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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re: MED DIVERSIFIED, INC., et al., Debtors.	CHAPTER 11 Jointly Administered Case No: 02-88564 02-88568 02-88570 02-88572 02-88573
CHARTWELL LITIGATION TRUST and GREGORY L. SEGALL AS TRUSTEE OF CHARTWELL LITIGATION TRUST, Plaintiffs, v. ADDUS HEALTHCARE, INC., an Illinois Corporation; W. ANDREW WRIGHT, an Illinois Individual; MARK S. HEANEY an Indiana Individual; COURTNEY E. PANZER, an Illinois Individual; and JAMES A. WRIGHT, an Illinois Individual, Defendants.	Adv. P. No. 04-08680 **Supplemental Objection to Trustee's Motion In Limine Regarding Expert Testimony of Scott P. Peltz**

SUPPLEMENTAL OBJECTION TO TRUSTEE'S MOTION IN LIMINE REGARDING EXPERT TESTIMONY OF SCOTT P. PELTZ

Per this Court's request on September 14, 2005 for additional points and authorities regarding the Trustee's Motion in Limine (the "Motion"), the Defendants Addus Healthcare, Inc., W. Andrew Wright, Mark Heaney, Courtney E. Panzer, and James A. Wright (collectively "Addus"), by their undersigned attorneys, respectfully submit this Supplemental Objection to the Motion. In support of this Supplemental Objection, Addus respectfully states as follows:

INTRODUCTION

The Court should permit Scott Peltz's ("Peltz") testimony and admit his expert report into evidence for five key reasons: (1) Peltz is more than qualified to testify as an expert in this matter pursuant to Federal Rule of Evidence 702; (2) Peltz utilized accepted valuation methodologies as recognized by several courts and utilized the same methodologies as Robert Cimasi ("Cimasi"), the Trustee's expert witness; (3) any objection to Peltz's testimony or report goes to the weight, rather than the admissibility, of such evidence; (4) Peltz testimony addresses matters specifically raised by this Court, including the calculation of a terms to cash analysis as requested by the Court; and (5) the Trustee's Motion misrepresents and mischaracterizes both Peltz's report and Peltz's deposition testimony.

OBJECTION

I. PELTZ IS MORE THAN QUALIFIED TO TESTIFY AS AN EXPERT IN THIS MATTER PURSUANT TO FEDERAL RULE OF EVIDENCE 702.

Peltz more than satisfies Federal Rule of Evidence 702 in that he is "qualified as an expert by knowledge, skill, experience, training or education." Fed. R. Evid. 702. The Trustee contends that Peltz is not qualified to testify regarding the Stock Purchase Agreement or the option because he is not a certified valuation expert. In making this argument, the Trustee

impermissibly engrafts a requirement that an expert must be "certified" in order to be deemed an expert under Rule 702. Yet nowhere does Rule 702 mandate such a requirement. Nowhere does Rule 702 require membership in what this Court has dubbed a "self-validating" club or organization. Instead, Rule 702 specifically states that an individual may qualify as an expert by virtue of his knowledge, skill, experience, training, or education:

> Woolley's background and practical experience qualify as "specialized knowledge" gained through "experience, training, or education," . . . . Fuller's quibble with Woolley's academic training in fume dispersal and air quality studies, and his other alleged shortcomings (lack of knowledge regarding the chemical constituents of the fumes or the glue vapor's concentration level), were properly explored on cross-examination and went to his testimony's weight and credibility--not its admissibility. See Fernandez v. Chios Shipping Co., 542 F.2d 145 (2d Cir. 1976).

McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1043 (2d Cir. 1995) (internal citations omitted); Fed. R. Evid. 702; Cf. Nimely v. City of N.Y., 414 F.3d 381, 385-86 (2d Cir. 2005) (noting that expertise may be based upon, inter alia, experience-based or personal experience).

