure
19 documents, based on the terms of the final structure term
20 sheet, rights attached to such," paren "Preferred Shares to
21 acquire for no, or nominal, consideration additional Preferred
22 Shares upon the exercise of any option, including," paren,
23 "employee stock option or other securities exercisable to
24 acquire," paren "Common Shares so as to maintain after the
25 first closing date the initial 49.76 percent non-diluted

1 interest of the holders of the Preferred Shares and the Common
2 Shares as defined in the Merger Agreement on an as-converted
3 basis."

4 Q Has Boketo maintained consistently its 49.76 percent
5 ownership interest in FSNA?

6 A Yes.

7 MR. MARINO: May I approach, Your Honor?

8 THE COURT: You may.

9 BY MR. MARINO:

10 Q Mr. Bachteler, I've handed you a document that's been
11 marked Exhibit 36 for identification.

12 A Yes.

13 Q Can you tell the Court what Exhibit 36 is?

14 A It is the certificate of incorporation of Franchise
15 Services of North America, Inc.

16 Q Directing your attention, sir, to Page 18 of that
17 document --

18 MR. MARINO: With the Court's permission, I have a
19 board illuminating this provision --

20 THE COURT: All right.

21 MR. MARINO: -- I'd like to show Your Honor.

22 Q Can you tell me, sir, at Page 18 --

23 THE COURT: Can opposing counsel see?

24 MR. MARINO: Oh, I beg your -- we haven't -- we
25 haven't put it up, Your Honor.

1 THE COURT: Oh, okay.

2 Q This Page 18 of the document is -- just for clarity of the
3 record -- Section 4.4(j), correct?

4 A "Certain Approval Rights of The Series A Stock and Common
5 Stock," yes.

6 Q Yes. Directing your attention to that paragraph, may I
7 ask you to indulge me and read it into the record, please?

8 A Yes. Little (j), "Certain Approval Rights of the Series A
9 Preferred Stock and Common Stock. For so long as any shares of
10 Series A preferred stock are outstanding, and represent at
11 least ten percent of the total outstanding capital stock,
12 defined term, calculated on a fully diluted basis, also defined
13 term, and subject to Article 8, with respect to the Board's
14 right to adopt, alter, amend, and repeal the bylaws, the
15 corporation shall not, in the case of Clause 2 below, shall not
16 permit any subsidiaries to, directly or indirectly, whether
17 through merger, consideration, amendment to the certificate of
18 incorporation or otherwise, do any of the following without
19 first obtaining the written consent or affirmative vote of the
20 holders of a majority of the shares of Series A preferred
21 stock, then outstanding, voting separately as a class, a
22 preferred majority, defined term." And Number 2, "The holders
23 of a majority of the shares of common stock, defined term, then
24 outstanding, voting separately as a class."

25 Q Did you understand this provision in the FSNA certificate

1 of incorporation to vest Boketo with an absolute right to
2 refuse to permit FSNA to file for bankruptcy protection?

3 A Yes.

4 Q Let me ask you to turn to Section 9.1, which is found at
5 Page 29, the portion of it that we want is at Page 29. And
6 direct your attention to around the middle of the page, the
7 definition of liquidation event.

8 A "The defined term liquidation event means any voluntary or
9 involuntary liquidation, dissolution, or winding-up of the
10 affairs of the corporation, or the corporation taking any
11 preparatory steps towards, or filing a petition for bankruptcy,
12 insolvency, receivership, or similar relief."

13 Q Was this provision important to both Macquarie and Boketo
14 in the transaction in which this \$15 million investment was
15 made into FSNA?

16 A Yes.

17 Q Why?

18 A It's a fundamental and customary protection of making a
19 large investment, and becoming the largest owner of a company.

20 Q It's been suggested in this courtroom that Macquarie and
21 Boketo were essentially creditors of FSNA, do you agree with
22 that?

23 A Macquarie, other parties within Macquarie, are a creditor
24 of FSNA today. We're not intended to be, and weren't at the
25 time of this document.

1 Q It's been suggested in this courtroom that the reason for
2 your objection to this bankruptcy is in your capacity, that is
3 to say Macquarie and Boketo's capacity, as a creditor as
4 opposed to as an equity investor, is that right?

5 A No.

6 Q Can you explain to the Court why not?

7 A We own -- Boketo owns almost half the company, we're, by
8 far, the largest investor. As part of a series of other
9 provisions in this document, we have a clear consent right
10 prior to a filing of a bankruptcy, a filing of a bankruptcy, in
11 my experience, is the last resort, and a dramatic step to take
12 for a company.

13 Q When you say --

14 A And that filing --

15 Q I beg your pardon; I thought you were finished.

16 A I'm sorry.

17 Q Please.

18 A I'm sorry. And that filing was made without seeking our
19 consent, and, in fact, without asking for our consent, and took
20 the ability of ours to seek to protect our investment or come
21 up with other options.

22 Q Have you, in your experience as an investment banker, had
23 occasion to deal with companies being placed into bankruptcy
24 before?

25 A I have, yes.

1 Q Can you tell the Court what the normal course of events is
2 when you make an investment in a company of this magnitude, and
3 there's a suggestion made that there might be a bankruptcy
4 filing?

5 A In my experience, bankruptcy is the last resort, sometimes
6 unavoidable, but the last resort evaluated amongst a series of
7 options by the Board, by the shareholders, involving typically
8 third party advisors, including counsel, financial advisors,
9 consultants, to determine what the options are give the
10 bankruptcy typically is the last resort, and often typically
11 results in a loss of the company --

12 Q Did --

13 A -- to equity.

14 Q Did anyone representing FSNA ever, at any time, seek your
15 consent to filing for bankruptcy?

16 A No.

17 Q Did anyone at FSNA, at any time, suggest to you that there
18 was a secured creditor of FSNA that was compelling it to take
19 this dramatic step?

20 A No.

21 Q Did anyone at FSNA seek your input as forty -- as the
22 representative of a 49.76 percent ownership interest in FSNA to
23 solve the company problems that apparently cause them to
24 conclude they should seek bankruptcy protection?

25 A No.

1 Q Had they done so, what would you have done?

2 A I would have been involved in that -- I would have been
3 willing to be involved in that evaluation. We're the largest
4 owner of the company, it's in our clear interest to find out
5 the best possible option whether that's a bankruptcy filing or
6 not.

7 Q Why do you describe a bankruptcy filing as the last resort
8 for a company?

9 A In my experience, it results in a loss to equity of the
10 business.

11 Q Can -- can -- I'm sorry; I did not hear you?

12 A In my experience, the result -- the end result of a
13 bankruptcy filing is that the previous equity owners no longer
14 have any stake, and often have zero recovery.

15 Q Do you have any doubt whatsoever that Boketo's equity
16 interest in FSNA will be substantially diminished by a
17 bankruptcy?

18 A Correct.

19 Q The -- just for clarity of the record --

20 A Yes.

21 Q -- you do not doubt that?

22 A I have no doubt.

23 Q Now did Boketo's Board of Managers, of which you are a
24 member, ever pass a resolution consenting to FSNA's filing of
25 the bankruptcy petition before that petition was filed?

1 A No.

2 Q Did FSNA ever suggest to you at any time that it was
3 entering into preparatory steps, that is to say in the words of
4 Section 9.1 of its certificate of incorporation, taking any --
5 quote, "any preparatory steps towards or filing a petition for
6 bankruptcy"?

7 A No.

8 Q Would it have been possible for Macquarie to infuse more
9 cash into FSNA if it thought that was an appropriate step,
10 rather than a bankruptcy?

11 A Of course.

12 Q Would it have been possible for Macquarie to engage in
13 negotiations with any secured creditors of FSNA as a way of
14 staving off a bankruptcy?

15 A Of course.

16 Q You were not given the opportunity to consider those
17 options, correct?

18 A Correct.

19 Q After learning that FSNA had filed for bankruptcy -- and
20 for the benefit of the Court, exactly when did you learn that
21 FSNA had filed for bankruptcy?

22 A The afternoon before the filing, I received a call from
23 the CO, Tom McDonnell, to inform me as a courtesy call that the
24 company had made the decision to file, had prepared for a
25 filing, and was filing imminently, and I believe the filing was

1 the following morning.

2 Q At -- during that call, did Mr. McDonnell, at any time,
3 suggest that he was seeking your consent, or your approval, or
4 your buy-in, if you will, to the filing of that bankruptcy?

5 A No.

6 Q Was it presented to you a fait accompli?

7 A Absolutely.

8 Q After learning of the bankruptcy --

9 MR. MARINO: Strike that.

10 Q At the time you learned of -- at or about the time you
11 learned of the bankruptcy, did you also learn that FSNA was
12 attempting to secure the 2004 examination of a gentleman by the
13 name of Bruce Donaldson?

14 A I learned it from the filing that -- the day of filing, as
15 soon as I received the document.

16 Q Did, at that time, Macquarie take immediate steps to make
17 certain that Mr. Donaldson's deposition would not proceed in a
18 bankruptcy proceeding to which Boketo had not consented?

19 A That was one -- yes, and that was one of several actions
20 we took at the time.

21 Q Now did Boketo and Macquarie undertake any investigation
22 of the relevant facts and documents to determine whether, in
23 fact, Boketo had a right to object to this bankruptcy?

24 A Yes.

25 Q What was the result of that investigation?

1 A We confirmed that we had not provided consent, nor been
2 asked for consent.

3 Q The term "golden share" has been used in this courtroom.
4 Do you know what a golden share is?

5 A I've heard the term; I don't know a legal definition, yes.

6 Q Is it the case, Boketo, that the reason both Macquarie and
7 Boketo have objected so vigorously to FSNA's bankruptcy filing
8 because they want to be sure that their two and a half million
9 dollar investment is protected -- their two -- I beg your
10 pardon -- their two and a half million dollars that are -- they
11 are owed as a fee by FSNA is protected?

12 A No, we are -- we own almost half the company, we're the
13 largest shareholder; we had no involvement in this bankruptcy
14 filing.

15 Q Do you know how the two and a half million dollar fee that
16 I'm describing came into being? What was the --

17 A Yes, I referred to -- you asked me earlier, around
18 Macquarie's roles, and I mentioned the arranger and financial
19 advisory role that Macquarie played in the context of this
20 transaction originally. And the fees owed to Macquarie are a
21 result thereof, and have been -- were originally owed
22 approximately four years ago, but have not been paid.

23 Q In your experience, is there anything whatsoever uncommon
24 about an investment bank simultaneously underwriting a
25 transaction, as Macquarie did here, and creating an investment

1 vehicle, as Macquarie also did here, such as Boketo, to
2 actually hold a substantial investment in a newly created
3 company?

4 A No, it's not uncommon.

5 Q All right. Is it the case, Mr. Bachteler, that when that
6 \$15 million was invested in FSNA, is it the case that the two
7 and a half million dollar arrangement fee that was due to
8 Macquarie was expected to be paid out of that 15 million?

9 A Amongst many other uses, yes.

10 Q Was there -- at the time that this investment commenced,
11 or at any other time, a sense on the part of Macquarie that its
12 principal relationship with FSNA was that of creditor to
13 debtor?

14 A No, the fee was a fraction of our investment.

15 Q Did the written consent provision that we've gone over
16 this morning exist for the express purpose of enabling Boketo
17 to protect its nearly 50 percent ownership interest in FSNA?

18 A Of course.

19 Q By the filing of this bankruptcy petition, is it fair to
20 say that FSNA has bankrupted this company out from under a
21 49.76 owner of the company?

22 A Yes.

23 MR. MARINO: Your Honor, I have shown Mr. Bachteler
24 Exhibits 32, the Boketo, LLC agreement Board of Manager dated -
25 - Managers dated July 12th, 2012. I'd like to move each of the

1 documents I've shown him into admission, he's identified them
2 as documents of which he has personal knowledge. If it's the
3 Court's pleasure that I do that at one time, I can move them en
4 masse, from 32 to 36. I'm also happy to move them
5 individually, as Your Honor desires.

6 THE COURT: You can move all of them. Any objection?

7 MR. ROSENBLATT: We have an objection to 35, Your
8 Honor. It is an amendment to another document, and it's not --
9 so this is not the complete document. We ask that the original
10 agreement and plan of merger also be introduced if 35 is to be
11 introduced.

12 MR. MARINO: Your Honor, I -- I'm not certain that we
13 have the original agreement here. I can represent to the Court
14 that the provision and the augmentation of the record, with
15 that portion of the document, A, does no violence to the
16 relevancy, or significance, or import of this portion of the
17 document. And I'm happy to augment the record with that
18 portion so that there will be completeness.

19 There's no attempt here, in other words, to just give
20 a small piece of this.

21 MR. ROSENBLATT: Your Honor, we --

22 MR. SMITH: We have it.

23 MR. ROSENBLATT: -- we have these on our exhibit
24 list. We were not aware of the amendment, but the original
25 agreement and plan of merger, we'll be glad to provide that as

1 -- make that maybe a composite of 35, do you want to do that?

2 MR. MARINO: I have no objection to calling it -- to
3 modifying 35 to include all of that, or to calling this 35
4 slash -- what number is it, Steve?

5 MR. ROSENBLATT: Um, it is -- it's 9A.

6 MR. MARINO: It's 9A, Your Honor. So with the
7 Court's permission, I'm happy to have -- and subject to the
8 admission of the debtor's Exhibit 9A, to which we have no
9 objection, I'd ask Your Honor to admit Exhibit 35, together
10 with Exhibit 32, the LLC agreement; Exhibit 33, the member of
11 consent appointing Mr. Bachteler; Exhibit 34, the equity
12 commitment letter, execution copy dated July 13, 2012; Exhibit
13 35, with this 9A; and Exhibit 36, FSNA's May 2nd, 2013
14 certificate of incorporation.

15 THE COURT: Is that your understanding, Mr.
16 Rosenblatt?

17 MR. ROSENBLATT: That's correct, Your Honor; no
18 objection.

19 THE COURT: All right. Let them be admitted.

20 MR. MARINO: Thank you very much, Your Honor.

21 THE COURT: Thank you.

22 MR. MARINO: I have no further questions for Mr.
23 Bachteler at this time.

24 MR. EASON: Your Honor, we should have brought this
25 up earlier, but we would like to invoke the rule of

1 sequestration (indiscernible) can't sit through the testimony
2 of other witnesses.

3 THE COURT: I'll leave that burden of the attorneys
4 to exclude whomever should be excluded.

5 MR. ROSENBLATT: Your Honor, Jon Nash is our
6 corporate representative; I believe he's entitled to stay.

7 MR. EASON: We have no objection to that, Your Honor.

8 THE COURT: All right.

9 MR. ROSENBLATT: Your Honor, I just see Bruce
10 Donaldson in the back of the courtroom, as well. But we do not
11 plan on calling him.

12 THE COURT: All right.

13 MR. EASON: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. ROSENBLATT:

16 Q Mr. Bachteler, is that -- am I saying that correctly? Or
17 is that close enough?

18 A That's fine. That's fine; good morning.

19 Q I also have a good German name, and people have difficulty
20 with it, as well. Are you here today in your capacity for
21 Macquarie Capital or Boketo, LLC, or both?

22 A I'm the manager of Boketo, and this hearing and this
23 motion is around Boketo's rights under the certificate of
24 incorporation. I'm also the Managing Director of Macquarie. I
25 have both roles.

1 Q All right. Let's start at Boketo, and move up the food
2 chain, if you could. Because you said it's -- I believe you
3 said it's an indirect subsidiary --

4 A Right.

5 Q -- of Macquarie. Who owns 100 percent of Boketo?

6 A Boketo's owned by two entities, predominantly an entity
7 called MIHI, which is M-I-H-I, that's an acronym, LLC, and a
8 second entity called Petro Tradelinks, and that's a small
9 percentage owned, I believe it's a five percent owner in MIHI,
10 so 70 -- it's 95 percent owner, to 100, both of those entities
11 are 100 percent owned by Macquarie.

12 Q And who owns each of those entities?

13 A I would need my --

14 Q Who owns -- who owns MIHI?

15 A I would need my company's Secretarial Department to tell
16 you the exact chain, it ends up being 100 percent owned by
17 Macquarie at the top.

18 Q How many entities do you have to go from MIHI to get up to
19 Macquarie Capital?

20 A I don't know the answer.

21 Q Would it be two? Three? Four?

22 A Yeah, that's a --

23 Q And the same on the other side, the Petro side?

24 A Similar, I'm guessing, yes.

25 Q Now the election of the managers, who does that for

1 Boketo? Who elects the Boketo managers?

2 A It's under the written consent that my counsel earlier
3 showed to me by the members of Boketo.

4 Q So the members of Boketo elect the managers of Boketo, is
5 that correct?

6 A Yeah, we -- I can check the document.

7 (Pause)

8 A Yeah, the -- the -- as I just mentioned, here it is, the
9 MIHI and Petro Tradelinks are the two members electing us in
10 the document I read out earlier.

11 Q And do you know if -- if those entities have to get
12 authority from above to take that action, or do they take that
13 independently of their Macquarie superiors?

14 A I would need to ask my company's secretarial group; I
15 imagine it goes up the chain.

16 Q So if -- the decisions go all the way up the chain to
17 Macquarie Capital, is that what you're saying?

18 A The decision to appoint --

19 Q To elect managers.

20 A Managers, yes.

21 Q And what about significant decisions affecting Boketo, do
22 those also go up the chain? Does Macquarie have input down the
23 chain to Boketo as to what it wants Boketo to do?

24 A The affairs of Boketo are managed by the Board of
25 Managers, the three people I read out, including myself.

1 Q And are those three managers -- Duncan Murdoch is a
2 manager of Boketo.

3 A Correct.

4 Q What other positions does he have with Macquarie?

5 A He is a Senior Managing Director of Macquarie Capital,
6 also based in New York, and he will have other positions that I
7 couldn't list off the top of my head.

8 Q Do you know that he is also a director of FSNA, F-S-N-A?

9 A He is.

10 Q Do you know if he disclosed to the FSNA Board, or anyone
11 within FSNA, that he was also a manager of Boketo?

12 A I don't know that.

13 Q And who is Jin Chun?

14 A Jin Chun is another colleague of ours, he's, as I read
15 out, the third manager of the three of Boketo, LLC. He is also
16 a Managing Director of Macquarie Capital, also in New York.

17 Q So all three managers of Boketo are also Managing
18 Directors of Macquarie Capital?

19 A That's correct.

20 Q Now -- so you didn't hear about the bankruptcy filing from
21 Duncan Murdoch, you heard it from Tom McDonnell?

22 A Tom called me and told me, yes. Tom called me to tell me,
23 in the conversation I alluded to earlier, the afternoon before
24 the filing.

25 THE COURT: I believe if you'd shift that microphone

1 right in front of your mouth, it might be better. I'm real
2 worried about this record. And then pull it close to you.

3 THE WITNESS: Let me know, I'll -- this should be
4 better. Let me know if it's not.

5 THE COURT: All right.

6 BY MR. ROSENBLATT:

7 Q So Tom McDonnell called you immediately after the filing,
8 or before the filing?

9 A He called me -- he told me -- he called me immediately
10 before the filing; I assume that's correct.

11 Q But had the Board already acted to approve the filing?

12 A The message of his phone call was, yes, this was a
13 courtesy phone call to inform me that the company had prepared
14 for, approved, and is ready to file a Chapter 11, and that it
15 would happen imminently.

16 Q And did he say to you something to the effect of "this
17 doesn't mean we can't quit talking; we can still work toward
18 resolving our issues between us"?

19 MR. MARINO: I just want to object to any mention of
20 anything that was discussed in -- subject to Rule 408 and
21 settlement.

22 MR. ROSENBLATT: I'm not --

23 MR. MARINO: That answer -- the question calls for
24 such disclosure.

25 MR. ROSENBLATT: I'm just asking what the nature of

1 the conversation was, Your Honor.

2 THE COURT: All right. I'll let you go shortly --
3 short period of time.

4 BY MR. ROSENBLATT:

5 Q What did -- what did he tell you or ask you about the --
6 about the relationship between Boketo -- between Macquarie and
7 FSNA? Did he make any comments about that?

8 A He -- he primarily called me to tell me that the filing
9 was imminent. He did also mention that he intended to provide
10 a DIP financing option for the company, and act as a stalking
11 horse bidder for assets of the company, and that something to
12 the effect of we can continue talking, or remain accessible,
13 but the filing would happen imminently.

14 Q And did you tell him, "Let me get with my folks and we'll
15 get back together"?

16 A No, he didn't ask me any questions. I -- I got with my
17 folks, and told them what happened, but there was no need for a
18 response.

19 Q All right. Now I noticed that the initial managers of
20 Boketo, LLC, according to the limited liability company
21 agreement, Exhibit 34, are Michael Silverton, Dan Boland, and
22 Bruce Donaldson, is that correct?

23 A That's correct.

24 Q Who is Michael Silverton?

25 A Michael Silverton is also a Senior Managing Director of

1 Macquarie Capital, he is today -- he probably wasn't then, but
2 he is today the head of our U.S. business.

3 Q Okay. And Dan Boland?

4 A Dan Boland was at the time an employee, I think a Managing
5 Director of Macquarie Capital, yes.

6 Q And is he still with --

7 A No.

8 Q -- Macquarie Capital?

9 A He's not.

10 Q What about Bruce Donaldson?

11 A Bruce Donaldson was also, I believe, also a Managing
12 Director of Macquarie Capital at the time.

13 Q We are here today on the motion of the Macquarie Parties
14 to have this Chapter 11 bankruptcy case dismissed as having
15 been filed without authority, is that correct?

16 A Yes.

17 Q Why did Boketo not file that motion?

18 A That's a question I would need to ask our counsel
19 specifically. But as I mentioned earlier, as we all mentioned
20 earlier Boketo is 100 percent -- indirectly 100 percent owned
21 entity of Macquarie.

22 Q So --

23 A And --

24 Q -- Boketo, Macquarie, it really didn't make any
25 difference? It was -- the motion to dismiss the bankruptcy

1 case affected both of them, is that right?

2 A It -- it makes a difference. Boketo is the owner of the
3 stock, and has the rights that we weren't afforded -- the
4 consent rights that we weren't afforded. But Macquarie and the
5 defined term, I think Macquarie Parties or Macquarie group
6 represent the ownership of Boketo.

7 Q So from the day of the filing of the petition, Boketo knew
8 about the bankruptcy petition being filed, right?

9 A Yes.

10 Q June 26th, 2017?

11 A Yup.

12 Q And it did not file even -- its first pleading was the
13 joinder in the motion of the Macquarie Parties to dismiss the
14 case, is that right?

15 A I would need my counsel to confirm that. I know there
16 were a series of motions, and -- and responses; I don't know
17 off the top of my head which was made by which entity.

18 Q Did Boketo managers discuss the motion to dismiss from
19 June 26th, 2017 until August 31st, 2017?

20 A What was the 31st, was it the filing of the --

21 Q Was the filing of the joinder.

22 A There were extensive discussions and preparations to the
23 filing. There were immediate actions that needed to -- the
24 filing was a surprise, I think is -- as I said earlier. I
25 briefed -- after the conversation with Tom, I briefed out

1 counsel; we didn't have bankruptcy counsel at the time, so we
2 found -- engaged and briefed bankruptcy counsel. There were
3 immediate responses and filings to be made as a necessity of
4 the original Chapter 11 filing, and about two weeks, as -- as
5 our counsel mentioned earlier, after the original filing, I
6 understand, the reference was made to the Court that we had
7 doubts around the validity, even though the filing itself
8 confirms the validity by the company that the corporate
9 authorities were there, we asked our counsel to research and
10 analyze that. The conclusion was that that was correct, so we
11 asked to draft a motion, which was the motion that was then
12 filed.

13 Q I appreciate that answer, Mr. Bachteler, but did the
14 Boketo managers gather to discuss filing a motion to dismiss
15 immediately after the case was filed?

16 A We discussed it; we did not include Duncan Murdoch in that
17 conversation.

18 Q Why was the first pleading filed by Boketo not a motion to
19 dismiss, but a joinder some 66 days later?

20 A I would need counsel to ask about the order. On the
21 timing, I can tell you that the time that went by, we didn't
22 sit idly by. There were a number of responses that needed to
23 be made immediately, our counsel referred to earlier the 2004
24 examination that required an immediate response, and also
25 whether we believed the filing to be inappropriate, and to be

1 dismissed, we still needed to -- it wasn't at the time, and it
2 hasn't been as of today, we need to continue to respond to the
3 rest of the filing.

4 Q Let me just top. You said the immediate -- I believe you
5 said something like the immediate need that had to be addressed
6 was the 2004 exam of Mr. Donaldson.

7 A And obviously I'm sure our counsel can answer that better,
8 but that's correct.

9 Q Was that discussed at the Boketo level?

10 A Yes, I'm a Manager at the Boketo level, so I was in every
11 conversation, yes.

12 Q Did you discuss that with Jin Chun and Duncan Murdoch?

13 A Jin, yes; Duncan, no.

14 Q Why did you not discuss it with Duncan Murdoch?

15 A When we learned of the filing, recognizing that Duncan
16 Murdoch was also a Director of the Board, we separated our
17 conversations on the topic.

18 Q So has Duncan Murdoch participated at all in any Boketo
19 matter affecting FSNA since the bankruptcy case was filed?

20 A I don't believe so, certainly not in relation to the
21 topics we're discussing today.

22 Q Is there any business other than FSNA business that Boketo
23 would be discussing?

24 A I don't believe so.

25 Q It has no other --

1 A It has no other business.

2 Q Now how would -- let's go ahead and address this: Are you
3 familiar with the pleadings that have been filed on behalf of
4 the Macquarie Parties in this case, and Boketo?

5 A Somewhat.

6 Q All right. Have you read the last filing, Docket Number
7 206?

8 A You'll need to tell me what pleading that is, please.

9 Q The title of that pleading is "The Macquarie Parties'
10 reply to the debtor's response and objection to their motion to
11 dismiss the Chapter 11 case and the Joinder of Boketo, LLC."

12 A I read that at the time, yes.

13 Q Now in that pleading -- in that pleading, the Macquarie
14 Parties state, "Then on July 11, 2017, just 15 days after the
15 debtor filed the bankruptcy petition, counsel for the Macquarie
16 Parties appeared at an in-chambers conference to discuss
17 hearing dates for the debtor's motion under FRBP, Federal Rules
18 of Bankruptcy Procedure 2004, and other matters and, at that
19 time, gave" -- and I quote specifically -- "gave clear and
20 unequivocal notice that the Macquarie Parties intended to file
21 a motion."

22 Do you agree with that statement?

23 A You just read it out, I'm sure it's correct, yes. I was
24 not at the meeting, of course.

25 Q So it gave clear and unequivocal notice to the Court on

1 July 11, but the Macquarie Parties didn't even file their
2 motion to dismiss until August the 10th, 30 days later.

3 A Those are the --

4 Q Had the decision already been made on July 11?

5 A I can't -- I don't know. We -- we --

6 Q How -- I'm sorry; go ahead and finish your answer.

7 A We -- yeah. We concluded prior to that hearing that I
8 didn't attend that despite the filing, and -- the filing itself
9 and the implication by the filing that it had authority, there
10 are a number of provisions and documents, most importantly the
11 one we focused on earlier, that may conflict with that.

12 We had, at that time, I believe, already checked
13 internally to make sure that it had -- no consent had, indeed,
14 been provided. And -- and I don't remember the dates of this,
15 specifically we asked on the back of that discovery for counsel
16 to do the research, check that this is, indeed, true, the
17 validity, and write the motion, and it got filed the day it got
18 filed.

19 Q All right. You said you had to check to see if Boketo had
20 consented to the petition being filed, is that correct?

21 A We confirmed it, of course; it was important.

22 Q Aren't you a manager of Boketo?

23 A Yes.

24 Q Wouldn't you have had to have been involved in any
25 discussion concerning consent to file a Chapter 11 case?

1 A Yes.

2 Q How frequently do you deal with Jin Chun or Duncan
3 Murdoch? Do you deal with them regularly?

4 A In all matters, regularly.

5 Q Wouldn't you have just been able to pick up a call and
6 say, "Hey, Jin/Hey, Duncan, did you -- did you know about the
7 filing? Have we consented to that?"

8 A Yes, that's easy.

9 Q You didn't --

10 A I have a team of --

11 Q You didn't do that, did you?

12 A No, I just -- and I did -- we confirmed that; I have a
13 team of counsel, both internally and externally, that asked me
14 multiple times over to confirm that to make sure we didn't have
15 consents in there, or misunderstandings, or verbal, or -- or
16 other suggestions that that may be inaccurate.

17 Q So you had regularly conversations with the other two
18 managers of Boketo, and yet you weren't sure whether Boketo had
19 consented, or not consented to the filing?

20 A I was sure; I got asked. I said, no.

21 Q All right. How can -- how can clear and unequivocal
22 indication of filing a motion to dismiss be given if all these
23 contingencies are still out there?

24 A That's a question that's for my lawyers.

25 Q Was Mr. Boland involved in the Advantage transaction?

1 A Yes.

2 Q Did he run the lead on that?

3 A I would say so.

4 Q And Mr. Silverton, was he Mr. Boland's superior --
5 immediate superior at that time?

6 A Yes.

7 Q And would he have been involved significantly in the
8 Advantage transaction?

9 A Not to the extent of Dan Boland, but meaningfully.

10 Q Dan Boland would have done the day-to-day sort of things,
11 but he would have reported up to Michael Silverton, wouldn't
12 he, and kept him informed as the case went along --

13 A Yeah, that's right.

14 Q -- as the transaction developed? Now I believe this --
15 this equity commitment letter is an exhibit to your testimony,
16 Exhibit 34, if you'll pull that up, please, sir.

17 A I have it; yes.

18 Q Now one of the permitted uses in the second paragraph,
19 Romanette ii, is the payment of a \$2.5 million arrangement fee
20 to Macquarie Capital USA, is that correct?

21 A I see it, yes.

22 Q Do you know if there's any documentation that Macquarie
23 Capital has concerning that arrangement fee?

24 A I don't recall the location or manner of documentation; I
25 believe it is incorporated into another document -- another

1 transaction document.

2 Q You believe it's in another transaction document?

3 A But I don't -- I don't recall and -- and I couldn't tell
4 you specifically.

5 Q What type of transaction document would a \$2.5 million
6 arrangement fee be in?

7 A It could be in a series of documents. It could be in the
8 commitment papers in the merger agreement, an engagement
9 letter, and a separate side letter.

10 Q Have you seen that in any of those documents as you've
11 looked through those, and been involved in this bankruptcy
12 case, and prepared for this hearing?

13 A I have not looked for it, so I cannot tell you where it is
14 located, other than what I'm looking at.

15 Q Now this letter is on Boketo letterhead, is it not?

16 A Yes.

17 Q Is that typed letterhead, or is that Boketo's printed
18 letterhead?

19 A I'm sorry; I don't understand the distinction.

20 Q Is this -- is this just a plain sheet of paper that Boketo
21 typed its name and address at the top?

22 A Correct, yes.

23 Q It's not Boketo's stationery, per se.

24 A Yes, correct. That's correct.

25 Q All right. And I noticed that it's addressed to a Adreca

1 Holdings Corp., is that right?

2 A Yes.

3 Q Now at that time, was Adreca Holdings Corp. 100 percent
4 owned by Macquarie?

5 A I don't remember, as I was not directly involved in the
6 transaction to the extent that Dan was. The sequence of events
7 and -- at -- whether at that point in time that statement was
8 true or not.

9 Q This is July of 2012, the merger didn't take place until
10 May of 2013, is that right?

11 A I believe that's right.

12 Q So Adreca Holdings Corp. was a 100 percent Macquarie-owned
13 entity that was designed to take assets out of the Hertz
14 transaction in the first closing of December of 2012, is that
15 right?

16 A I believe that is correct, but I'm not familiar enough
17 with the documents, and didn't negotiate them myself to know
18 that for sure.

19 Q All right.

20 MR. MARINO: Your Honor, may I please remind the
21 witness just to move closer to the microphone --

22 THE WITNESS: Yeah.

23 MR. MARINO: -- and speak up? It's a taped record,
24 so it's essential that you actually project and speak right
25 into the microphone.

1 BY MR. ROSENBLATT:

2 Q And this letter deals with funding of the Advantage
3 acquisition, is that correct?

4 A Yes.

5 Q Now when the money flowed from Boketo to Adreca Holdings,
6 did Boketo already have 15 million? Or was this -- was it
7 simply a conduit that passed money from Macquarie Capital, or
8 one of the other upper Macquarie entities, down through Boketo,
9 and out to Adreca?

10 A I don't know that for certain in this case, but it would
11 be common for funding to be passed down.

12 Q And passed down, would -- would Boketo have had any assets
13 of its own? As of July 13, 2012, would it have had 15 million
14 in its bank account?

15 A I don't think so.

16 Q It would have counted on Macquarie funding this subsequent
17 to this letter, is that right?

18 A I don't know about the timing, but it would have counted
19 on Macquarie to fund -- provide the funding for the 15 million.

20 Q All right. Now this letter, it's -- it looks like a
21 simple three-page/four-page letter with an Annex A, but really
22 it incorporates a lot of other documents, doesn't it?

23 A I have not re-read it, and I see it refers to an Annex A,
24 and on the front refers to funding sources, but I have not been
25 through it.

1 Q All right. Let's look at the third paragraph down. It
2 says, "This letter, including Annex A hereto, together with the
3 other agreements dated the date hereof," which is July 13,
4 2012, "among Macquarie, the Company, and certain of their
5 respective affiliates collectively constitute the sole
6 agreements and supersede all prior agreements, understandings,
7 and statements, whether written or oral, between the
8 undersigned, or any of their respective affiliates, and any
9 other person with respect to the subject matter hereof and
10 thereof." Is that right?

11 A Yes.

12 Q So this -- this letter incorporates other agreements into
13 it, does it not?

14 A I'm not a lawyer, but I believe that's correct.

15 Q Now Annex A refers to two general types of document, the
16 purchase documentation in Paragraph 1, and the investment
17 documentation in Paragraph 2, doesn't it?

18 A Yes.

19 Q So it -- at a minimum, it's those two groups of documents
20 are also incorporated into this equity commitment letter, is
21 that right?

22 A It appears so.

23 Q Now there are also apparently some other agreements
24 because I'm not sure what other agreements dated thereof
25 between Macquarie, the Company, and their respective affiliates

1 would be. Do you know what those agreements would be?

2 A I don't.

3 Q How would anyone know what agreements those are? It
4 doesn't even identify the affiliates, does it?

5 A No.

6 Q And these are Macquarie affiliates?

7 A It says "respective affiliates," which refers to the
8 company also. The documents that were negotiated at the time
9 may be the -- may be the two listed and maybe others as of the
10 date hereof, we would need to ask counsel the time -- to tell
11 us which ones they are.

12 Q Now do you think it's unusual that Boketo would be defined
13 as Macquarie in the first sentence of this letter?

14 A No, given Boketo is 100 percent-owned subsidiary
15 indirectly -- 100 percent-owned subsidiary of Macquarie.

16 Q So Macquarie's calling the shots here, and passing money
17 through, and orchestrating this advantage transaction?

18 MR. MARINO: Objection to the form of that question.

19 THE COURT: Will you restate that?

20 Q So Macquarie is formulating this transaction, funding this
21 transaction, structuring this transaction, is that correct?

22 A That's correct; and Boketo is a -- has a Board of Managers
23 that I outlined earlier.

24 Q Now let's go over to Page 3 of the letter. And this
25 letter is dated July 13, 2012, is it not?

1 A That's correct.

2 Q Did this letter have to be acted upon by any specific
3 time?

4 A Um, it appears so; I'm reading live as you're asking me on
5 the last paragraph on Page 3.

6 Q And is that deadline by which Adreca had to act, was it
7 the very next day, July 14, 2012?

8 A It was.

9 Q And what did Adreca have to do one day after this equity
10 commitment letter was issued?

11 A I'm reading off the page, "Unless on or prior to such time
12 Macquarie shall have received a copy of this letter agreement
13 executed and delivered by the company."

14 Q Were there any other conditions that had to be met by July
15 14, 2012, the very next day?

16 A There might have been, I didn't -- I would need to go
17 through the documents in full with counsel.

18 Q Would you read the next sentence in that letter, please,
19 sir?

20 A Right, "Notwithstanding acceptance of this letter
21 agreement, the commitment set forth herein will automatically
22 terminate at 5 p.m. Eastern Standard Time on July 14, 2012
23 unless definitive investment documentation is executed on or
24 before such date."

25 Q All right. So definitive execute -- definitive investment

1 documentation had to be executed on that date, is that correct?

2 A It appears so.

3 Q And I believe that's defined on the very -- on Annex A,
4 Paragraph 2, is it not?

5 A Correct.

6 Q And what -- what constituted investment documentation?

7 A Would you like me to read it out?

8 Q The FSNA buyer merger agreement is one of those, is it
9 not?

10 A Yes.

11 Q Management services agreement?

12 A Yes.

13 Q A warrant?

14 A Correct.

15 Q Voting agreements?

16 A Yes.

17 Q And also the purchase documentation had to be executed and
18 delivered, did it not?

19 A Correct.

20 Q Do you realize that those documents comprise at least 980
21 pages of documents?

22 A I didn't know that.

23 Q And do you know if those had already been read, and pre-
24 approved by anyone?

25 A I was not involved in this action at the time running it,

1 as we discussed earlier. I can tell you from my personal
2 experience in transactions like this, documents get signed on
3 the last day in totality after a typically long period of
4 drafting and negotiation by all parties involved. And,
5 therefore, the time frames referenced in these letters are very
6 short.

7 Q All right. So the -- you drafted and signed by the
8 parties involved, if you'd turn to the third -- the -- the
9 third page of -- the fourth page, the parties involved are
10 Boketo, LLC and Adreca Holdings Corp., is that correct?

11 A Correct.

12 Q Who signed for Boketo, LLC?

13 A Dan Boland as Managing Director, and Bruce Donaldson also
14 as Managing Director.

15 Q And who signed for Adreca Holdings Corp?

16 A The same individuals, Dan Boland and Bruce Donaldson.

17 Q So these two entities negotiated this equity commitment
18 letter and all of the investment documentation between
19 themselves?

20 A I don't know if that is true. I imagine there's a number
21 of other parties that are parties to the other agreements that
22 you mentioned -- some names were mentioned in the Annex A.

23 Q All right. But this commitment letter is between two
24 wholly owned Macquarie entities, is that right?

25 A This commitment letter is.

1 Q Yeah. Now going back to the permitted uses, do you know
2 what expenses Macquarie incurred in connection with this
3 transaction?

4 A I don't.

5 Q Because those are a permitted use.

6 A I don't. I don't know what the expenses were.

7 Q Do you know who prepared the investment documentation?

8 A I don't know the individuals. I'd expect our, and all the
9 involved parties' counsel and principals to have developed and
10 negotiated those.