Moreover, the Second Circuit has recently held that "[i]t is a well-accepted principle that Rule 702 **embodies a liberal standard of admissibility for expert opinions**, representing a departure from the previously widely followed, and more restrictive, standard of Frye v. United States . . . ." Nimely v. City of N.Y., 414 F.3d 381, 385-86 (2d Cir. 2005) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)) (emphasis added; Frye citation omitted).

As evidenced by Peltz's experience, Peltz satisfies the "liberal standard" of Rule 702. First, in addition to his 24 years of experience, Peltz has been admitted as an expert regarding valuation several times. Peltz was admitted as a valuation expert in connection with three different fraudulent transfer actions commenced in the McCook Metals bankruptcy case as well as in the Trailmobile LLC bankruptcy case.

Second, Peltz has played a prominent role in connection with the NCFE bankruptcy. In NCFE, the Department of Justice sought to retain Peltz in connection with a fraud action to be brought by the government. Not only was Peltz involved in the class action involving NCFE, he was also hired by 12 NCFE bondholders which held $1.8 billion of the $3.1 billion in bondholder debt. In addition, Peltz was retained by one of the NCFE post-confirmation trusts to perform forensic work regarding large causes of action.

Third, Peltz has substantial experience in connection with fraudulent transfer actions – which is the very heart of the dispute in this case. Peltz has frequently served as a plan administrator and liquidating trustee. In connection with his role as plan administrator and liquidating trustee, Peltz has commenced significant fraudulent transfer actions and has personally reviewed the validity of such actions, including (a) a $48 million fraudulent transfer action in the Bridge Information Systems bankruptcy; (b) a $28 million fraudulent transfer action in USN Communications, and (c) a number of fraudulent transfer actions in the J.H. Collectibles bankruptcy case aggregating between $7-$10 million. Not only has Peltz commenced fraudulent transfer actions, he has testified in connection with a number of fraudulent transfer actions, including David Berg et al., IBM v. Whitlock, and Apex Whitlock Corporation.

Fourth, as the head of American Express' Restructuring Group, Peltz has frequently reviewed sales transactions to determine whether the purchase price constitutes reasonably equivalent value, including matters involving health care companies such as Edgewater Hospital, Doctors Hospital, and North Suburban Clinic.

Fifth as evidenced by Appendix B of his report, Peltz has frequently spoken on fraud, valuation, and the health care industry (including speaking to the National Conference of Bankruptcy Judges):

- Speaking Engagement: How Other Industries Have Dealt with Enduring Change in the Wake of Extreme Financial Challenges, the Healthcare Roundtable for CFO's (Mar. 4, 2004)

- Speaking Engagement: Analyzing Debtor's Financial Information: Asking the Right Questions, American Bankruptcy Institute Annual Winter Conference (Dec. 2-6, 2003)

- Speaking Engagement: Healthcare Finance and Securitization Issues after National Century, Fourth Annual Conference on Health Transactions (Apr. 2003)

- Speaking Engagement: Sex and Fraud in the City, National Conference of Bankruptcy Judges (October 2002)

- Speaking Engagement: Critical Care: Financial Analysis, Due Diligence and Valuation in the Health Care Arena, Second Annual Healthcare Industry Bankruptcy and Workouts Forum (May 18-19, 2000)

- Speaking Engagement: What Financial Information Doesn't Tell Us - Due Diligence and Monitoring, Lending to and Investing in Troubled Healthcare Companies (Oct. 25-26, 1999)

- Speaking Engagement: Tales from the Front: Lending to and Investing in Troubled Healthcare Companies (Oct. 25-26, 1999)

- Speaking Engagement: Tales from the Front, Watching for the Tips: Signs of Deterioration, Healthcare Industry Bankruptcy and Workouts Forum (May 11-12, 1999)

- Speaking Engagement: Avoiding Fraud and Financial Statement Misrepresentation: Tales from the Front, Bankruptcy Sales and Acquisitions 1999 Seminar (Apr. 26-27, 1999)

- Speaking Engagement: Association for Insolvency Accountants, Valuation Conference (March 1996)

Sixth, Peltz has had experience with mergers and acquisitions, including the Four Columns/Centerpoint Properties sale and with approximately 25 troubled companies.