11 Q So the two parties to this agreement are Adreca Holdings
12 and Boketo, is that right?

13 A That's correct.

14 Q And do you know who represented Boketo in this, and who
15 represented Adreca Holdings?

16 A I don't remember.

17 Q Do you know who drafted the investment documentation?

18 A I don't remember. I imagine all the parties involved and
19 their counsel in those -- in those various documents.

20 Q But you don't know that.

21 A I don't know that.

22 Q Do you know if the \$2.5 million arrangement fee that was a
23 permitted use was ever paid out of these funds?

24 A I don't believe so.

25 Q Do you know why?

1 A I don't know why it wasn't paid at the time.

2 Q Is that unusual that it was not paid?

3 A It would be unusual, yes.

4 Q Did you say it was unusual?

5 A It is unusual, yes.

6 Q If I were to try to contact someone at Boketo, LLC, how
7 would I go about that?

8 A Typically documentation, notice provisions with addresses
9 and names of individuals.

10 Q If I were to -- if I were not a party to the agreements,
11 how would I contact Boketo?

12 A You would look up the details in the notice provision with
13 the addresses or individuals.

14 Q What if you didn't have a document with a notice provision
15 in it?

16 A I don't know, unless your circumstance --

17 Q Is -- does Boketo have a telephone number? Is it listed
18 as a -- in the telephone directory?

19 A I don't know the answer to that question.

20 Q Does it have a web page?

21 A I don't know.

22 Q Does it have a -- is it housed in the same facility as the
23 Macquarie Capital?

24 A I don't know. I imagine the address, and I see at the top
25 of the page here it lists it as 2012, it's the same address as

1 the Macquarie office.

2 Q Does it have any employees?

3 A It has a Board of Managers; I'm one of them.

4 Q Are you compensated by being a manager of Boketo?

5 A I'm an employee of Macquarie Holdings USA, Inc. for --

6 Q So your compensation comes through Macquarie Holdings?

7 A Correct.

8 Q Boketo does not pay you to be a Managing Director?

9 A No, it's 100 percent-owned entity of Macquarie.

10 Q If I wanted to find out who the managers of Boketo are,
11 how would I -- how would I go about that?

12 A If I needed to find that -- that question out about a
13 company, I would ask my counsel how to.

14 Q Well, if -- if you -- if FSNA was to give notice to
15 Boketo, how would it know who to contact?

16 A I imagine, from experience and other transactions, that
17 the stack of 980 pages of documents lists a number of parties,
18 including FSNA and Boketo with notice provisions, plus the
19 reality that the parties have been dealing with each other for
20 a number of months.

21 Q Let's go back to the original limited liability company
22 agreement. That has the initial managers as being Michael
23 Silverton, Dan Boland, and Bruce Donaldson, right?

24 A Yes.

25 Q And would you expect the notice to be given to one of

1 them?

2 A I don't know what the notice provisions say. They could
3 either list the individuals, or they could list the legal
4 department, or one of our lawyers.

5 Q So it might be Boketo, LLC at the same address as shown on
6 this letter which is Macquarie's address?

7 A It might be.

8 Q Are you familiar with the agreement and plan of merger?

9 A Yes.

10 Q I believe that's Exhibit -- it's Exhibit 35, it's our 9A,
11 but I don't have the amendment to that, so if you will pull
12 Exhibit 35 up.

13 A Yes.

14 Q I'll be asking you a couple of questions about that. If
15 you would flip over to Section 9.3 of the agreement and plan of
16 merger.

17 A Okay.

18 Q I believe that's on Page 16, it says "The parties shall
19 negotiate" --

20 A I'm sorry, sir. Are we looking at the same document?
21 Mine's on Page 9, I'm looking at the amendment. Are you
22 looking at the --

23 (Pause)

24 THE COURT: Are these the original documents that I
25 have, or are they copies?

1 (The Court engaged in off-the-record colloquy with Clerk)

2 THE COURT: I have Document 35, if you need it.

3 UNIDENTIFIED ATTORNEY: Here it is, it was under
4 here.

5 BY MR. ROSENBLATT:

6 Q All right. Let's go back to the agreement and plan of
7 merger that was executed on -- do you have the original
8 agreement and plan of merger --

9 A No.

10 Q -- or do you need a copy of that?

11 A I have the amendment, but not the original. Thank you.

12 MR. MARINO: Is that 9A?

13 MR. ROSENBLATT: 9A, that's part of now 35, I
14 believe.

15 MR. MARINO: I think they were admitted as Exhibit
16 35/9A.

17 MR. ROSENBLATT: Okay.

18 Q At the time of the equity commitment letter, it was the
19 agreement and plan of merger dated July 13, 2012 that would be
20 the applicable document, is that correct?

21 A I'm looking at it, yeah.

22 Q If you could look at Section 9.3, did that contemplate
23 final structure documents consistent with the terms set forth
24 in Exhibit E, the final structure term sheet?

25 A Yes.

1 Q Flip over, if you would, to Exhibit E.

2 A Yes.

3 Q Look down there under "Approval Rights of the Preferred
4 and Common," Item Number 3.

5 A Yes.

6 Q Do you see that?

7 A Yup.

8 Q Is bankruptcy one of those four items?

9 A In little -- in Item Number 3, the list is "Liquidation,
10 solution, winding up, or reorganization."

11 Q That does not include bankruptcy, does it?

12 A It doesn't include the word "bankruptcy."

13 Q And -- and so it was this final structure term sheet that
14 was part of the investment documentation that was a part of the
15 equity commitment letter, is that correct?

16 A It appears so.

17 Q On the certificate of incorporation and bylaws, do you
18 know who prepared those?

19 A I don't; I imagine it was the same sort of counsel,
20 including the company's counsel.

21 Q Do you know how far in advance those were submitted to Mr.
22 McDonnell before he was asked to execute those?

23 A I don't know.

24 MR. ROSENBLATT: May I approach the witness, Your
25 Honor?

1 THE COURT: You may.

2 MR. ROSENBLATT: Does the Court have a copy of all
3 this?

4 THE COURT: I'm not sure what you're talking about,
5 "all of this." I've got --

6 (Laughter)

7 MR. ROSENBLATT: Exhibit 9, Your Honor.

8 THE COURT: I probably don't. I have Exhibits 32 --
9 you know, 30 through -- 32 through 36. Then I have another
10 tall stack that I believe were yours, that's probably six/eight
11 inches steep. Exhibit Number 9 appears to be -- the one you
12 were just talking about.

13 MR. ROSENBLATT: All right. This is the motion to --
14 of the Macquarie Parties to dismiss the case, which is Docket
15 Number 121 in this case.

16 THE COURT: I do have that because I brought it with
17 me.

18 BY MR. ROSENBLATT:

19 Q If you would look over at --

20 THE COURT: The motion to dismiss is what you want me
21 to look at at this time?

22 MR. ROSENBLATT: That's correct, Your Honor.

23 THE COURT: All right. I'm looking at Document 121.

24 MR. ROSENBLATT: Okay.

25 Q Would you look at the last sentence on Page 2?

1 A Yes.

2 Q Does that say that the debtor's certificate of
3 incorporation, Exhibit B, expressly states that the debtor
4 cannot file a bankruptcy petition without the consent of the
5 owners of the majority of such stock?

6 A It does.

7 Q All right. Now would you go back to the certificate of
8 incorporation, and don't you have to piece that together? It
9 doesn't say that in one sentence, does it?

10 A (No verbal response).

11 Q There's not a sentence in there that says "FSNA cannot
12 file a bankruptcy petition without the consent of the owners of
13 the majority of the stock," does it?

14 A No.

15 Q It speaks of effecting a liquidation event.

16 A I'm looking at it; that's correct.

17 Q And then you've got to go over and look at the definition
18 of liquidation event, is that correct?

19 A Correct.

20 Q And liquidation event would even prevent, as I understand,
21 Boketo's position and Macquarie Parties' position would keep
22 the FSNA directors from even considering or beginning to
23 explore or discuss the possibilities of a bankruptcy case, a
24 Chapter 11 case, is that correct?

25 A It refers to preparatory steps towards --

1 Q Wouldn't discussion of that and exploring the
2 possibilities, and the benefits of that be part of the
3 preparatory steps?

4 A I would ask counsel to give an -- to give a legal answer
5 to that. That's not necessarily the only interpretation, but
6 it's a question for counsel.

7 Q So you think that's a legal question. You don't feel
8 comfortable from a business perspective answering that?

9 A From a business perspective, preparatory steps is much
10 earlier than actually occurred, but is after the first person
11 thought of the possibility of a filing of a bankruptcy as an
12 option.

13 Q Now at the time of the bankruptcy filing, I think your --
14 Mr. Marino asked you wasn't -- wouldn't it be possible for
15 Macquarie to invest more money in FSNA; did he ask you that?

16 A He asked me that, yes.

17 Q And it would have been possible --

18 A Of course.

19 Q -- wouldn't it?

20 A Yeah.

21 Q But Macquarie had sued FSNA in New York State Court for
22 its \$2.5 million fee, and another \$500,000 fee in the previous
23 November of 2016, hadn't it?

24 A That's correct.

25 Q So do you think there's a snowball's chance that Macquarie

1 would have ever invested more money in FSNA?

2 A Yes, there is. We have a \$15 million equity stake versus
3 a two and a half plus five -- two and a half million plus
4 \$500,000 fee. I have no idea what the options were because I
5 wasn't at all involved in the deliberations. It's absolutely
6 possible, I don't know whether it would have happened.

7 Q Had any steps been taken to explore options prior -- prior
8 to the bankruptcy filing, in the months before bankruptcy
9 filing, had you had any discussions with Tom McDonnell, or
10 anyone else at FSNA, about their financial condition and about
11 resolving issues between Macquarie and FSNA?

12 MR. MARINO: Objection to that question. Discussions
13 between the principals about resolving the dispute, and we're
14 going to have testimony about it?

15 THE COURT: I sustain it.

16 BY MR. ROSENBLATT:

17 Q Had you discussed with anyone at FSNA its financial
18 conditions and resolution to protect Boketo's interest in FSNA?

19 MR. MARINO: The same objection.

20 THE COURT: I'll sustain it one more time. I mean
21 I'm not sure what -- how we got off into this.

22 MR. ROSENBLATT: Your Honor, he said Macquarie could
23 have invested more money, and so I was just exploring whether
24 there had been any discussions along those same lines prior to
25 the bankruptcy filing.

1 THE COURT: Well, ask him if it had any discussions
2 with it.

3 Q Had you had any discussions with FSNA about a financial
4 investment -- additional financial investment or concessions by
5 Macquarie to FSNA to enable it to become financially viable?

6 A We did not get to that level of detail. The financial
7 conditions of the company are publicly available, so I'm
8 broadly familiar with those.

9 Q Would you get regular reports from Duncan Murdoch about
10 the financial condition of FSNA?

11 A The reports are publicly available, so it wasn't
12 necessary.

13 Q Say again?

14 A The reports -- the financial reports of the company are
15 publicly available because of the filing obligations the
16 company has, so -- actually I was able to -- actually have
17 access to those reports directly.

18 Q So the publicly filed financial reports of FSNA were
19 available to you, and you looked at those?

20 A They're available to everybody; I've seen those, yes.

21 Q And are you aware that on the consolidated financial
22 statements for FSNA and all of its subsidiaries for the fiscal
23 year ending September 30, 2016, the auditor had in several
24 places references to going concern?

25 A I saw going -- I saw a going concern reference, yes.

1 Q And would you tell the Court what a going concern
2 reference is? Is that a positive or a negative factor?

3 A I'm not an accountant, but it is a -- a negative factor.

4 Q And why is that a negative factor?

5 A The auditors -- this may not be the exactly right
6 terminology. The auditors are expressing a concern about the
7 viability of the company as a going concern.

8 MR. MARINO: Your Honor, I'm -- I'm trying to hold
9 objection, but we've gotten off on some tangent here, and I
10 don't know what it -- that it has any relevancy to the matter
11 before the Court. I'll try to afford counsel latitude because
12 it's a bench trial, and Your Honor's presiding. But with the
13 Court's permission, I'd ask that we bring counsel back to the
14 matter at hand.

15 MR. ROSENBLATT: And, Your Honor, my -- my
16 questioning goes to the -- his knowledge of the financial
17 condition and stress of the company from the audited financial
18 report publicly filed that he reviewed.

19 THE COURT: Well, I don't -- I'm always worried about
20 expressing opinions, but having read -- y'all referred to them
21 in briefs, but they're motions, but they're briefs. There are
22 kind of two or three different theories, each one of you's
23 traveling on a different theory, so I want to let each of you
24 develop your set of facts to go with the theory.

25 But this particular aspect, it seems like to me, has

1 gotten way off track to any theory you had expressed in any of
2 the briefs. So I'm going to sustain it.

3 MR. MARINO: Thank you, Your Honor.

4 BY MR. ROSENBLATT:

5 Q Mr. Bachteler, if immediately prior to the filing of the
6 bankruptcy case you had been, as a -- as a Managing Director,
7 you're not just a Managing Director at Macquarie, are you?

8 A I am a Managing Director, I'm the co-head of our so-called
9 Principal Transactions Group, yes.

10 Q PTG?

11 A PTG.

12 Q All right. So you're a co-head of the PTG; that's pretty
13 high up the food chain, isn't it?

14 A Relatively.

15 Q With Macquarie being a creditor suing FSNA for \$2.5
16 million, \$500,000 in State Court, for Mr. Boland and Mr.
17 Silverton suing FSNA in the Delaware State Courts, couldn't
18 Macquarie have gone into Chancery Court and tried to
19 preemptively strike and enjoin FSNA from filing?

20 A I --

21 MR. MARINO: Objection.

22 A -- don't know how to answer that question, I'm not
23 qualified to answer that.

24 THE COURT: Did you withdraw your objection?

25 MR. MARINO: It's -- he answered the question.

1 BY MR. ROSENBLATT:

2 Q So you don't take issue with the fact that you had notice
3 of the bankruptcy case the day of the filing?

4 A I don't recall whether it was -- I believe it was the
5 afternoon before, but that's correct, yeah. To be clear, that
6 was a verbal -- I'm sorry -- to be clear, that was a verbal,
7 it's not a -- not a filing.

8 Q But subsequently, because both Macquarie and Boketo were
9 on the creditor matrix, you received notices from the
10 Bankruptcy Court, did you not?

11 A I've received the filings, yeah.

12 Q Now maybe I'm not remembering this, but why was it that
13 the Macquarie Parties jumped into the case immediately, but
14 Boketo did not?

15 A That's a question my counsel needs to answer. It's a
16 technical question -- for me, from my perspective, Macquarie
17 owns 100 percent of Boketo indirectly.

18 Q So in the bankruptcy case, are you aware that the
19 Macquarie Parties filed objections to DIP financing?

20 A Yeah.

21 Q Or joined -- joined -- they did not file objections, they
22 joined in the objection of other parties.

23 A Yeah, there were a series of -- of -- of submissions, and
24 I believe that was one of them.

25 Q And this is with your Macquarie Capital hat on, right,

1 that you knew that? Or was it from your Boketo perspective?
2 Or both?

3 A I have both hats on; my knowledge is on both sides that I
4 received the filings.

5 Q So were you regularly communicating with the filings, the
6 status of the bankruptcy case?

7 A Yes, I would say so, we were in regular connection with
8 our internal and external counsel.

9 Q And so you know the Macquarie Parties filed joinders to
10 various objections that were filed in the bankruptcy case.

11 A Yes.

12 Q And you know the Macquarie Parties never raised the motion
13 to dismiss, or the authority to filing any of those objections,
14 is that correct?

15 A I don't know that with certainty. I believe that's right,
16 I heard the reference earlier that it was referenced here in
17 court.

18 Q Why was it so important to Boketo and/or the Macquarie
19 Parties that Mr. Donaldson's deposition not be taken?

20 MR. MARINO: Objection; irrelevant.

21 THE COURT: State that again.

22 Q Why was it so important to Boketo and/or the Macquarie
23 Parties that Mr. Donaldson's deposition not be taken in this
24 case?

25 THE COURT: I'm going to sustain that objection.

1 MR. MARINO: Thank you, Your Honor.

2 BY MR. ROSENBLATT:

3 Q Were you involved in discussions about the Macquarie
4 Parties filing a motion to dismiss?

5 A Yes.

6 Q And did you raise at that time whether Boketo should --
7 did you -- did you think about whether Boketo should file that
8 motion?

9 MR. MARINO: I'm going to object, Your Honor. These
10 are obviously discussions that were held with counsel. And so
11 to the extent the question calls for the disclosure of
12 privileged information, we object.

13 THE COURT: I take it, Mr. Rosenblatt, that one of
14 your grounds you raise on why the motion should be dismissed is
15 because it was not timely filed.

16 MR. ROSENBLATT: That's correct, Your Honor.

17 THE COURT: And part of it, of course, say
18 prepetition you ask him questions to find out how long did he
19 know about it before filing, whether -- how much time they had,
20 whether they ought to file it the next day or not. And then --
21 then it's pretty clear when it was filed. And then you wanted
22 to know why it took them so long, and you've been over that a
23 pretty good bit. But seems like you're going over the same
24 territory a pretty good bit, but -- you could go a while
25 longer, but --

1 MR. ROSENBLATT: We'll go ahead and wrap this up.

2 THE COURT: -- seems like you've pretty well done
3 pretty good so far on your record, but I don't want to cut you
4 off prematurely.

5 MR. ROSENBLATT: Thank you, Your Honor.

6 BY MR. ROSENBLATT:

7 Q But -- in summary then, Mr. Bachteler, Boketo never filed
8 any objection to anything that happened in this bankruptcy case
9 until the objection that it joined in or filed to the retention
10 of Horne CPA group.

11 A I believe that's correct.

12 Q With respect to Boketo's rights as a golden shareholder --
13 can we use that terminology?

14 A It's not reflected anywhere, and my understanding of a
15 golden share is different.

16 Q Would -- would it be your view that the effect of the
17 provision of Section 4.4(j) would be to place in the hands of
18 Boketo the ultimate authority to prohibit FSNA from filing for
19 Federal bankruptcy relief?

20 A Without the consent of the single largest owner, yes.

21 Q And even if the Board of Directors of FSNA deemed in its
22 best judgment interest, and the use of -- in its business
23 judgment that it was in the best interest of FSNA to file, it's
24 the position of Boketo that it had an absolute right to block
25 that regardless?

1 A I never got to ask that question because I never got -- of
2 counsel because I never got faced with that question.

3 Q But is that your view of this provision?

4 A My view is clearly as expressed in the filing, that the
5 consent that was necessary for this filing was neither sought
6 nor provided.

7 Q But I'm asking, do you -- did --

8 A Which invalidates --

9 Q Did you view that you have an absolute right to block a
10 bankruptcy filing without your consent?

11 A There is a subtle distinction in the terminology; I would
12 confirm with my counsel that that statement is also true, in
13 addition to the one that I gave. The reason why I haven't
14 asked that question is because we weren't asked to consent; at
15 that point, I would have asked that question, whether we are
16 able to say no or, for some reason, aren't able to say no.

17 Q Does Boketo take the position that it owes no duties to
18 anyone but itself in connection with the issue of whether FSNA
19 would be better served being in a Chapter 11 case or not -- or
20 being denied access to a Chapter 11 case?

21 A It's a similar answer. I understand the question, and I
22 would discuss that with counsel, and that discussion never
23 happened since I was informed of the bankruptcy filing as it
24 occurred.

25 Q Do you agree with me that if this provision that Boketo

1 seeks to enforce is given full force and effect, that the
2 business judgment of the Board of Directors of FSNA would be
3 effectively overruled by Boketo?

4 A Unfortunately, same answer. I don't know, and I can't
5 express, not being a lawyer, what the effect of that is. We're
6 clearly of the position that it does not allow for the filing
7 of this bankruptcy case.

8 Q And would you agree with me that if Boketo refused to
9 consent to the filing of the bankruptcy case, even if it had
10 been approved by the Board of Directors of FSNA, that the free
11 exercise of the business judgment of the FSNA directors would
12 be effectively thwarted?

13 A I can't confirm that either, unfortunately, for the same -
14 - or the same reason. It sounds like a broader statement than
15 the one I'm making.