In short, Peltz's knowledge, skill, and experience well exceed the requirements promulgated by Rule 702.

II. PELTZ NOT ONLY UTILIZED ACCEPTED VALUATION METHODOLOGIES AS RECOGNIZED BY SEVERAL COURTS, PELTZ UTILIZED THE SAME METHODOLOGIES AS ROBERT CIMASI ("CIMASI"), THE TRUSTEE'S EXPERT WITNESS.

Peltz, like Cimasi, utilizes three widely accepted methodologies in connection with his report: (1) the Guideline Company Approach (the "Company Approach"); (2) the Direct Market Comparable Transaction Method (the "Transaction Approach"); and (3) the Black-Scholes Method. The Court has expressed concern regarding each of these methodologies. Despite the limitations of these methods, the Court should not discard their application wholesale. In fact, the District Court for the Western District of Kentucky grappled with the very concerns raised by this Court and concluded that notwithstanding these concerns, such valuation techniques are admissible:

> First, although the guideline company approach is useful and its application is always encouraged, everyone recognizes its limits. No company will be entirely comparable to the subject business. See Solk & Grant, supra at 266 (comparisons "may be hazardous at best"); Pratt et al., supra, at 230-33 (summarizing factors and inconsistent results in litigation, making hazardous both too narrow and too broad a selection of comparables). In addition, most guideline company approaches examine several years of data for the guideline companies. See Pratt et al., supra at 234 (suggesting five to ten years); Solomon & Saret, supra, at 65 (noting that comparable company data must be analyzed for trends). The Gravitt Report, by contrast, presents between one and three years of data for the comparable companies, see Gravitt Report Exs. 2-5, and relies only on the most recent year in each case for comparisons to market data, see id. Ex. 6. Also important as a limit on the guideline company approach is the suitability of the subject company. The approach loses robustness the further the subject company is away from the attributes of a stable, publicly-traded business. Although USCC was comparable in many ways to the guideline companies, it was more highly leveraged, closely-held, and was not poised to enter the public markets. The Gravitt Report candidly and credibly notes at p. 5 that "USCC appears similar in some ways and differs in some respects when compared to the publicly traded corrections companies." See Slee, supra ("To have a relevant private-to-public comparison, the subject company should have the attributes necessary to go public itself."). **Overall,**

> **though, none of these shortcomings justify discarding the guideline company method entirely.**
>
> **The method needn't be rejected just because we were not satisfied with either the number or the degree of comparability of available guideline companies. In the final analysis, the quantity and quality of the guideline company data compared with the quantity and quality of data available for other methods will influence the weight accorded the method in correlating the results of various methods and reaching a value conclusion.**

Horn v. McQueen, 353 F. Supp. 2d 785, 827-28 (W.D. Ky. 2004) (emphasis added).

Like the Company Approach, courts have recognized the validity of the Black-Scholes Model as set forth at length in the Defendants' Memorandum Regarding Valuation of Reasonably Equivalent Value under the First Amendment to the Stock Purchase Agreement (the "Memorandum") previously tendered to the Court. (Memorandum, pp. 3-5)[1]; see also Mathias v. Jacobs, 238 F. Supp. 2d 556, 574 n.12 (S.D.N.Y. 2002) (noting that the Black-Scholes model was developed in 1971 by economists Fisher Black and Myron Scholes, for which they were awarded the Nobel Prize in 1997). "In fact, the Black-Scholes model "today lies at the core of many financial markets, such as those in puts, calls, and other forms of options." Alliant Energy Corp. v. Bie, 277 F.3d 916, 921 (7th Cir. 2002) (citing Hans R. Stoll & Robert E. Whaley, Futures and Options (1993); Frank J. Fabozzi & Franco Modigliani, Capital Markets: Instit. and Instruments (1992); Myron S. Scholes, "Global Financial Markets, Derivative Securities, and Systemic Risks," 12 J. Risk & Uncertainty 271 (1996); Roberta Romano, "A Thumbnail Sketch of Derivative Securities and Their Regulation" 55 Md. L. Rev. 1 (1996)). Indeed, Cimasi even utilizes the Black-Scholes Model to value the option. (Cimasi Report, § 7.3).

Because the Court has expressed during trial its concerns regarding Black Scholes, Peltz

[1] Addus incorporates by reference the Memorandum in its entirety as if set forth herein.

has also conducted a time-value calculation regarding the delay of payment, as set forth in Exhibit A hereto, which provides another alternative for the Court to determine the value of the option.

III. THE ISSUES RAISED IN THE TRUSTEE'S MOTION IN LIMINE SPEAK TO THE WEIGHT THE COURT SHOULD ACCORD TO PELTZ'S TESTIMONY AND REPORT, NOT WHETHER PELTZ'S TESTIMONY AND REPORT SHOULD BE ADMITTED.

The Trustee contends that a number of assumptions in Peltz's report are incorrect. However, simply because Peltz does not utilize the same assumptions as Cimasi, does not make Peltz's report inadmissible. Indeed, a wealth of case law exists in which courts admit two expert reports and agree with assumptions utilized by one expert while also accepting assumptions from the opposing expert's report. Simply because the assumptions differ between Peltz and Cimasi, in no way means that Peltz's report is *inadmissible*. Taken to its logical conclusion, anytime a defendant's expert utilized different assumptions than the Plaintiff's expert, the defendant's expert report should be excluded. The Court should not countenance this result.

Furthermore, "[o]nce the thresholds of reliability and relevance are met, the testimony is admissible. Thereafter, any purported weakness in an expert's methodology or conclusion goes to the degree of credibility to be accorded to the evidence, not to the question of its admissibility." 2 Handbook of Fed. Evid. § 702.5 (citing Ambrosini v. Labarraque, 101 F.3d 129, 133-35 (D.C. Cir. 1996) (holding that 'the fact that several possible causes might remain "uneliminated" ' goes to the weight rather than the admissibility of the expert's testimony) (citing Mendes-Silva v. United States, 980 F.2d 1482 (D.C. Cir. 1993)); Allstate v. Hugh Cole, 137 F. Supp. 2d 1283, 1291 (M.D. Ala. 2001)).

Moreover, "[a]s recently decided by the Second Circuit, the fact that the expert's theories were not subject to peer review and publication or general acceptance goes to the weight of their

testimony rather than its admissibility." 2 Handbook of Fed. Evid. § 702.6 (citing McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1043 (2d Cir. 1995)); see also Amorgianos v. National R.R. Passenger Corp., 303 F.3d 256, 266-67 (2d Cir. 2002) ("In McCullock, for example, we affirmed the district court's admission of medical expert testimony despite the fact that the expert "could not point to a single piece of medical literature" that specifically supported the expert's opinion. 61 F.3d at 1043. Where an expert otherwise reliably utilizes scientific methods to reach a conclusion, lack of textual support may "go to the weight, not the admissibility" of the expert's testimony . . . . A contrary requirement "would effectively resurrect a Frye-like bright-line standard, not by requiring that a methodology be 'generally accepted,' but by excluding expert testimony not backed by published (and presumably peer-reviewed) studies." . . . . Such a bright-line requirement would be at odds with the liberal admissibility standards of the federal rules and the express teachings of Daubert."); see also Bankr. Evid. Man. § 702.2.[2] At bottom,

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[2] Section 702.2. of the Bankruptcy Evidence Manual provides:

Expert testimony was admissible despite challenge to methodology which went to weight rather than admissibility of evidence.

Debtor brought an adversary proceeding to recover, from pest extermination company, for termite-related damage to its apartment complex. Defendant moved to exclude the expert testimony.