16 Q Does Boketo contend that it can act in its own best
17 interest of the Macquarie Parties on the issue of whether to
18 consent to the bankruptcy filing?

19 MR. MARINO: Objection to this, Your Honor. It's
20 repetitive and misstates the prior testimony.

21 THE COURT: It does seem to be repetitive; I think
22 he's answered that.

23 BY MR. ROSENBLATT:

24 Q Francis Brown --

25 A Yes.

1 Q Who is Frances Brown?

2 A Frances Brown used to be an employee or consultant --
3 employee of or consultant to Macquarie.

4 Q And did he used to be a FSNA director?

5 A I don't know the answer to that question.

6 MR. MARINO: Objection to this, Your Honor; beyond
7 the scope of direct, and really unrelated.

8 THE COURT: It's about 20 to 12, we've been here a
9 little over two hours. If this is going to go on for a while
10 longer, we'll take a break. If you're close to the end, we'll
11 finish out your cross.

12 MR. ROSENBLATT: Your Honor --

13 THE COURT: Do you have any idea?

14 MR. ROSENBLATT: -- I think we're pretty close to
15 the end. I think we can easily finish before lunch, if the
16 Court --

17 THE COURT: All right.

18 MR. ROSENBLATT: Or we can take our --

19 THE COURT: Now --

20 MR. ROSENBLATT: We can go ahead and take our lunch
21 break now and --

22 MR. MARINO: I just want to press my objection, Your
23 Honor. We've been over this ground --

24 THE COURT: All right.

25 MR. MARINO: -- it was a narrow --

1 THE COURT: I'll sustain your objection.

2 MR. MARINO: Thank you, sir.

3 BY MR. ROSENBLATT:

4 Q Who is John Hughes?

5 MR. MARINO: Your Honor, objection.

6 THE COURT: I'll him ask who they are, but I'm not
7 going into John Hughes's life story.

8 BY MR. ROSENBLATT:

9 Q Who is John Hughes?

10 A John Hughes is a former employee of Macquarie.

11 Q Did either of the submit a report to Boketo with respect
12 to Boketo's investment in FSNA and then the Advantage
13 transaction?

14 MR. MARINO: I'm going to object to this, Your Honor;
15 completely beyond the scope of direct, and beyond the scope of
16 this proceeding. It's very much designed to lead us into a
17 matter that I would suggest -- is was actually the impetus for
18 this filing related to Mr. Donaldson's deposition.

19 THE COURT: Sustained.

20 MR. MARINO: Thank you, sir.

21 MR. ROSENBLATT: Your Honor, I was not going to go
22 toward the 2004 exam. I was going to show the relationship,
23 again, between Boketo, its investment, and Macquarie.

24 MR. MARINO: Your Honor, objection to that as
25 cumulative.

1 THE COURT: I would -- I've heard -- wait, wait.
2 I've -- we've been over that all morning, I think, and you
3 showed the line up, who owns everything crossways.

4 MR. ROSENBLATT: This is just another angle into that
5 same issue, Your Honor.

6 THE COURT: Briefly go into it if you want to.

7 MR. ROSENBLATT: Okay.

8 THE COURT: Briefly.

9 BY MR. ROSENBLATT:

10 Q Do you know if Mr. Brown and Mr. Hughes issued any report
11 to Boketo concerning their investigation about why this --

12 MR. MARINO: The objection's been sustained.

13 THE COURT: Wait, wait, wait.

14 MR. MARINO: The objection to that question was
15 sustained.

16 THE COURT: Let me --

17 MR. ROSENBLATT: May I ask --

18 THE COURT: Let him finish the question first.

19 Q Do you know whether Mr. Frances Brown and Mr. John Hughes
20 ever issued a report to Boketo, LLC concerning their
21 investigation into the investment of Boketo into FSNA for the
22 Advantage transaction.

23 MR. MARINO: Objection; the question's beyond the
24 scope of this proceeding.

25 THE COURT: Sustained.

1 MR. MARINO: Thank you, Your Honor.

2 Q I believe you testified on direct that you have some
3 experience with distressed businesses.

4 A I have some, yes.

5 Q Do you deal in that very often?

6 A Thankfully not.

7 Q If -- if you were the investment banker here -- and you're
8 generally familiar with FSNA's financial status?

9 A Broadly.

10 Q And you've reviewed the schedules and statement of
11 financial affairs, right?

12 A I've reviewed the publicly available financials as they
13 became ---

14 Q And --

15 A -- public over time.

16 Q And you reviewed the publicly filed consolidated financial
17 statements.

18 A Yes.

19 Q Where do you see this case? Where do you see FSNA going
20 from here, absent a bankruptcy case?

21 MR. MARINO: Objection to that.

22 THE COURT: Sustained.

23 MR. ROSENBLATT: We don't have anything further, Your
24 Honor.

25 THE COURT: All right. Anything on redirect?

1 MR. MARINO: Just very briefly, Your Honor, a couple
2 questions.

3 THE COURT: All right.

4 REDIRECT EXAMINATION

5 BY MR. MARINO:

6 Q Mr. Bachteler, you were asked on cross-examination how
7 anyone would be able to find Boketo, do you remember those --
8 that line of questions?

9 A The managers of Boketo, yes.

10 Q Let me ask you to speak right into the microphone, please.

11 A Yes, I remember that question.

12 Q All right. I want to ask you to take a look at Exhibit
13 9A, do you have that in front of you?

14 A Right.

15 Q The original agreement and plan of merger.

16 A Yes, I have it.

17 Q Turn to Page 10, please.

18 A Yes.

19 Q And direct your attention to the center of the page there,
20 "Investor," see that?

21 A Yes.

22 Q Can you read that into the record, please?

23 A It's a defined term, "Investor has the meaning set forth
24 in the preamble hereto."

25 Q Okay. And to go back to the preamble, which is the very

1 first paragraph under --

2 A Yeah.

3 Q -- the heading, "Agreement and Plan of Merger," and tell
4 the Court who is defined as investor.

5 A "Boketo, LLC, a Delaware Limited Liability Company,
6 defined term, Investor."

7 Q Okay. Let me ask you to direct your attention to Page 78
8 of that document, and read that into the record, if you will,
9 please, sir.

10 A "Section 13.2, Notices: All notices, requests, and other
11 communications to any party hereunder shall be in writing,
12 including facsimile, transmission, or similar writing, other
13 than e-mail, and shall be given to such party addressed to it
14 as -- at its address or telephone number set forth, or at such
15 other address or telephone number as such party may hereafter
16 specify for the purpose by notice to the other party, to
17 Investor and/or Company, both defined terms, Macquarie Capital
18 USA, Inc., 125 West 55th Street, New York, New York 10019,
19 Attention: Katherine Mogue (phonetic), Senior Vice President,
20 Legal Counsel, with a copy to, which shall not constitute
21 notice, Sidley Austin, LLP, 787 7th Avenue, New York, New York
22 10019, Fax 212-839-5599, Attention" --

23 Q That's enough.

24 A Okay.

25 Q Does that leave you with any doubt, sir, that this

1 agreement, set forth as Exhibit 9A in this proceeding, makes it
2 abundantly clear that notices to the investor, Boketo, are to
3 be sent to Macquarie Capital at its New York address?

4 A It doesn't leave me with any doubt.

5 Q You testified on cross-examination that the implication by
6 the filing of this bankruptcy petition, the implication was
7 that there was authority, and that you spent some time trying
8 to run that to ground, do you remember that?

9 A Yes.

10 Q All right.

11 MR. MARINO: And just to clarify with respect to
12 implication, Your Honor, I -- I believe this is Exhibit 11,
13 which was on the debtor's exhibits, the voluntary petition for
14 non-individuals filing for bankruptcy, with the Court's
15 permission, I'll approach the witness.

16 THE COURT: Say again?

17 MR. MARINO: May I approach the witness?

18 THE COURT: Yes.

19 BY MR. MARINO:

20 Q Mr. Bachteler, I ask you to take a look at the -- at
21 Exhibit 11, voluntary petition for non-individuals filing for
22 bankruptcy, do you see that?

23 A Yes, I do.

24 Q Okay. I direct your attention to Page 4.

25 A Yes.

1 Q Do you see the warning there?

2 A Yes.

3 Q And what is the first sentence of that warning?

4 A It says "Warning: Bankruptcy fraud is a serious crime,
5 making a false statement in connection with a bankruptcy case
6 can result in fines up to \$500,000 or imprisonment for up to 20
7 years, or both."

8 Q And this was a document that was executed on June 26th,
9 2017, correct?

10 A Correct.

11 Q And you see that it's signed by Thomas P. McDonnell the
12 Third, yes?

13 A Yes.

14 Q Did Boketo and Macquarie understand Exhibit 11 to
15 constitute a sworn representation by Mr. McDonnell that, in
16 fact, he had achieved or secured all of the authorization he
17 needed to file this bankruptcy petition?

18 A It did.

19 Q Do you have any doubt whatsoever that that was a false
20 statement?

21 A I don't have any doubt.

22 Q Now Mr. Rosenblatt asked you a number of questions about
23 Boketo and Macquarie's relationship to one another, and asked
24 you does Boketo --

25 A Yes.

1 Q -- have an office of its own, and things of that nature,
2 do you remember that?

3 A Yes.

4 Q Based on your 16 years of experience at investment banking
5 -- in investment banking, an you tell the Court if there's
6 anything remotely unusual about a company forming an entity,
7 such as Boketo, in this case for the exclusive purpose of
8 making an equity investment in a company in which an investment
9 bank has done an underwriting?

10 A It is done by us, and others, almost universally.

11 Q Now last question: Mr. Rosenblatt spent a little time --
12 he showed you a statement that was contained in one of our
13 briefs where we say that the certificate of incorporation of
14 Franchise Services of North America, Inc. expressly stated that
15 it could not file bankruptcy without getting the express
16 written consent of Boketo, do you remember that?

17 A Yes.

18 Q And then he walked you through the documents; I'd like to
19 do that again. Is there any doubt in your mind that the
20 certificate of incorporation of Franchise Services of North
21 America, Inc. makes it expressly clear that a liquidation event
22 includes not only the filing of a petition from bankruptcy, but
23 also taking any preparatory steps towards the filing of a
24 petition from bankruptcy?

25 A There is no doubt.

1 Q Is there any doubt in your mind that the -- that the
2 provision that we went over earlier, that specifically cross
3 references liquidation event -- I'll post it again for you --
4 it's provision 4.4(j), which says, "For so long as any shares
5 of Series A preferred stock are outstanding, and represent at
6 least ten percent of the total outstanding capital stock,
7 calculated on a fully diluted basis, and subject to Article 7
8 with respect to the Board's right to adopt, alter, amend, and
9 repeal the bylaws, the corporation shall not, and in the case
10 of Clause 2 below, shall not permit any subsidiary to, directly
11 or indirectly, whether through merger, consideration, amendment
12 to the certificate of incorporation or otherwise, do any of the
13 following without first obtaining the written consent or
14 affirmative vote of, one, the holders of a majority of the
15 shares of Series A preferred stock, then outstanding, voting
16 separately as a class, a preferred majority; and, two, the
17 holders of a majority of the shares of common stock then
18 outstanding voting separately as a class; three, effect any
19 liquidation event." Is there any doubt in your mind that the
20 certificate of incorporation that we've looked at, and that has
21 been marked into evidence in this case made it absolutely,
22 abundantly, explicitly clear that FSNA could not file for
23 bankruptcy without Boketo's written consent given Boketo's role
24 as a 49.76 percent owner of the company?

25 A There's no doubt in my mind.

1 Q Now, last question --

2 MR. MARINO: Did I say that already, Your Honor?

3 THE COURT: I've heard them before.

4 (Laughter)

5 MR. MARINO: Withdrawn; thank you, sir.

6 THE COURT: All right; thank you.

7 Do you have a next -- may this witness stand-down?

8 MR. MARINO: Yes, he may, Your Honor.

9 THE COURT: All right; you may stand-down.

10 I would think it's appropriate to take a lunch break
11 at this time. If I may ask, how many more witnesses do you
12 anticipate having?

13 MR. MARINO: We're going to confer over the lunch
14 break, Your Honor, but my expectation is that that will be our
15 only witness.

16 THE COURT: All right; thank you.

17 MR. MARINO: Thank you, sir.

18 THE COURT: It is 12 o'clock, we will return at 1:30.

19 Thank you very much; stand in recess.

20 (Recess 11:52 a.m./Reconvene 1:29 p.m.)

21 THE COURT: The movant is recognized.

22 MR. MARINO: Thank you very much, Your Honor.

23 Your Honor, other than to present such argument as
24 the Court may wish to hear at the conclusion of these
25 proceedings, and also I -- Mr. Eason mentioned a couple of

1 times that the debtor filed some papers on Tuesday evening, and
2 we obviously haven't had an opportunity to respond in writing
3 to those. So if Your Honor would appreciate or benefit by
4 responsive filing after today's proceedings, we would do that.

5 But in terms of our presentation of the evidence,
6 subject to our need to file a rebuttal case, that would
7 conclude our presentation on the motion from an evidentiary
8 perspective.

9 THE COURT: All right. Quite frankly, when we
10 conclude, I do anticipate asking for briefs from both sides on
11 it. So you can cover that at that time.

12 MR. MARINO: All right; thank you very much, Your
13 Honor.

14 THE COURT: All right. So you rest at this time?

15 MR. MARINO: We do rest at this time, Your Honor.

16 THE COURT: All right.

17 MR. MARINO: Thank you very much.

18 THE COURT: And the debtor's recognized.

19 MR. MADDUX: May I proceed, Your Honor?

20 THE COURT: You may.

21 MR. MADDUX: May it please the Court, Chris Maddux of
22 the Butler Snow firm here today for the debtor, Franchise
23 Services of North America.

24 At this time, the debtor would like to call Jon Nash
25 to the stand.

1 THE COURT: All right. Mr. Nash, you know where the
2 witness stand is.

3 MR. NASH: I do.

4 JONATHAN NASH, DEBTOR'S WITNESS, SWORN

5 THE COURT: All right; please be seated.

6 DIRECT EXAMINATION

7 BY MR. MADDUX:

8 Q Mr. Nash, will you please state your full name for the
9 record?

10 A Jonathan Nash.

11 Q And with which firm are you affiliated?

12 A MeadowLark Advisors.

13 Q Okay.

14 MR. MADDUX: Your Honor, I believe Mr. Nash has
15 testified in this Court previously, and has detailed his
16 qualifications and background. I would propose, for pace of
17 play today, that we just move on, unless you have anything in
18 particular you would like for me to cover.

19 THE COURT: I would probably be best for you to have
20 some background there for another -- another appeal separately.

21 MR. MADDUX: Okay; yes, Your Honor.

22 Q All right. Mr. --

23 THE COURT: I always assume everything's going to be
24 appeal.

25 MR. MADDUX: That -- that's right.

1 THE COURT: Oftentimes reversed, so --

2 (Laughter)

3 MR. MADDUX: All right.

4 BY MR. MADDUX:

5 Q Mr. Nash, can you please describe for the Court your
6 background in the restructuring and bankruptcy space?

7 A Yes, I am a -- I'm the owner of MeadowLark Advisors. I
8 have been a professional in turnaround and restructuring space
9 for 16 years. I've been a partner in several firms, most
10 recently prior to MeadowLark, I was a principal at Deloitte in
11 Deloitte's restructuring practice. I have been an interim
12 manager, and in particular a CRO, in several previous cases in
13 Bankruptcy Courts in various jurisdictions, including one in
14 Mississippi that we've discussed previously.

15 Q About how many cases have you served as Chief
16 Restructuring Officer?

17 A I don't remember off the top of my head, but it's at least
18 a dozen.

19 Q So that this is a role with which you've become very
20 familiar over the course of your career?

21 A It is.

22 Q Okay. Let's talk about this Chapter 11 case in
23 particular, Mr. Nash. Can you describe for the Court your role
24 and how you came to this case?

25 A I was -- I was contacted by debtor's counsel the week of -

1 - well, the week before the petition date, so the week would
2 have been -- I don't remember the date, but anyway, late June,
3 and made aware of the generalities of the situation. I was
4 retained by FSNA that week, I think it was maybe Thursday of
5 that week, and I was retained as an advisor, our firm was
6 retained as an advisor. And the retention at that time allowed
7 me to do a little bit of investigation into the affairs of the
8 company.

9 After the petition was filed, I became Chief
10 Restructuring Officer.

11 MR. MADDUX: And for the record, since this will
12 likely result in a transcript, Mr. Nash's name, Jon is short
13 for Jonathan, so it's J-O-N, as opposed to J-O-H-N.

14 Q All right; thank you, Mr. Nash. All right. So when you
15 began your prepetition engagement with the debtor, what were
16 the net steps that you and MeadowLark undertook?

17 A We -- we -- well, we looked into the basic financial
18 affairs of the company, the cash flow, and the projected
19 financial health over the next several months, making certain
20 assumptions, of course, but on the information that we were
21 able to gain from the company and the company's management
22 about the health of the company. And we came to what was a
23 rather clear conclusion at the time, that the company was
24 basically a healthy little company that was entangled in a
25 number of different legal battles in a number of different

1 venues, and the cost of litigating all of those various issues
2 was overwhelming the cash flow of the company.

3 Q And to whom did you report these findings?

4 A The Board of Directors.

5 Q Okay; all right. So ultimately, this -- your
6 representation of the debtor, fast forward a little bit, it
7 culminates on June 26th where you were called upon to enter
8 into a telephonic meeting of the Board of Directors in process,
9 correct?

10 A That's correct.

11 Q And at that time, who were the members of the Board of
12 Directors of FSNA? And on that call; excuse me.

13 A All five members of the Board of Directors were on the
14 call, that would include: Tom McDonnell, Duncan Murdoch, David
15 Miller, Bruce Donaldson, and Steve Brandon.

16 Q Okay.

17 MR. MADDUX: And, Your Honor, at different points in
18 time today, we're going to be talking about the various
19 compositions of the Board to address various matters. And so I
20 think it would be helpful if Mr. Nash would identify how these
21 five Directors came to be appointed to the FSNA Board, the
22 sources of their selection.

23 MR. MARINO: I want to register an objection to the
24 line of testimony that doesn't seem really directed at the
25 question that brings us to Your Honor. I can -- I can see, and

1 perhaps Your Honor can, as well, based on this morning's
2 proceedings, this hearing is stretching in -- on for many
3 hours, and I'm -- I -- you know, I -- so I've -- in terms of a
4 little background, we always like to give latitude, and it's
5 not my practice to try to cut someone off at the beginning of
6 an examination. But I want to draw to Your Honor's attention:
7 All this discussion about the financial condition of FSNA and
8 Mr. Nash's knowledge of it and so forth, the question is what
9 does it have to do with the question that brings us here,
10 whether this is a properly filed/authorized filing? And that's
11 the reason I rise to voice that objection.

12 MR. MADDUX: May I respond, Your Honor?

13 THE COURT: All right.

14 MR. MADDUX: First of all, I would like to point out
15 we're about four and a half minutes into the examination of Mr.
16 Nash before that came.

17 And Your Honor pointed out this morning that each of
18 the parties in their briefs, as we're now appropriately calling
19 them, have different paths that we're pursuing. Your Honor, I
20 can assure you this line of questioning is going directly to
21 one of the paths that we've set forth in our briefs.

22 I think that I can link all of this up, either in the
23 testimony or in closing. And I'd request a little bit of
24 latitude.

25 THE COURT: All right; I'll overrule the objection

1 for the time being.

2 MR. MARINO: Thank you, Your Honor.

3 MR. MADDUX: All right.

4 BY MR. MADDUX:

5 Q So the question that was pending was there were five
6 members of the Board of Directors that I had asked how the
7 appointment of each of those was determined, and just do it
8 very quickly.

9 A So I'll do the best I can to interpret the question, and
10 give you what you're looking for. Tom McDonnell is -- at the
11 time of -- at the time that we were retained, and the time of
12 the filing was the CEO of the company, and the Chairman of the
13 Board, he's a shareholder in his own right;

14 Duncan Murdoch and David Miller were appointed to the
15 Board by Macquarie;

16 Bruce Donaldson was appointed to the board, I
17 believe, by Tom McDonnell;

18 And Steve Brandon, I honestly don't know, but I
19 believe -- well, I just don't know.

20 Q Okay; all right. So there are five members of the Board,
21 three that are appointed by one group of shareholders, or came
22 from that direction, and two that Macquarie-appointed is your
23 understanding, correct?

24 A Um, that's right.

25 Q All right. And so, Mr. Nash, the -- your report to the

1 board on that day resulted in a decision that the Board
2 reached, and that you heard the Board make, correct?

3 A Yes.

4 MR. MADDUX: Your Honor, may I approach the witness?

5 THE COURT: You may.

6 MR. MADDUX: For the record's sake, Your Honor, I
7 have handed Mr. Nash a document that was premarked before the
8 hearing as Exhibit 1.

9 BY MR. MADDUX:

10 Q And I would ask Mr. Nash if he could identify that
11 document, please.

12 A This is a resolution adopted by the Board at the meeting
13 that we're discussing.

14 Q And what was this res -- what was the ultimate resolution
15 the Board adopted?

16 A You want me to read this whole thing?

17 Q No, do not read the whole thing. But it -- ultimately,
18 what decision was made?

19 A To file Chapter 11.

20 Q Okay. And, Mr. Nash, you were on that Board meeting, and
21 you listened to the Directors. Was Mr. Duncan Murdoch present
22 at that Board meeting?

23 A He was.

24 Q Did Mr. Murdoch, at any point in time, raise the golden
25 share or the rights of Boketo as a preferred shareholder during

1 that meeting?

2 A Not during the portion of the meeting that I was in
3 attendance.

4 Q Since that time, has he ever raised that to you, or in the
5 context of a full Board meeting?

6 A No.

7 Q Thank you.

8 MR. MADDUX: Your Honor, we would move for Exhibit 1
9 to be admitted into the record of this hearing.

10 THE COURT: Let it be admitted.

11 BY MR. MADDUX:

12 Q All right. So, Mr. Nash, the filing of the bankruptcy
13 takes place on June 26th, 2017, correct?

14 A Yes.

15 Q And then what -- what -- what did you begin doing once the
16 case was filed?

17 A We did a number of different things that are typical in a
18 bankruptcy: We filed first day motions, some of which are very
19 typical, some of which are a little bit unique. But, quite
20 frankly, every bankruptcy case is unique, so there's always
21 some unique first days;

22 There were several different paths that we were
23 working on at the same time. At the highest level, kind of a
24 30,000-foot view, we began a sale process. We entered a motion
25 for a 363 sale of certain assets;

1 We asked for a 2004 examination of Bruce Donaldson;
2 We started working with various claimants, and trying
3 to resolve various other issues that were out there plaguing
4 the company;

5 And we began really looking after the assets of the
6 company and trying to do everything that we could to maximize
7 value.

8 Q Now, Mr. Nash, one -- one of the things that we spent a
9 lot of time on early, and which this Court heard testimony
10 about at the final DIP hearing, related to the governance of
11 the company during the bankruptcy case. Can you describe to
12 the Board (sic) the unique issues that presented?

13 A The Board of Directors, composed of five members that
14 we've talked about, had a number of conflicts as a result of
15 their relationships with outside parties, and also as a result
16 of actions that certain Board members were taking. So for
17 example, Tom McDonnell was coming in as potential stalking
18 horse bidder at that time, coming in as the DIP lender. He had
19 conflicts with respect to those issues; the Macquarie-appointed
20 Directors had conflicts with respect to the pending Macquarie
21 litigation.

22 So we created a governance protocol that would allow
23 for Board members to be recused from meetings of the Board that
24 were taking place to discuss topics, and potentially decide on
25 topics for which there was a conflict.

1 Q And approximately how many Board meetings have we had
2 since the case was filed?

3 A Approximately 30.

4 Q How were the -- how were the conflicts identified with
5 respect to the conflict protocol?

6 A We asked each Board member to self-identify their
7 conflicts.

8 Q And did Mr. Murdoch identify that he was currently serving
9 as a Manager of Boketo?

10 A He did not.

11 Q Throughout the case, has the protocol been observed that
12 the Board determined was appropriate?

13 A Absolutely. I think that the Board has done an excellent
14 job, both in terms of supporting the company by having 30 Board
15 meetings, but also by making sure that we were following the
16 protocol scrupulously in every one of those meetings. There
17 have been only one or two events where Board members who had a
18 conflict were confronted with a discussion, you know, as the
19 natural discussion occurred during a Board meeting where their
20 conflict came to play. In those one or two instances, we
21 stopped the Board meeting, excused those Board members from the
22 call, and then proceeded accordingly.

23 MR. MADDUX: Your Honor, may I approach the witness?

24 THE COURT: You may.

25 MR. MADDUX: For the record, I have just handed Mr.

1 Nash a document identified as Exhibit 2 in our premarkings
2 prior to the hearing. And for the record, I don't know that we
3 need to have this introduced as evidence because the Court
4 takes judicial notice of its pleadings in the case, and this is
5 a copy of the docket printed from the Court's electronic case
6 filing system. We would ask that it be admitted as Exhibit 2
7 to this record.

8 MR. MARINO: No objection, Your Honor.

9 THE COURT: Let it be admitted.

10 MR. MADDUX: All right.

11 BY MR. MADDUX:

12 Q Mr. Nash, what I represent has been placed in front of you
13 is a copy of the bankruptcy docket in this case. And I would
14 ask that you look from the beginning through the date of August
15 the 10th, and ask that you identify for the record how many
16 entries on the docket are there between the first day and I --
17 and let's look at Docket Number 115 -- excuse me, 119. Prior
18 to August 10, how many docket entries did we have in this case?

19 A 119.

20 Q 119. Mr. Nash, I would ask that you flip over, and if you
21 could please tell me how many docket entries there were before
22 August the 31st, which I'll represent is the date that Boketo
23 filed its joinder to the motion to dismiss.

24 A Looks to me like 164.

25 Q So when we talk about the extent of the activity taking

1 place in the bankruptcy case, it is, indeed, reflected in that
2 number of docket entries up to those times, correct?

3 A Yes.

4 Q And is that unusual?

5 A No.

6 Q And based upon your experience as a Chief Restructuring
7 Officer, why is that not unusual in a Chapter 11 case?

8 A Well, based on my experience, the objective of a debtor,
9 once it goes into bankruptcy, is to get out of bankruptcy as
10 quickly as possible. And that generally requires taking action
11 on a number of different fronts very quickly. It requires
12 working with various parties in interest to resolve objections,
13 to improve the financial health of the company, and get it into
14 a position where it can reorganize.

15 MR. MADDUX: Your Honor, may I approach the witness?

16 THE COURT: You may.

17 MR. MADDUX: Your Honor, for the record, I've handed
18 Mr. Nash an exhibit which was premarked as Exhibit 3 to this
19 hearing record, and this is one I will need him to
20 authenticate.

21 THE COURT: All right.

22 BY MR. MADDUX:

23 Q So, Mr. Nash, can you identify this document for the
24 record, please?

25 A This is called Timeline Franchise Services of North

1 America, Inc.

2 Q And what does this document describe?

3 A This document describes the time from the filing of the
4 petition until the filing of the various entries in the docket,
5 time and dates.

6 Q And I'd like to point out for the record a few things:

7 The bankruptcy case was filed on June 26th, correct?

8 A Yes.

9 Q And then on June 28, who entered an appearance as
10 referenced in this exhibit?

11 A The Macquarie Parties entered an appearance, and that was
12 it.

13 Q Okay. And then on Friday, June 30th, what -- what
14 important motion did the debtor file, the second of the two
15 listed there?

16 A Well, I would say that the motion for interim fee
17 procedures for professionals might be the important one, but at
18 the -- the one that's obviously the critical one here is the
19 employ -- the motion to employ Equity Partners for the sale
20 process.

21 Q Okay. So that motion was granted -- or ultimately was
22 granted by an order entered by this Court. Did the Macquarie
23 Parties object to the motion to retain Equity Partners --
24 excuse me -- the application to retain Equity Partners?

25 A To my memory, there were no objections.

1 Q Did the Macquarie Parties object to the sale procedures
2 motion?

3 A No.

4 Q If you look on this timeline, Mr. Nash, prior to August
5 10th, what seems to be the thing that draws the Macquarie
6 Parties into the case?

7 A Prior to August 10th, it appeared that the Macquarie
8 Parties were focused on the 2004 examination.

9 Q Okay. Mr. Nash, in the course of reviewing this document,
10 have you determined that it summarizes an accurate state in
11 terms of the docket entries and the number of days involved
12 from the filing of the petition date?

13 A It does.

14 Q All right.

15 MR. MADDUX: Your Honor, on that basis, we would move
16 this document to be admitted into evidence as Exhibit Number 3.

17 THE COURT: Let it be admitted.

18 MR. MADDUX: All right.

19 BY MR. MADDUX:

20 Q So, Mr. Nash, what happened then from that point in time
21 is the case is off, it's going, and there's this sales process
22 that's taking place. Can you describe to the Court what was
23 going on with that process at that time?

24 A At what time?

25 Q At the time that the motion was filed to approve the sales

1 procedures, June 30th, I believe.

2 A You've got me confused.

3 Q Okay.

4 A June 30th was not the filing of the --

5 Q Oh.

6 A -- sales procedures motion.

7 Q Oh, I had my dates wrong. I got -- yeah, we filed the
8 application to employ Equity Partners, I see. Let's just go to
9 the date that Equity Partners was approved, July 21st. What
10 had been happening before and after that with respect to the
11 sale process?

12 A With respect to the sale process, prior to their
13 retention, Equity Partners had already gotten started, and was
14 doing a lot of work preparing for the starting gun, so to
15 speak: getting confidential information memorandum, and a
16 teaser, and a -- the -- the customary sort of preparation that
17 you would do for a sale process.

18 Q All right.

19 MR. MADDUX: Your Honor, may I approach the witness?

20 THE COURT: All right.

21 MR. MADDUX: For the record, I have handed Mr. Nash a
22 document that was premarked as Exhibit 6 to this proceeding,
23 and the title of the document is Marketing Timeline Franchise
24 Services of North America, Inc., Equity Partners HG, LLC.

25 BY MR. MADDUX:

1 Q Mr. Nash, I would ask if you could please identify this
2 document for the record?

3 A This is the marketing timeline of Franchise Services North
4 America, Inc. by Equity Partners.

5 Q And have you reviewed this document?

6 A I have.

7 Q And are you familiar with the actions described in the
8 summary?

9 A I am.

10 Q All right.

11 MR. MADDUX: Your Honor, on that basis, we would move
12 this document be admitted into evidence as Exhibit 6 to the
13 record, please.

14 MR. MARINO: No objection to this document, Your
15 Honor.

16 THE COURT: All right; admitted. Exhibit 6 is
17 admitted.

18 MR. MADDUX: Sorry I jumped out of order, Your Honor,
19 but I thought that'd be easier based on how we had premarked.

20 THE COURT: Well, we had 3, and then the next one
21 is 6.

22 MR. MADDUX: Yes, sir. Yes, sir, 4 and 5, I decided
23 to move past.

24 THE COURT: All right.

25 MR. MADDUX: I know that broke your heart.

1 THE COURT: If you've got some more, we'll certainly
2 entertain those, too.

3 MR. MADDUX: Okay; all right.

4 (Laughter)

5 BY MR. MADDUX:

6 Q Mr. Nash, if you could, please, using this document,
7 describe to the Court everything that was going on, or the
8 summary of what was going on in the sale process between
9 July 10 of 2017 and August 10 of 2017.

10 A I'll keep this at a very high level, but there was a
11 tremendous amount of effort going on between July 10th and
12 August 10th to bring potential buyers into the process; to give
13 them access to the kind of due diligence information that they
14 were interested in seeing; to negotiate with various bidders on
15 various points, those negotiations being led by Equity
16 Partners; and to continually update the Board of Directors on
17 the process; and to get the Board of Directors' input where
18 necessary and advisable.

19 Q And so when you say the "Board of Directors," with matters
20 pertaining to the sale process and the work of Equity Partners,
21 who was involved in that -- in those Board meetings?

22 A All of the Board members, with the exclusion of Tom
23 McDonnell.

24 Q So Duncan Murdoch and David Miller were all in those
25 meetings, correct?

1 A They were.

2 Q Okay; all right. Mr. Nash, if you could pick that exhibit
3 back up, please. We not only have to look at what happened
4 before August the 10th, but also what happens the next three
5 weeks in the sale process?

6 A Much the same sort of things, with the exception that over
7 the following three weeks, we were much closer to -- well, we --
8 -- we were approaching, and past, the stalking horse bid
9 deadline, and then ultimately the bid deadline, and so there
10 was a lot of work to bring bids in for the assets that were for
11 sale, and also to work with various bidders to modify the terms
12 of the sale to create a structure that was -- that was
13 something that would allow them to bid basically.

14 Q All right. So, Mr. Nash, we had the bankruptcy case
15 moving along, we have a sale process moving along, you
16 mentioned that there was certain prepetition litigation that
17 was pending that impacted the company's entry into bankruptcy.
18 Can you describe to the Court what's happening in that
19 litigation at this point in time?

20 A Some of the prepetition litigation, in particular I would
21 point to the prepetition litigation with Mr. Mitchell, was
22 proceeding through settlement discussions. And we believe that
23 those settlement discussions have ultimately been fruitful, and
24 are hopeful that we'll be able to submit a 9019 to the Court in
25 due course.

1 Others were effectively stayed, and stalled, and no
2 real progress occurred.

3 Q Okay. So how does this case compare to most Chapter 11s
4 in your experience?

5 A I'd say this is a pretty typical case. There's a couple
6 of nuances here that are unique, but there's nothing in this
7 case that I see that's completely unusual.

8 Q And so what are the unique nuances?

9 A The governance issues with respect to the internal
10 conflicts on the Board are very unique; the request for a 2004
11 exam in a first day motion is certainly unique.

12 I don't think there's anything particularly unique
13 about the claims pool or the claims process that we're going
14 through. Or I don't believe there's anything particularly
15 unique about the sale process that we've been going through,
16 even though it's -- it's certainly been an interesting one,
17 selling stock as opposed to assets, but I don't think those are
18 particularly unique.

19 Q So as you look at the activity that happened between June
20 26th and August 10th, what changed after August 10th, which was
21 the date the Macquarie Parties filed the motion to dismiss?

22 A In terms of the debtor's approach to the case, nothing
23 changed.

24 Q And why did nothing change?

25 A We were proceeding at that point down a path toward a

1 sale, in particular, that had -- you know, we had a sales
2 procedure motion that was approved by the Court, and there was
3 no way to stop that train. There was no way to slow that train
4 down, so we proceed at a pace in that front.

5 We also had various processes with claimants that
6 were underway, and we felt it was reasonable and worthwhile to
7 continue those discussions and negotiations, as well.

8 Q Mr. Nash, based upon your experience, not only in many
9 cases, but in this case in particular, what is the basis for
10 your comment that it's appropriate to look to get this sale
11 closed and concluded? Why do you think that's important?

12 A I think that -- in particular with this case, what we're
13 talking about is the sale of the stock and a subsidiary that
14 has a number of -- this is a franchise company, it has a number
15 of subsidiaries whose businesses are reasonably healthy, but
16 are small, and with the franchises, the number of third parties
17 unrelated to the bankruptcy that are affected by the outcome of
18 that sale process is very large, and I think it's important for
19 the health of that entity to get it into whatever ultimate
20 ownership structure that it's going to get into. A company's
21 in play, it's generally best for a company to get out of play
22 as soon as possible, especially one of this size.

23 Q And the sale process was run heretofore without any
24 interference from Macquarie.

25 A Yes.

1 Q All right. So what has Macquarie's involvement been in
2 the case otherwise? I mean obviously --

3 A Maybe you could elaborate on the question?

4 Q Well, I mean, you know, where -- where has Macquarie
5 gotten involved in this case? The Macquarie Parties.

6 A I think the Macquarie Parties have filed some motions of
7 their own, and the Macquarie Parties have filed joinders to
8 various other motions that are part of the docket.

9 Q All right. We are 101 days into this Chapter 11 case;
10 what has been your goal?

11 A We have -- we have a couple of goals overall, I guess
12 there's -- there's really three goals overall:

13 One is to define and understand the claims pool in
14 the case so that we have an understanding of what the creditors
15 look like that we need to work with;

16 The second is to resolve as much litigation as we
17 could;

18 And the third is to sell the assets of U-Save for as
19 much money as we could.

20 Q Mr. Nash, what would have happened if the debtor had not
21 filed for Chapter 11 protection?

22 MR. MARINO: I would just object to that as
23 speculative. I don't know what his basis for knowing that
24 would be.

25 THE COURT: Sustained.

1 BY MR. MADDUX:

2 Q Mr. Nash, how has the bankruptcy benefitted the debtor?

3 A The debtor has definitely benefitted from the automatic
4 stay, and an ability to redirect its focus from some of the
5 pending prepetition litigation to the sale process. It has
6 definitely benefitted from the ability to pursue the sale of
7 the assets, and to discover the market value of the U-Save
8 entity.

9 It has also benefitted from the ability to work with
10 claimants to satisfy their needs for understanding what their
11 claims are, and also the ability to negotiate on the value of
12 those claims, and define those claims through settlement
13 negotiations prior to any adjudication in the Bankruptcy Court.

14 Q One final question before we tender the witness: Mr.
15 Nash, you've mentioned the various assets of the debtors, and
16 one of the assets that's been identified is certain claims
17 against Macquarie. Where do you stand presently with respect
18 to your investigation of those claims?

19 A I've done -- well, I walked into the case knowing very
20 little about the claims that the debtor has against Macquarie.
21 I'm still in a position where I know little about the real
22 value of those claims.

23 I have heard from debtor's management their position
24 about the value of those claims. I've heard some from debtor's
25 counsel. What I don't have is the benefit of knowledge that, I

1 think, is in the minds of certain parties who are unable to
2 testify, or are unable to discuss their knowledge with me
3 without a court order. And I have not been able to have any
4 substantive negotiations with Macquarie to discuss the issues
5 around those claims from their perspective.

6 MR. MADDUX: Thank you, Your Honor; I tender the
7 witness.

8 THE COURT: All right.

9 CROSS-EXAMINATION

10 BY MR. MARINO:

11 Q Good afternoon, Mr. Nash.

12 A Good afternoon; forgive me, I've got a cough.

13 Q Would you like a bottle of water?

14 A I would; thank you.

15 MR. MARINO: May I approach?

16 THE COURT: You may.

17 THE WITNESS: That's the best exhibit yet.

18 MR. MARINO: That one would be admitted without
19 objection, I'm guessing.

20 (Laughter)

21 Q Mr. Nash, you testified to having a good bit of experience
22 in this particular arena, yes?

23 A Yes.

24 Q Okay. And when I say "this particular arena," you've
25 served in your -- in the exact capacity you're serving here

1 with respect to a number of previous bankruptcies, correct?

2 A I have.

3 Q Would you agree with me, sir, that it's important to
4 determine whether a bankruptcy was authorized right at the
5 beginning of your assignment?

6 A Absolutely.

7 Q Well, tell me everything you did to satisfy yourself that
8 Boketo, a 49.76 percent equity owner of FSNA, consented to this
9 bankruptcy.

10 A Prepetition, I was an advisor to a company, and I was
11 focused on other issues. I will tell you that on June 22nd, I
12 had a conversation with debtor's counsel about this topic, and
13 I left the matter in debtor's counsel's hands, and the company
14 management's hands.

15 Q Does that mean that you accepted as true debtor's
16 counsel's representation that FSNA had all the necessary legal
17 authorization to file this proceeding?

18 A That's not what I said.

19 Q I thought you said "I left it in debtor's counsel's
20 hands."

21 A That is what I said.

22 Q Can you tell me exactly what you mean by that?

23 A What I mean is that as a prepetition advisor to the
24 company, I was focused on other things. And while I do agree
25 that proper corporate authority prior to prepetition is an

1 important issue, it was -- it was an issue for the fiduciaries
2 of the company. It was an issue for the Board of Directors and
3 the managers.

4 Q You say you were focused on other things. Was it
5 important to you, given your role as the Chief -- is it Chief
6 Restructuring Officer, is that -- is that the title?

7 A It is.

8 Q CRO?

9 A Chief Restructuring Officer.

10 Q Was it important to you as the CRO to determine that
11 before you engaged in all of the things you described for Mr.
12 Maddux, you satisfy yourself that the proceeding was not void
13 ab initio, was that important?

14 A I became Chief Restructuring Officer post petition. So I
15 was not in a position to make any determination; we were in
16 court.

17 Q When was the first time you became aware of the
18 possibility that Franchise Services of North America, Inc.
19 might wish to pursue the protection of the Bankruptcy Court?
20 What date?

21 A That's a good question. It would have been June 20th,
22 maybe the 21st.

23 Q Okay. So about a week before the filing, right?

24 A Give or take.

25 Q Did you ever, at any time during the week before this

1 petition was filed, inquire as to whether FSNA had all the
2 necessary legal authorization to file this proceeding?

3 A Yes, I did.

4 Q Of whom did you make that inquiry?

5 A Debtor's counsel.

6 Q Did you do anything other than rely upon debtor's
7 counsel's word to determine that, in fact, FSNA had the ability
8 to file this proceeding?

9 A (No verbal response).

10 Q I think that's a simple question: Did you do anything
11 other than rely on debtor's counsel?

12 A I think it's a simple question, as well. What I'm trying
13 to do is recall the specifics of the conversations that I had.

14 (Pause)

15 A I think the simple answer to the question is no.

16 Q Okay. So let's try for a more complicated answer. Why
17 not?

18 A That's a good question. The reason why not is because
19 prior to the filing of the petition, I was not asked to opine
20 on whether or not the company should file, one; I was asked to
21 opine on whether or not the cash flow of the company was
22 sustainable, so I was focused on that;

23 And, two, I was reliant on the company's management,
24 and the company's Board of Directors, and the company's outside
25 counsel to properly explore the issue and come to a conclusion

1 on their business judgment, in particular the Board's business
2 judgment.

3 Q In other words, sir you did nothing to satisfy yourself
4 that FSNA had the legal authorization to file bankruptcy before
5 you agreed to become involved in this case, am I right?

6 A Oh, that's absolutely true.

7 Q Okay. So let me direct your attention to this certificate
8 of incorporation that's been marked -- I believe it's 36 -- 35
9 perhaps -- 36 -- and I have it blown up here for you, so did
10 you ever look at the certificate of incorporation of FSNA
11 before you said it should file bankruptcy?

12 A I did not ever say that FSNA should file bankruptcy.

13 Q Did you ever look at the certificate of incorporation of
14 FSNA before you became involved in this matter?

15 A I didn't look at anything before I became involved in the
16 matter.

17 Q Did you ever look at the certificate of incorporation of
18 FSNA at or about the time the bankruptcy petition was filed?

19 A I don't recall doing so, no.

20 Q Did you -- and -- and that's very important, right?

21 A Sure, absolutely.

22 Q I mean you'd recall if you did, right?

23 A Oh, I would, yes.

24 Q Yeah. And so when you say "I don't recall," that's like
25 saying "I didn't do it," right?

1 A Well, I think that's fair.

2 Q Okay.

3 A I mean there were a million things going on, but I think
4 that's fair.

5 Q A million things going on, but -- but one of the key
6 things was does this company have the capacity legally to file
7 for the bankruptcy protection of this Court, right?

8 A Sure.

9 Q But you did nothing, zero, to pursue that issue, correct?

10 A (No verbal response).

11 Q I'm right, right?

12 A Other than rely on the company's managers and counsel.

13 Q Right. And if they told you the truth, they told you the
14 truth, right? If they didn't, they didn't.

15 A Yes.

16 Q Okay. So take another look at the certificate of
17 incorporation.

18 THE COURT: Wait, wait, wait. You need to stay close
19 to the mic.

20 MR. MARINO: Oh, I'm sorry, Judge; I'm sorry. I
21 forgot myself here.

22 THE COURT: I know it.

23 MR. MARINO: I apologize.

24 THE COURT: Go ahead.

25 MR. MARINO: I'd like to be able to approach, just to

1 point out the -- the Board, if that's all right.

2 THE COURT: That'll be fine.

3 MR. MARINO: Thank you, sir.

4 BY MR. MARINO:

5 Q And here we go. Back to Exhibit 36, and we've got a
6 provision of the certificate of incorporation that says that
7 holders of --

8 THE COURT: Hold on. Hold just a second.

9 MR. MARINO: Thank you very much. Thanks. This is
10 the only time I'll do this, Your Honor, I'll -- no, that's
11 fine. I'll -- thank you so much. And I don't want to get too
12 close to you. We're pals because I gave you the water, but I
13 don't want to get too close; okay.

14 BY MR. MARINO:

15 Q So you never looked at the certificate of incorporation,
16 right, before --

17 A Not prepetition.

18 Q When's the first time you looked at it?

19 A I don't recall; it would have been shortly post petition.

20 Q And did --

21 THE WITNESS: Am I close enough to the here?

22 MR. MARINO: Yeah, you're great, yeah.

23 THE COURT: Not really, but I don't want to --

24 MR. MARINO: I'll get over here, everything will be
25 fine.

1 BY MR. MARINO:

2 Q So, Mr. Nash, did you ever focus on this provision,
3 4.4(j)?

4 A Ever? Absolutely, sure.

5 Q And when's the first time?

6 A Um, well, I got really focused on it after your motion to
7 dismiss.

8 Q I'm going to understand you to mean that "really focusing"
9 for you means something different than focusing.

10 A That's fair.

11 Q Okay. When'd you first focus on it?

12 A I would have first focused on this within two weeks of the
13 petition date; I don't have an exact date for you.

14 Q That's right. So you -- you first focused on this issue,
15 right, of someone having the ability to say "We don't consent
16 to the bankruptcy" two weeks after the thing was filed, right?

17 A I think that's probably right.

18 Q Okay. So did that cause you a little professional
19 heartburn?

20 A (No verbal response).

21 Q Let's be -- just -- if you understand what I mean, that's
22 fine.

23 A What do you mean by "professional heartburn"?

24 Q I can -- I can ask a different, perhaps less colloquial
25 question. But did it give you a little concern?

1 A Yes.

2 Q Is it your practice, sir, to become involved in the
3 capacity in which you are involved in this case in bankruptcies
4 that are not properly filed?

5 MR. MADDUX: Objection; legal conclusion.

6 THE COURT: Sustained.

7 BY MR. MARINO:

8 Q Is it your practice, sir, to become involved in cases in
9 which you do not, or have not, satisfied yourself that they are
10 properly filed?

11 A I think the real answer to that is that, one, it's my
12 practice to get involved prepetition, hopefully as far
13 prepetition as possible.

14 Q Here, it was three days, right? Three or four days.

15 A Here, it was three days.

16 Q Okay.

17 A Which isn't very long.

18 Q Okay.

19 A It is -- let me answer it this way: I think it's
20 certainly in my practice to make sure that companies are strict
21 in their followance of corporate governance requirements and
22 procedures.

23 Q And would you agree with me that based upon your review of
24 the certificate of incorporation, it does not appear that that
25 happened in this case?

1 A I would not. And the reason that I would not is because I
2 think there is a legal question here that I'm not qualified to
3 answer.

4 Q Well, I don't want to ask you any legal questions, sir.
5 But you probably -- I know -- I know you were present, sitting
6 at debtor's counsel's table this morning when I showed Mr.
7 Bachteler the petition itself, right?

8 A Yes.

9 Q Okay. And you know that Mr. McDonnell signed that under
10 pains and penalty of perjury, right?

11 A I do.

12 Q And you know that that petition is a form that is used in
13 every bankruptcy filed in the United States of America,
14 correct?

15 A I do.

16 Q And you know that filing a bankruptcy is serious business,
17 am I right?

18 A Absolutely.

19 Q You know that that's a very much, very often, and almost
20 always a last-ditch thing for a company to do, right?

21 A I think that's a fair characterization.

22 Q Okay. So it's a big deal, right?

23 A It's a big deal.

24 Q Okay. And you certainly, given your reputation, and you -
25 - you have a good reputation, am I right?

1 A I like to think so.

2 Q Well, and you do think so, right?

3 A I do.

4 Q And it's justified, you spent years at Deloitte as an
5 expert, right?

6 A Yes.

7 Q And you were recruited to go to other firms, and you went
8 there, right?

9 A Yes.

10 Q You've done an excellent job in your capacity as CRO, am I
11 right?

12 A I believe so, yes.

13 Q Okay. How many times have you been involved in a
14 situation where someone came in and said, "I had an absolute
15 right as a 49.76 percent owner of the debtor to block this
16 bankruptcy, and they didn't even ask my consent," how many times
17 has that happened in your career?

18 A Once.

19 Q This is the time, right?

20 A This is it.

21 Q A first time for everything, right?

22 A There is.

23 Q Okay. So here we are. It's July 11th, on direct
24 examination, Mr. Maddux told you -- had you tell him that there
25 were 119 entries, right?

1 A (No verbal response).

2 Q 119 entries that were filed before Macquarie came in and
3 objected to its -- this bankruptcy, and there were 164 entries
4 before Boketo joined the motion, do you remember that?

5 A Yes.

6 Q But you did well over 100 things in this case, secure in
7 the knowledge that there was a party that had a 49.76 percent
8 ownership interest in the debtor that was saying, "Hold it. We
9 didn't agree," am I right or wrong?

10 A (No verbal response).

11 Q You went and did all those things, although you knew that
12 there was a party that was claiming it had the authority to
13 agree or not to agree, and it had not been asked, am I right or
14 wrong?

15 A Restate the question for me, please.

16 Q I certainly will. You testified on direct examination to
17 having done many, many things in the course of this bankruptcy
18 proceeding, correct?

19 A Correct.

20 Q Many filings, pretty routine filings, and we'll get to
21 which ones weren't routine in a moment -- excuse me. But
22 pretty routine things that would happen in the relatively early
23 stages of the bankruptcy, yes?

24 A Correct.

25 Q Okay. How many of those things did you do after you

1 learned that: A, Boketo was a 49.76 percent owner of the
2 company? And, B, it was -- let's use the colloquial phrase --
3 making a little noise about having not agreed, how many other
4 things did you do after you heard that?

5 A I didn't hear any noise from Boketo until the joinder.

6 Q So no one told you that on July 11th, Alan Smith, who's
7 seated at counsel table, appeared in an in-chambers conference
8 with Judge Ellington and said, "Boketo/Macquarie, we, the owner
9 of 49.76 percent, have a question about this. We may be filing
10 to move to dismiss this bankruptcy as not authorized."

11 A My understanding -- I was told that day that Alan Smith
12 told Judge Ellington that Macquarie had some -- was considering
13 the possibility of filing a motion to dismiss.

14 Q Okay. And you -- and then the first question in your mind
15 would have been, "Well, who the heck is Macquarie," right?

16 A I was pretty aware of who Macquarie was.

17 Q You -- not only were you pretty aware, you knew they were
18 the 100 percent owner of Boketo, right?

19 A I knew they were --

20 MR. ROSENBLATT: Your Honor, we object to that. I
21 think the testimony is that Macquarie is not 100 percent owner
22 of Boketo. I think there are Macquarie entities that are the
23 owner --

24 MR. MARINO: Okay. This -- this can't be proper --

25 THE COURT: Wait, wait, wait. Just hold -- no --

1 MR. ROSENBLATT: If they want -- if they want to
2 consolidate everyone from Boketo up to Macquarie and call them
3 Macquarie, that's fine with us, Your Honor.

4 MR. MARINO: I'll ask it this way, Your Honor.

5 BY MR. MARINO:

6 Q You knew that Macquarie --

7 MR. MARINO: Strike that.

8 Q You knew that Boketo was a wholly owned subsidiary of
9 Macquarie, right?

10 MR. ROSENBLATT: Your Honor, I --

11 Q Did you know that?

12 MR. ROSENBLATT: This is the same question.

13 THE COURT: Let's --

14 MR. ROSENBLATT: I think the testimony's contrary --

15 THE COURT: Let's just stop a second. Y'all --

16 MR. ROSENBLATT: Unless he's going to define who
17 Macquarie is, I think we need to have the record clear.

18 THE COURT: May I say a word?

19 MR. MARINO: I'm sorry, Your Honor?

20 THE COURT: May I say a word? It seems to me y'all
21 are engaging in distinctions without much difference. I think
22 it's true that Macquarie itself does not hold all the stock,
23 it's indirect. Is that --

24 MR. MARINO: That's absolute --

25 THE COURT: Can we agree on that? But at the end of

1 the day, I believe when Mr. Macquarie says "Do something,"
2 Boketo is going to do it.

3 MR. MARINO: I couldn't agree with that more
4 completely, Your Honor.

5 THE COURT: All right.

6 MR. ROSENBLATT: We would agree with that, too, Your
7 Honor.

8 MR. MARINO: And as a matter --

9 THE COURT: All right; let's move on.

10 BY MR. MARINO:

11 Q As a matter of fact, Mr. Nash, you've been involved in
12 many corporate transactions where, as part and parcel of the
13 transaction, an entity is created for the exclusive purpose of
14 making an investment in another company, fair?

15 A Sure, that's typical.

16 Q Right; and that's what happened here, right?

17 A It appears so.

18 Q Yeah. So here's Macquarie having created Boketo for
19 purposes of accomplishing this 49.76 percent equity interest in
20 FSNA, right?

21 A Yes.

22 Q And you knew -- at least on July 11th, you drew this
23 distinction for me. You said -- I said -- I said, "Didn't you
24 know that Boketo was raising this issue on July 11th?" You
25 said, "Well, I knew Macquarie was." You knew Macquarie was

1 raising this issue on July 11th, right?

2 A I knew Macquarie was, yes.

3 Q Did you know that debtor's counsel filed a document,
4 Document 186, on September 18th in which it said, quote, "At
5 that chambers conference," referring to the July 11th
6 conference, "counsel for the Macquarie Parties indicated that
7 the Macquarie Parties were considering filing a motion to
8 dismiss the bankruptcy case on the grounds that Boketo, LLC, a
9 preferred shareholder holding the," quote/unquote, "'golden
10 shares' had not consented to the bankruptcy filing"?

11 A I did.

12 Q So there was no concealment from you by debtor's counsel
13 that what was going on in Judge Ellington's chambers on July
14 11th was Mr. Smith was saying, you know, there may be a problem
15 here, we may have a consent problem, right? You knew that on
16 July 11th, right?

17 A I did.

18 Q Okay. Did that -- at that time, did that cause you to say
19 to debtor's counsel -- and just for clarity of the record,
20 debtor's counsel is not your lawyer, right?

21 A No, debtor's counsel is debtor's lawyer.

22 Q Right. There's no attorney/client relationship between
23 you and debtor's counsel, right?

24 A I'm a fiduciary of the debtor, so there is; absolutely.

25 Q When you say "there is," does that mean you believe

1 there's -- there are privileged conferences between you and
2 debtor's counsel?

3 A I do.

4 Q Okay. So I don't want you to tell me anything about
5 privileged conversations. I just want to know if you, in your
6 independent capacity as the CRO, as of July 11th, knowing as
7 you did that Macquarie, through its counsel, was making noise
8 about perhaps having this being an unauthorized filing, tell me
9 everything you did to address that concern.

10 A Let me ask you --

11 Q Please -- please -- please answer me. Tell me everything
12 you did to address the concern.

13 A In my independent capacity as CRO, I served the Board of
14 Directors of FSNA, so I'm not sure I have an independent
15 capacity as CRO. I work for the Board, I work for the company.

16 Q I'm not splitting hairs with you, sir. What I want to
17 know is what you, Jonathan Nash, did in response to learning on
18 July 11th that a question had been raised as to whether this
19 petition had been properly filed. Tell me each and everything
20 you did.

21 A I asked debtor's counsel to give me a very thorough
22 understanding of the legal issues that surround the question of
23 whether or not the company had properly filed the petition.

24 Q Did you, at any time, at or about July 11th, upon learning
25 this information, look at the certificate of incorporation of

1 FSNA, and take a look at this 4.4(j)(3) that I've been pointing
2 out to you.

3 A Yes.

4 Q Did you do that on the 11th, or the 12th, or thereabouts?

5 A Um, sure, yes.

6 Q Pretty -- pretty promptly, right?

7 A Of course.

8 Q Because it was important, right?

9 A Yes.

10 Q And what did you do to satisfy your --

11 MR. MARINO: Well, strike that.

12 Q Did you -- did you become satisfied at that point that
13 that was a lot of hooey and, in fact, the bankruptcy had been
14 properly filed?

15 A I became satisfied that we were probably going to be right
16 where we are today.

17 Q You are going to have to break that down for me, sir.

18 A I became satisfied that, yes it is -- it's in black and
19 white.

20 Q What's in black and white?

21 A I'm -- I'll break it down. It's in black and white that
22 the articles of incorporation say what they say. They say that
23 there is an approval required for a liquidation event, and a
24 liquidation event is defined as you described earlier, or as
25 testimony described earlier.

1 I was definitely -- I mean that's not hard to figure
2 out, right? It's -- it's in the documents. It's not -- it
3 doesn't exactly jump out at you, I'll grant you that. But it's
4 not hard to figure it out; you can connect the dots. I
5 connected those dots.

6 What I -- what I was unable to do at the time, have
7 been unable to do since then, and am still unable to do right
8 now today, is satisfy myself one way or another that the
9 petition was either filed properly or improperly. And,
10 frankly, I think it's going to have to be left to Judge
11 Ellington to tell the answer.

12 Q Well, Judge Ellington will get to the question for sure.
13 But as far as your answers go, I want to know what you, as a
14 serious professional who makes his living in this space, and
15 has done so for many years, I want to know whether you thought
16 it probably made sense to have the Court resolve this issue
17 before anything else happened.

18 A No.

19 Q Why not?

20 A Because as a professional in this space, I'm quite used to
21 the Court having control of its own docket.

22 Q Okay. But you're not quite used to the Court being
23 confronted with this circumstance because you've told us this
24 is the only time it's ever happened, right?

25 A That's true, but that doesn't change the requirement for

1 the Court to control its own document -- own docket.

2 Q Well, I'm sure everyone appreciates your respect for the
3 Court's ability in that regard, but my question's a little
4 different. What I want to know is given the position you
5 occupy in this case, I want to know if you felt, "You know
6 what, I'd better get to the bottom of this because otherwise
7 all these efforts are going to be either in vein, or worse. I
8 could participate in divesting an equity owner of 49.76 percent
9 of the company, I could participate in the bankruptcy being
10 filed, and the company being bankrupted out from under them."
11 Didn't you think when you went to bed at night, "Goodness
12 gracious, if this is wrong, these guys that put \$15 million
13 into this company, and own 49.76 percent might really be
14 divested of their interest," didn't that bother you even once?

15 MR. MADDUX: Objection, Your Honor. I'm not sure
16 there's even a question there. If there's --

17 MR. MARINO: Didn't it bother him even once? I want
18 to know. The guy's a professional, I want to know if he --
19 when he goes to bed --

20 MR. MADDUX: The testimony --

21 MR. MARINO: -- at night, he's thinking about it.

22 MR. MADDUX: -- but that's for closing, I would --

23 THE COURT: There's no jury there; it did not bother
24 him.

25 MR. MARINO: No, he didn't say that.

1 THE COURT: I was just --

2 MR. MARINO: I think his testimony's going to be
3 different than that, and I'll ask it a different way.

4 THE COURT: Okay. You know you got carried away
5 there for a minute.

6 MR. MARINO: Okay, yeah, I -- yeah.

7 (Laughter)

8 MR. MARINO: You know -- you know, full disclosure,
9 Your Honor --

10 THE COURT: Yeah.

11 MR. MARINO: -- it has been known to happen from
12 time-to-time.

13 THE COURT: All right.

14 MR. MADDUX: Your Honor, maybe what we could do then
15 is for these proceedings, have a future objection that,
16 "Objection, counsel's carried away."

17 THE COURT: Well --

18 MR. MADDUX: We all know what that means.

19 THE COURT: Well, he can come back from -- go ahead.
20 Let's --

21 MR. MARINO: Thanks Your Honor.

22 THE COURT: Let's move on.

23 MR. MARINO: We appreciate that. I appreciate the
24 levity, and all of it. But I don't -- I wouldn't want the
25 record to reflect that Jonathan Nash, who has earned his living

1 in this space for a long time, and is going to continue to do
2 so, I wouldn't want the record to reflect your testimony
3 incorrectly.

4 BY MR. MARINO:

5 Q So did it bother you?

6 A It didn't; I have a lot of confidence in the bankruptcy
7 process and the courts to resolve this kind of issue.

8 Q Okay. Did it bother you to think that if Macquarie and
9 Boketo were correct, and this was an unauthorized filing, that
10 their rights might seriously be undermined in a proceeding in
11 which you're involved? Did that bother you?

12 MR. MADDUX: Your Honor; asked and answered.

13 MR. MARINO: I don't think --

14 THE COURT: I'll let him answer one time, then that's
15 the last time.

16 MR. MARINO: Thank you, that's fine, Judge.

17 A It didn't bother me. One, my understanding is that
18 Macquarie and Boketo have fairly competent representation. And
19 my understanding is that this is a court of equity, and these
20 things play out all the time.

21 Q Does it bother you as you're sitting here today?

22 A Does what bother me as I'm sitting --

23 Q Does it bother you as we're sitting here today that Boketo
24 might be divested of its interest in this company?

25 A No, I -- I don't believe that -- one, I don't think that

1 anything in bankruptcy allows one equity holder to be treated
2 differently than another equity holder, unless there is a real
3 good real for them to be classed separately. And I don't
4 believe there's a reason for -- or a way for an unsecured
5 creditor like Macquarie to be treated differently than another
6 unsecured creditor unless there is a very good reason for
7 separate classifications.

8 I believe the Absolute Priority Rule is pretty clear
9 and settled law. And I, as a bankruptcy professional, have a
10 tremendous amount of confidence in the Chapter 11 process to do
11 right by the parties in interests in companies.

12 So, quite frankly, I think Boketo is pretty safe in
13 Chapter 11.

14 Q Do you think Boketo's interest in the -- in FSNA is going
15 to be worth as much after this bankruptcy proceeding as it was
16 before it was filed?

17 A That's a tough question; there's a lot inside that
18 question, so I don't want to give a short and trivial answer to
19 a question of that importance. I think it's fair to say that
20 it's speculative, so it's hard to know. But I think it's also
21 fair to say that I do believe that it is entirely possible that
22 all of the equity holders, including Boketo, will be better off
23 after this Chapter 11 concludes in a successful reorganization
24 than they were prepetition.

25 Q Did you know that Boketo held a 49.76 percent interest in

1 the company, in FSNA?

2 A When?

3 Q Ever.

4 A Yes.

5 Q When did you find it out?

6 A It would have been prepetition. It would have been around
7 about that conversation on the 22nd.

8 Q Did you know that Boketo was the single largest equity
9 holder?

10 A Yes.

11 Q Did you know that there was no other equity holder that
12 was remotely close?

13 A Yes.

14 Q Do you think a holder of 49.76 percent of a company should
15 be consulted before the company files bankruptcy, separate and
16 apart from any legal requirement?

17 A As a good friend of mine says in bankruptcy, it depends.
18 And in this case, it depends. I mean the fact is that there
19 are certainly circumstances that can arise where a 49 percent
20 shareholder shouldn't be consulted.

21 Q Shouldn't be?

22 A Shouldn't be.

23 Q Well, give me one such circumstance, please.

24 A One such circumstance would be where a 49 percent holder
25 of the equity of the company had interests or relationships

1 that were contrary to other parties in interest in the case who
2 had, say, 51 percent of the equity.

3 Q That didn't exist here, right?

4 A That did not exist here.

5 Q Okay. Anything else?

6 A Any other reasons?

7 Q Any other circumstance in which someone who owned -- a
8 company that owned such a large piece of the company should not
9 even be brought into the discussion before a bankruptcy
10 petition is filed?

11 A (No verbal response).

12 Q And please feel free to draw on your entire experience in
13 this space.

14 A Well, I'll paint one picture that I think is a
15 possibility. Let's say there is a 49 percent shareholder who's
16 controlled by a creditor who is in substantial prepetition
17 litigation with the potential debtor.

18 Q Do you know about the litigation that you spoke about on
19 direct examination in which Macquarie is seeking to recover the
20 two and a half million dollar arrangement fee?

21 MR. MADDUX: Your Honor, I do have an objection. I
22 don't think Mr. Nash had finished his answer.

23 MR. MARINO: Oh, I thought he had. Had you?

24 THE WITNESS: I had. I had.

25 MR. MADDUX: You have; okay.

1 MR. MARINO: I thought you had.

2 MR. MADDUX: No problem. No problem.

3 BY MR. MARINO:

4 Q So my question is, you were asked on direct examination
5 about the litigation that's pending where this two and a half
6 million dollars was being sought in litigation by Macquarie
7 against FSNA, right?

8 A Yes.

9 Q Okay. Do you know how that litigation came to be filed?

10 A In broad strokes, yes.

11 Q Do you know that that litigation was not the first piece
12 of litigation between -- filed between Macquarie and -- I'm
13 sorry -- between FSNA and either Macquarie or some of its
14 principals, correct?

15 MR. ROSENBLATT: Your Honor, I think we ought to
16 clarify the question when we're talking about -- Macquarie
17 Capital he's talking about and FSNA, or is he talking about
18 anyone under that large Macquarie Group umbrella? I think we
19 need some clarification on what he's asking.

20 MR. MARINO: I thought it would be clear to the
21 witness, Your Honor, but I'll try to clear it up for him.

22 BY MR. MARINO:

23 Q You know that Macquarie has filed some litigation against
24 FSNA, right?

25 A Yes.

1 Q Okay. Did you know that FSNA filed suit against Macquarie
2 in several matters, in several courts before Macquarie ever
3 filed an action to recoup its two and a half million bucks?

4 MR. ROSENBLATT: We object, Your Honor, unless Mr.
5 Marino is willing to tell the witness which matters those were,
6 and then ask him if he knew about them. This is just a broad,
7 ambiguous, vague question that I'm not sure that Macquarie was
8 in litigation with FSNA prepetition, prior to their filing the
9 lawsuit in New York.

10 THE COURT: I'm not sure how much you want to get
11 into this, but just from the pleadings themselves, the
12 footnotes, as I understand it, there are three separate pieces
13 of litigation: One is in the Southern District of Mississippi
14 Federal Court; I believe one's in New York; and one's in
15 perhaps Delaware.

16 And whether it's necessary and enlightening to go
17 through exactly which technical entity it was that files them,
18 if -- if he wants you to do that, or you want to pursue it, but
19 if he wants you to be specific, then I guess you need to be
20 specific.

21 MR. MARINO: Well, I'll be as specific as I can. My
22 -- I don't think my question really requires that level of
23 specificity.

24 BY MR. MARINO:

25 Q But did you know, Mr. Nash, that the first thing that

1 happened of an adversarial nature between FSNA and anyone on
2 the broad Macquarie side of the table was a lawsuit that was
3 filed by FSNA?

4 A Yes.

5 Q Did you know that although the deal documents required
6 FSNA to pay the two and a half million dollar arrangement fee
7 shortly after closing, that Macquarie did not take a single
8 affirmative step to recoup that money until after it had been
9 sued in more than one jurisdiction by FSNA?

10 MR. ROSENBLATT: To which we would object on multiple
11 grounds, Your Honor. Mr. Toby Bachteler, the witness for FSNA
12 -- I mean for Macquarie said he could not identify a document
13 on which it was based, and Mr. Marino cannot identify any
14 lawsuit that before -- that was against Macquarie.

15 THE COURT: Right or wrong, this is a ruling on this
16 generally: If you want to ask him generally if he knew the
17 litigation was going on, that's fine. But we're not fixed to
18 go through here on all this litigation, who filed, who filed,
19 and who didn't, and who got sued, and when they didn't pay
20 them. We're just not getting into all of that.

21 MR. MARINO: Understood, Your Honor.

22 BY MR. MARINO:

23 Q Mr. Nash, you knew that Boketo had made a \$15 million
24 investment in FSNA, correct?

25 A I did not.

1 Q You had no idea about that?

2 A I did not.

3 Q When did you learn that?

4 A Uh, I learned about that in the last week.

5 Q So the entire time you've been serving in this case, you
6 have not known until the last week that Boketo's 49.76 percent
7 ownership interest in FSNA was purchased with a \$15 million
8 investment?

9 A That's right. The fact is that Boketo is a 49 percent
10 owner in FSNA, and, frankly, for me, and in my work with
11 respect to the company, that's really all that matters.
12 They're our largest shareholder.

13 Q At or about July 11th, you learned that the Macquarie
14 Parties were suggesting that this had been -- this bankruptcy
15 had been improperly filed because Boketo or Macquarie had not
16 consented, right?

17 A Macquarie.

18 Q Okay. At or about that time, right?

19 A Yes.

20 Q Okay. Did you ever ask anyone why does Boketo have such a
21 large stake in FSNA?

22 A I don't recall asking that question. I don't recall
23 asking that question, no.

24 Q Now that you know -- and this knowledge that you've had
25 for the last week -- that actually Boketo purchased its equity

1 interest in FSNA with \$15 million that was actually paid, all
2 right, now that you know that, does that give you a little bit
3 more concern about whether, and to what extent, they should
4 have been consulted before this bankruptcy was filed?

5 A No, it doesn't change it at all. They could have paid 150
6 million, 1.5 billion, or \$15, they're a 49 percent owner, they
7 would get the same level of concern regardless of a
8 consideration that they paid for that ownership.

9 Q And in this case, it was -- just for clarity of the record
10 -- no concern, right?

11 A That's not correct, no.

12 Q What concern did you pay in your capacity to the fact that
13 Boketo had this 49.76 percent interest?

14 A I laid awake at night worrying about it. I mean I -- I
15 think that the fact is that the -- the concern that I paid was,
16 as a practical matter, to ask debtor's counsel to give me a
17 clear understanding of the legal underpinnings for the argument
18 why our petition was properly filed; and to give me an
19 understanding of the arguments for why the petition might not
20 have been properly filed; and to explore those questions in
21 preparation for this hearing today.

22 Q And when you say "to explore those questions," you mean to
23 explore them with debtor's counsel, right?

24 A Yes.

25 Q Have you ever had occasion to engage independent counsel

1 when you are serving in the role that you're serving in in this
2 case?

3 A I have.

4 Q Did you, in this case --

5 A No.

6 Q -- consider that it might make sense to ask your own
7 lawyer this question?

8 A Define what you mean by my own lawyer.

9 Q Well, a lawyer that is -- that you bring in specifically
10 to assist you in your role. In other words, you might have --
11 for example, in this case, you might have said, "You know what,
12 the debtor's counsel told me, and signed a petition under pains
13 and penalty of perjury that this was an authorized filing.
14 Subsequently, two weeks later, I found out that there was an
15 owner of nearly 50 percent of the company that was saying it
16 had a problem with that because it wasn't asked to consent,"
17 right? Those things happened, right?

18 A Um-hum.

19 Q Okay. And then you told us earlier today you looked and
20 saw in black and white that the documents, the certificate of
21 incorporation of FSNA gave Boketo the ability to say, "We don't
22 want any liquidation event, including a bankruptcy or the run
23 up to a bankruptcy," right?

24 A Right.

25 Q And you said you figured we'd end up here, right?

1 A Right.

2 Q But you didn't -- you didn't ask -- put that question, or
3 that factual set of circumstances to your own lawyer and say,
4 "What do you think," right? Or did you?

5 A Well, I mean the fact is that for the purpose that you're
6 talking about, debtor's counsel is my own lawyer. I mean I'm
7 here representing the company.

8 Q You didn't ask another lawyer, other than debtor's
9 counsel, is my point, right?

10 A I'll answer a more general version of the question, which
11 is that there have been two times during the course of this
12 case where I've pursued the question of whether or not
13 additional independent counsel from Butler Snow should be
14 retained for the debtor.

15 Q Why did you think that?

16 A Well, as we've talked about earlier, the conflicts that
17 are present in this case are complicated, to say the least.
18 And there's been a couple of times where those conflicts have
19 given me reason to pursue that question.

20 Q We're going to turn to the conflicts in a few minutes.
21 But I'd like to know, when you said, you know, you were aware,
22 it was in black and white that Boketo had this right, and you
23 were aware that the right had not been honored, in other words
24 its consent had not been sought or given, and you knew that we
25 were going to end up in court, can you tell the Court why,

1 notwithstanding all of that knowledge, you would pursue the U-
2 Save sale in this bankruptcy?

3 A I think it's pretty simple: The bankruptcy process allows
4 all parties in interest to get notice of the actions that the
5 debtor is taking that are outside of the ordinary course. And
6 I am in the habit of relying on parties in interest who are --
7 who are sophisticated and who have sophisticated representation
8 to represent themselves in court. I am in the habit of relying
9 on parties to object to the debtor's actions that are taken
10 outside of the ordinary course that they want to object to.
11 And I'm in the habit of relying on them to object in a timely
12 manner. I'm in the habit of relying on those objections to
13 request emergency hearings when they're necessary. And I'm, in
14 short, in the habit of relying on the procedures of the
15 bankruptcy process and the Bankruptcy Court to give parties in
16 interest the ability to represent themselves.

17 Q And for that reason, notwithstanding being aware on July
18 11th of these concerns about the validity of the petition
19 having been raised, from your perspective, it was, "Let's just
20 go full steam ahead and, you know, it will -- it will work out
21 in the end," right? Is that fair?

22 A Yes.

23 Q Okay. Have you given any thought to whether there might
24 have been a more responsible way to address the problem? And
25 when I say "the problem," I mean the issue of someone raising a

1 concern as of July 11th, a couple weeks after the petition was
2 filed, that it might have been unauthorized? Have you given
3 any thought -- because we find ourselves here today, and all
4 that has happened has happened, have you given any thought as
5 to whether, you know, maybe I should have drilled down just a
6 little bit harder on this?

7 A I've given some thought to a lot of things. For
8 instance --

9 Q Well, that's the one I'm asking about. We could be here
10 for a long time.

11 A Well, in that context, I've given thought to, for instance
12 -- I mean you asked specifically why would I pursue the sale of
13 U-Save. You did ask me specifically why I would pursue the
14 sale of U-Save, and I would say that, you know, I've given a
15 lot of thought to the fact that the sales procedures motion was
16 duly notified to all the parties in interest, including the
17 Macquarie Parties, and that the Macquarie Parties filed no
18 objection to that.

19 So it's hard for me to conclude that the right thing
20 for me to do as the Chief Restructuring Officer of the debtor
21 is to stop a sale process that the Macquarie Parties made no
22 objection to.

23 Q I understand, Mr. Nash, but I'm not trifling with you now.
24 I'm asking you a different question, and if it was unclear, let
25 me try to clarify: I'm not asking you about the U-Save sale

1 now, we have already gone over that. What I'm asking you now
2 is, in light of everything that's happened, have you given any
3 thought as to whether perhaps you should have drilled down a
4 little bit deeper, and a little bit more carefully into this
5 question of whether the petition was properly filed? That's
6 the only question: Have you, Jonathan Nash, a professional,
7 under oath, given any thought as to whether you might have
8 conducted yourself more responsibly had you thought a little
9 harder about this, and drilled a little deeper into it, and
10 perhaps asked an independent lawyer about it? That's all.

11 A I've given a lot of thought to a lot of things.

12 Q But I'm not asking you that. I'm asking you if you gave
13 that some thought. Do you understand my question? I want to
14 know if you, Jon Nash, has, in light of everything that
15 transpired, given a little bit of thought as to whether perhaps
16 it might not have been a better idea to drill a little bit more
17 deeply into this question of whether the petition was
18 authorized? It's that simple, did you or didn't you?

19 A Look, I think the fair answer is that we've been drilling
20 as deeply into that question as we --

21 Q I'm not asking about what "we've" been doing.

22 MR. ROSENBLATT: Your Honor, I've --

23 Q I'm asking about what you've been doing.

24 THE COURT: Uh, well --

25 MR. ROSENBLATT: I would just ask --

1 MR. MARINO: Judge, I'd just ask that the witness be
2 directed --

3 MR. ROSENBLATT: -- that the witness be allowed to
4 answer the question.

5 MR. MARINO: Goodness gracious, I'd be elated if he
6 answered the question.

7 THE COURT: Do this again, just kind of say yes or
8 no, and then explain your answer.

9 MR. MARINO: Well, I'll give -- I'll put the question
10 one more time so it's clear.

11 BY MR. MARINO:

12 Q Did you, Jon Nash, you, in light of everything that's
13 transpired in this case, give any thought to whether it might
14 have been more reasonable for you to drill a little bit more
15 deeply into this question of whether this bankruptcy was
16 properly filed? Did you? Do you, at that -- throughout the
17 course of these proceedings, have you given any thought to
18 whether it might have made more sense to drill a little more
19 deeply, yes or no?

20 A You're asking me if I gave any more thought to it at any
21 time during these proceedings?

22 Q Yeah, that's what I'm asking.

23 A Yes.

24 Q That was a candor test, sir; thank you.

25 MR. MARINO: Judge, I have it marked Exhibit 37, but

1 I'd like to, if I might do so, and if I might add it to my list
2 and approach the bench with it?

3 THE COURT: All right.

4 MR. MARINO: Thank you, sir.

5 THE COURT: Show it to opposing counsel; I don't know
6 what it is.

7 (Pause)

8 THE COURT: Here's Number -- is this the original?

9 MR. MARINO: Yeah, I have them, Your Honor.

10 THE COURT: That's my copy; all right.

11 MR. MARINO: Your Honor, may I approach the witness,
12 please?

13 THE COURT: You may.

14 (Pause)

15 BY MR. MARINO:

16 Q Mr. Nash, I've shown you a document that's been marked
17 Exhibit 37 for identification. Can you please take a look at
18 that document and tell me what it is?

19 A This is the report of Jonathan Nash, me, on the Adoption
20 and Implementation of a Conflicts Protocol by the Board of
21 Directors for Franchise Services of North America.

22 Q Okay. And directing your attention to the fifth
23 paragraph, the one that begins, "Recognizing the conflicts
24 issues facing the Board," do you see that?

25 A Yes.

1 Q And you testified about doing this conflicts analysis on
2 direct examination, right?

3 A I did.

4 Q Okay. And you identified five potential areas of conflict
5 affecting one or more Board members, correct?

6 A At that time, yes.

7 Q Okay. And -- but when you say "at that time," is that
8 because you have since come to the conclusion that there are
9 some other conflicts problems that you did not know about?

10 A No, it's -- it's -- I just like to be precise on this
11 because it -- it's -- it changes, or it has the ability to
12 change.

13 Q Right. Well, I'm asking you questions about a document,
14 all right?

15 A And that's why I said "at that time."

16 Q Okay. So at the time you wrote this document, it
17 accurately reflected your beliefs, correct?

18 A That's right.

19 Q Okay. So the five areas that you identified were DIP
20 financing, the sale process for the stock of U-Save Holdings,
21 the Macquarie litigation, the Silverton and Boland litigation,
22 and bankruptcy contested matters and other litigation affecting
23 the Macquarie Parties, right?

24 A That's right.

25 Q Okay. Now take a look at the last page of the document,

1 the recommended recusals of each FSNA Board member, do you see
2 that?

3 A Yes.

4 Q Tell me if I'm reading this incorrectly or correctly. It
5 appears to me, as I'm reading this document, that Steve Brandon
6 and Bruce Donaldson, because their pie charts are all green,
7 does that mean they're not to be recused, or they are to be
8 recused?

9 A You're reading it correctly, they're not to be recused.

10 Q Okay. And, in fact, in Mr. Donaldson's case, he wasn't
11 recused from any part of this proceeding, as well -- as far as
12 you know, right?

13 A That's right.

14 Q In fact, he presided over the meeting at which this
15 decision to file for bankruptcy was made, correct?

16 A That's not correct.

17 Q Okay. Who presided over it?

18 A Tom McDonnell.

19 Q Okay. And Mr. Donaldson just participated.

20 A Yes.

21 Q All right. He was present?

22 A He was present.

23 Q Voted?

24 A No.

25 Q Do you know why?

- 1 A I don't.
- 2 Q He recused -- he recused himself?
- 3 A He didn't recuse himself.
- 4 Q He abstained?
- 5 A He abstained.
- 6 Q Okay. Do you have any reason to believe that your report,
7 with respect to these -- this conflicts protocol, should, in
8 any way, have come out differently?
- 9 A No.
- 10 Q You think you got this right?
- 11 A I think we got it right, yeah.
- 12 Q You testified that this -- you testified that this
13 bankruptcy petition was approved at that meeting, right? That
14 the file -- we're going to file this petition, right?
- 15 A That's right.
- 16 Q Okay. Do you remember who voted in favor of it?
- 17 A I do.
- 18 Q Who were they? Who were the parties?
- 19 A Tom McDonnell and Steve Brandon.
- 20 Q So two of the five voted in favor of it, and did the other
21 three recuse?
- 22 A The other three abstained.
- 23 Q I beg your pardon; abstained.
- 24 A Yeah.
- 25 Q Okay. And that was enough to go forward and file the

1 petition, right?

2 A It was.

3 Q Has anything come to your attention since this petition
4 was filed that gives you to believe that perhaps you didn't
5 have the full picture at the time of that meeting?

6 A I'm 100 percent certain I don't have the full picture even
7 to this day.

8 Q How do you feel about that?

9 A I'm not real happy about it, but it is what it is.

10 Q Well, tell me the parts of it that you're unhappy about.

11 A I'm unhappy that I don't understand all of the
12 relationships that all of the parties -- specifically that all
13 of the Board members have with each other;

14 I'm unhappy that I don't understand all of the
15 relationships that all of the Board members have with other
16 parties in interest in the case;

17 And I'm particularly unhappy that I don't understand
18 the knowledge that the various Board members have with respect
19 to claims and other prepetition litigation that's out there.

20 Q Well, at the time you got involved in this, I take it that
21 you had occasion to speak to the various Board members of FSNA,
22 correct?

23 A The first time I had occasion to speak to the various
24 Board members of FSNA was when I was invited to the Board
25 meeting at some point during the proceedings of that Board

1 meeting.

2 Q And so you've had the opportunity to speak to them, yes?

3 A Yes, I have.

4 Q And you've availed yourself of that opportunity by
5 conducting quite a number of discussions with the various Board
6 members, correct?

7 A Many times. Board conversations and individually.

8 Q Okay. In fact, with respect to Mr. Donaldson, you had the
9 opportunity to speak to him whenever you wished, right?

10 A That's right.

11 Q There was nothing keeping you from sitting down with Bruce
12 Donaldson and asking him anything and everything he knew about
13 the value of a particular asset, right?

14 A Nothing keeps me from asking him.

15 Q Okay. Now if you are feeling a little discomfort, and you
16 tell me about -- in the way that you've described, can you tell
17 me what you think might be done to address that discomfort?
18 What would make you feel more -- how could you -- how could you
19 get comfortable is -- for lack of a better way of saying it?

20 A Well, I would be a lot more comfortable if I was able to
21 get answers to the questions that I ask from Board members.
22 For instance, you mentioned Mr. Donaldson, I've asked some of
23 those questions that you alluded to; I've not gotten answers to
24 those questions.

25 I would be more comfortable if Mr. Donaldson and

1 other Board members disclosed to me, or to debtor's counsel,
2 all of the relationships that they have with any other party
3 that is either a party in interest or is another Board member.

4 Q What cause you to believe that you don't have all the
5 information you want?

6 A Well, one cause is really obvious, which is Bruce
7 Donaldson says, "I can't tell you" when I ask some of these
8 questions.

9 Q How about Mr. McDonnell, did he say he couldn't tell you
10 about those employment agreements?

11 A No.

12 MR. MADDUX: Objection.

13 Q Did you know anything about the employment agreements
14 before you put forward this U-Sale save -- U-Save sale?

15 MR. MADDUX: Your Honor, I'm objecting for lack of
16 foundation.

17 THE COURT: All right.

18 MR. MARINO: Well, I'll establish one.

19 BY MR. MARINO:

20 Q Mr. Nash, you know what I'm talking about when I reference
21 these employment agreements, right?

22 A I do.

23 Q Did you come at some point in time to learn that there
24 were some employment agreements that FSNA had with certain
25 individuals?

1 A I did.

2 Q And who were those --

3 A No; I'm sorry, I need to amend that. FSNA doesn't have
4 any employment agreements. U-Save Auto Rental of America --

5 Q Okay.

6 A -- has these employment agreements.

7 Q With whom? With whom --

8 A With Tom McDonnell and Kendall Moore.

9 Q So U-Save has employment agreements with Tom McDonnell and
10 Kendall Moore. When, in relation to the time that you asked
11 this Court -- I'm sorry -- that the debtor asked this Court to
12 approve the U-Save sale did you learn about those employment
13 agreements?

14 A I learned about those employment agreements on about
15 August 2nd or 3rd.

16 Q When did you file -- when was the petition for bankruptcy
17 filed?

18 A On June 26th.

19 Q Is that a fact, the existence of those agreements that you
20 should have known before this bankruptcy was filed?

21 A I don't think I can answer that question. I -- I --

22 Q I'm sorry. Is that -- are those agreements something of
23 which you expect to have been made aware before the U-Save sale
24 was proposed to this Court for approval?

25 A I'll answer this: I -- I would like to have known, yes.

1 But I didn't, and there it is.

2 Q Why would it make a difference?

3 A Had we known about those agreements prepetition, we might
4 have made different recommendations for how the case was
5 pursued, or how the sale process was set up. Had we known post
6 petition, but before the sale process -- sales procedures were
7 filed, we might have made some attempt to have some
8 negotiations with the counterparties.

9 Q Is Mr. McDonnell one of those counterparties?

10 A Yeah, Mr. McDonnell.

11 Q In other words, Mr. McDonnell, who presided over the
12 meeting at which this bankruptcy petition was filed, and who
13 presumably presided over the meetings that resulted in U-Save
14 sale being placed before this Court for approval was going --

15 MR. ROSENBLATT: Your Honor --

16 Q -- to --

17 MR. ROSENBLATT: -- I object to that.

18 MR. MARINO: I haven't finished my question.

19 MR. ROSENBLATT: He's stating facts contrary to --

20 MR. MARINO: I haven't finished my question.

21 THE COURT: Wait now. When he objects, just wait
22 until he finishes.

23 MR. ROSENBLATT: He said that Mr. McDonnell presided
24 over a meeting with -- in which sale procedures were approved.
25 Actually he's already testified about the conflicts procedures,

1 about Mr. McDonnell being excluded from everything having to do
2 with the sale process and DIP financing. The question's
3 contrary to anything in this record.

4 THE COURT: Now.

5 MR. MARINO: Thank you, Your Honor.

6 BY MR. MARINO:

7 Q Mr. Nash, as we sit here today --

8 THE COURT: That --

9 MR. MARINO: I'm --

10 THE COURT: Are you going to restate your question?

11 MR. MARINO: I'm asking a different question. Yes,
12 I'm asking -- I'm restating the question, yes.

13 Q As we sit here today, Mr. Nash, you know that had that
14 sale been approved, that would have been to the considerable
15 pecuniary benefit of Mr. McDonnell, correct?

16 A What sale?

17 Q The U-Save sale.

18 A I don't know that.

19 Q Mr. Nash, what was the urgency to file this petition?
20 They contacted you in late June, and the petition was filed
21 three days later. What was the urgency?

22 A I think, in fairness, I have to say I don't know.

23 Q Well, you were brought in for your expertise, right?

24 A Yes.

25 Q And your expertise includes, I take it, participating in

1 advising a debtor as to the wisdom and the timing of a petition
2 filing, right?

3 A In some cases.

4 Q Yeah.

5 A Not in this case.

6 Q Okay. Well, not in this case because they didn't ask you,
7 right?

8 A That's right.

9 Q Okay. But -- and I take it from what you're saying that
10 you didn't ask them either, right?

11 A Uh --

12 Q When I say "you didn't ask them," just for clarity of the
13 record, you didn't ask them, "What's the rush?" right?

14 A Who's "them"?

15 Q FSNA.

16 A I did not.

17 Q You didn't ask them, "Okay, you contacted me here on June
18 21st," I believe you said, "and we're going to have this
19 filing, it's got to be done, boom, boom, boom, it's going to be
20 filed before the end of June, so I've got about a week." Why?
21 What -- who's the Wolfe at the door? You didn't ask that,
22 right?

23 A Let me just be clear, I asked debtor's counsel that
24 question; I didn't ask the Board of Directors as a whole.

25 Q Okay. Well, who -- who's the secured creditor that forced

1 this case into bankruptcy?

2 A There is no secured creditor.

3 Q That's right. And who -- who -- what other circumstance
4 was there that made you, at a minimum, buy into the idea that
5 it made sense to go forward with this filing? Totally separate
6 and apart from whether it was authorized or not, what made you,
7 as the advisor, say, "Yeah, that's a good idea, go forward"?

8 A Again, I did not ever say "that's a good idea, go
9 forward."

10 Q You weren't asked.

11 A I was not.

12 Q It was a fait accompli that this bankruptcy was going to
13 be filed, am I right?

14 A It wasn't my -- I -- I can't answer that.

15 Q Well, they certainly weren't asking you for advice, right?

16 A That's --

17 Q It's not like they said, "Listen, we have a real problem
18 with this company, and we're thinking about filing for
19 bankruptcy, do you think it's a good idea?" They didn't say
20 that, right?

21 A They did not.

22 Q And just as -- just as they didn't say, "And, by the way,
23 there might be a little wrinkle here because the 49.76 percent
24 owner of the company is unlikely to consent, and we're not
25 going to give them that opportunity." They didn't say that,

1 right?

2 A They did say that -- yeah, actually they did say that.

3 Q Really? What did they say exactly on that subject?

4 MR. MADDUX: Just for clarity sake, who is "they"?

5 BY MR. MARINO:

6 Q Who's the "they" you're referring to?

7 A Debtor's counsel.

8 Q Okay. What did they say?

9 MR. MADDUX: We object; privilege.

10 MR. MARINO: He's already testified about it.

11 THE COURT: Just move on.

12 Q You did, went forward, filed you -- filed -- they filed
13 their bankruptcy, and you got the wheels rolling, right?

14 A That's right.

15 Q And you're being paid for that, right?

16 A That's right.

17 Q And FSNA's paying you?

18 A That's right.

19 Q Okay. How is -- how does that work, the compensation? Is
20 that something that is paid out of the company's fist? The
21 company pays you.

22 A I just said FSNA's paying me.

23 Q All right. So in the normal course, when you're brought
24 into one of these things, do you participate in the decision-
25 making process as to whether a petition ought to be filed?

1 A (No verbal response).

2 Q I know that didn't happen here, but in the normal course.

3 A I -- I mean, look, I have to say that there is no normal
4 course. I'm not trying to be obtuse, there's certainly a
5 number of circumstances, it's very common for me to be
6 consulted prepetition on whether or not the petition should be
7 filed, that's very common; it doesn't always happen.

8 Q And it didn't happen here.

9 A It did not.

10 MR. MARINO: May I just have a moment, Your Honor?

11 THE COURT: All right.

12 MR. MARINO: Thank you.

13 (Pause)

14 MR. MARINO: Your Honor, I want to thank you very
15 much for your indulgence in my moving around a bit, I apologize
16 to the Court. I'm finished with this witness.

17 THE COURT: All right; thank you very much.

18 MR. MARINO: Thank you, sir.

19 THE WITNESS: Thanks for the water.

20 MR. MARINO: You may have another bottle on the way,
21 if you'd like.

22 MR. MADDUX: Your Honor, I have four or five redirect
23 questions. Do you want to do them or take an after --

24 THE COURT: Yeah.

25 MR. MADDUX: -- take an afternoon break?

1 THE COURT: Let's -- let's do it.

2 MR. MADDUX: Okay.

3 THE COURT: Let's try it.

4 MR. MADDUX: For the record, Chris Maddux for the
5 debtor. May I proceed, Your Honor?

6 THE COURT: You may.

7 REDIRECT EXAMINATION

8 BY MR. MADDUX:

9 Q Mr. Nash, in the course of your experience as the Chief
10 Restructuring Officer, how many times have you reviewed a
11 corporate charter before a bankruptcy was filed?

12 A Many.

13 Q I mean have you reviewed the articles of incorporation of
14 a company about to file before it was filed?

15 A I have.

16 Q You have; okay. And in this case, you were relying upon
17 others to have done that.

18 MR. MARINO: Just objection, oftentimes knowing
19 redirect tends to take on the ora of cross-examination, but it
20 is direct, for the leading.

21 THE COURT: Well, oftentimes I can't tell who the
22 witness is supporting anyway, so --

23 MR. MARINO: Fair enough, Your Honor.

24 Q In how many cases have you seen a party with an absolute
25 blocking position?

1 A I've seen it; I can't say that I know the number off the
2 top of my head.

3 Q And what effect does it have that the party with the
4 blocking position is aligned with a party embroiled in
5 litigation with the debtor?

6 A I think it has a significant effect.

7 Q What is that effect?

8 A I think it makes it reasonable to conclude that it would
9 be impossible to get the blocking party's agreement to
10 practically anything that the debtor wanted to do, prepetition
11 or post petition.

12 Q One of the interesting things is the questions Mr. Marino
13 was just asking you, so I'm going to ask a similar question a
14 different way. And the question is this: We're now 101 days
15 into the bankruptcy case. And with the benefit of hindsight,
16 if we go back to that time around June 26th, would your
17 recommendation have been to file bankruptcy?

18 A With the benefit of hindsight, sure.

19 Q And why is that?

20 A It's very clear to me that this is -- I mean this is
21 really a small company. It's a relatively simple company.
22 This is a company that has a number of auto rental franchises,
23 and conducts a reasonably profitable insurance business for
24 those auto rental franchises. But it's small, and this company
25 does less than \$10 million in annual revenue. It's got a

1 corporate structure that is complex, it's publicly traded, it
2 is fighting litigation on a number of fronts, and it has a
3 claims pool that is far in excess of the value of the assets
4 that the company owns.

5 It's hard to see a -- it's hard to see, just on an
6 objective basis, a case where Chapter 11 was a more suitable
7 solution to the set of -- set of circumstances that are
8 presented by this debtor.

9 Q How did the Macquarie Directors on the Board vote with
10 respect to the sale and the sale process?

11 A (No verbal response).

12 Q When I say "the Macquarie Directors," I'm referring to
13 Duncan Murdoch and David Miller.

14 A Can you be a little more specific about what votes?

15 Q How did they vote with --

16 A Which vote?

17 Q -- with respect to -- I want to know how they voted with
18 respect to the adoption of the sale procedures.

19 A They were in favor.

20 Q Were they -- and were they in -- so they were in favor of
21 the structure that was included within the sale procedures.

22 A They were in favor.

23 Q How did the Macquarie Directors vote with respect to the
24 stalking horse bid?

25 A They were in favor.

1 Q In favor of accepting --

2 A Of accepting the stalking horse bid.

3 Q From?

4 A Tom McDonnell.

5 Q One final question, Mr. Nash: At any point in time --
6 you've had a chance to work with a lot of lawyers over the
7 course of your career. With respect to this golden share
8 question, did you happen to ask anything about that, or an
9 opinion of that of another lawyer informally?

10 MR. MARINO: I'll object. When I asked him about his
11 conversations with other lawyers, it doesn't seem quite cricket
12 to have him then present it and be cross-examined on it.

13 MR. MADDUX: All right; I'll withdraw it.

14 THE COURT: All right.

15 MR. MADDUX: I was just asking if he did or he
16 didn't, that's --

17 MR. MARINO: And I was objecting to that question.

18 THE COURT: All right. Are you through?

19 MR. MADDUX: I'm done.

20 THE COURT: You can stand-down.

21 MR. NASH: Thank you.

22 THE COURT: Thank you very much.

23 MR. ROSENBLATT: Your Honor, could we take an
24 afternoon break now for a few minutes? We are at that point in
25 time.

1 THE COURT: Yeah, I think it'd be a good idea. One
2 thing, though, and I'm not sure -- Exhibit Number 37, did you
3 ask to have it admitted?

4 MR. MARINO: No; may I do that now, Your Honor?

5 THE COURT: All right.

6 MR. MARINO: I'd like to have it admitted in
7 evidence.

8 MR. MADDUX: He did not; we have no objection.

9 THE COURT: All right.

10 MR. MARINO: Thank you, sir.

11 THE COURT: We'll stand adjourned, 15 minutes -- I
12 mean recess for 15 minutes; thank you.

13 (Recess 3:11 p.m./Reconvene 3:28 p.m.)

14 THE COURT: Please be seated.

15 Who's next?

16 MR. ROSENBLATT: If it please the Court, Steve
17 Rosenblatt for the debtor. The debtor rests, Your Honor.

18 THE COURT: All right; thank you.

19 MR. MARINO: Your Honor, I didn't know if it was the
20 Court's pleasure to have some sort of oral summations. I think
21 it would be our -- our preference to get a transcript of the
22 proceeding, and then provide Your Honor with a written
23 summation if that -- I haven't discussed that with Steve --

24 THE COURT: Yeah, what I wanted to do if -- I don't
25 need, I don't think, any oral argument, since at this point, it

1 wouldn't do any good. What I'd like to do is meet with the
2 lead attorneys, and whoever might be writing the briefs, and
3 let's meet in chambers on those. Everybody else is free to
4 stay or go, whatever you want to do; is that agreeable?

5 MR. MARINO: Yes, Your Honor.

6 THE COURT: So both sides rested. We're through, all
7 right.

8 MR. ROSENBLATT: Your Honor, we'll take our top two,
9 and let them take their top two.

10 THE COURT: All right.

11 (Laughter)

12 THE COURT: We're adjourned.

13 (Whereupon, at 3:30 p.m., the hearing was adjourned.)

14

15

16 CERTIFICATE OF TRANSCRIBER

17 I, KAREN HARTMANN, a certified Electronic Court
18 Transcriber, certify that the foregoing is a correct transcript
19 from the electronic sound recording of the proceedings in the
20 above-entitled matter.

21

22

23 /s/ Karen Hartmann

24 Karen Hartmann, AAERT CET**D0475 Date: October 16, 2017

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