The defendant argued that the debtor's expert witness' testimony should be excluded pursuant to Rule 702:

Defendant argues that Bowyer's Subtraction Method is not well-grounded, not well-reasoned, and not sufficiently reliable and should therefore be excluded pursuant to Fed.R.Evid. 702 and the Daubert trilogy. Defendant argues that the method is prone to error and overstates the cost to repair termite damage. Defendant asserts that Bowyer should have added up the cost to repair termite damage rather than subtracting the non-termite damage. Defendant points to the following five examples in support of its argument that Bowyer's methodology is unreliable: (1) Bowyer failed to subtract the cost to repair wood damage caused by carpenter ants and wood destroying beetles; (2) Bowyer failed to subtract the cost to repair wood damage caused by wood destroying fungi; (3) Bowyer failed to subtract the cost to repair wood damage cause by both termites and wood destroying fungi; (Bowyer attributed approximately $41,000 in damages to the Clubhouse to Defendant despite Dr. Nolan's testimony that the Clubhouse suffered no termite damage); and (5) Bowyer amended his Termite Cost Summary Report to remove the cost of 160 window and door units he originally believed had been surrounded by termite damaged wood but failed to subtract the cost of the corresponding wood and the interior dry wall. 265 B.R. at 333.

the Trustee's motion in limine raises issues only with respect to the weight to be accorded to Peltz's testimony, not the admissibility.

IV. THE COURT REQUESTED CIMASI TO GO BEYOND THE SCOPE OF HIS REPORT AND TO TESTIFY REGARDING A TERMS TO CASH ANALYSIS OF THE PURCHASE PRICE UNDER THE STOCK PURCHASE AGREEMENT. PELTZ SHOULD BE PERMITTED TO DO THE SAME.

On August 29, 2005, the Court requested that Cimasi go beyond the findings of his report and reduce the value of the purchase price under the Stock Purchase Price (including promissory notes and stock) to cash. (Trial Trans., 8/29/05, pp. 305-309). Cimasi called this calculation a Terms to Cash Conversion. (Trial Trans., 8/29/05, p, 305, lines 3-6, 8-9). Per the Court's request, Cimasi testified to the Terms to Cash Analysis on August 30, 2005.[3] Peltz has also prepared a Terms to Cash Analysis which was tendered to the Trustee on September 13, 2005. Peltz should likewise be given the same opportunity as Cimasi to go beyond his report and to testify regarding the Terms to Cash Analysis. In the event the Court declines to permit Peltz to do so, Addus will be severely prejudiced.

Held: Motion to exclude denied. The court concluded:

The judge's role as gatekeeper is not intended to take the place of the adversary system. Allison, 184 F.3d at 1311. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* quoting Daubert, 509 U.S. at 596, 113 S. Ct. 2786, 125 L. Ed. 2d 469. "The question of whether the expert is credible or whether his or her theories are correct given the circumstances of a particular case is a factual one best left for the jury to determine after opposing counsel has been provided the opportunity to cross-examine the expert regarding his conclusions and the facts on which they are based." Smith v. Ford Motor Co., 215 F.3d 713, 718 (7th Cir. 2000) *citing* Walker v. Soo Line R.R. Co., 208 F.3d 581, 590 (7th Cir. 2000).

The Court finds that Bowyer's testimony as to the amount of termite related damage is sufficiently reliable to be admissible. The Court as the trier of fact will determine what weight to give to Bowyer's testimony. As Plaintiff points out, weaknesses in testimony brought out be cross-examination go to the weight rather than to the admissibility of such evidence. In re Westminster Associates, Ltd., 265 B.R. 329, 335 (Bankr. M.D. Fla. 2001).

[3] The parties have ordered the transcripts on an expedited basis, but have yet to receive the transcript from August 30, 2005.

Furthermore, to the extent Cimasi raised new matters in his testimony that exceeded the scope of his report, Peltz should be permitted to respond to those matters.

V. BECAUSE CIMASI UTILIZED THE SAME METHODOLOGIES AS PELTZ AND BECAUSE THE COURT PERMITTED CIMASI TO TESTIFY AS TO THOSE METHODOLOGIES, THE COURT SHOULD ALSO PERMIT PELTZ TO TESTIFY REGARDING SUCH METHODOLOGIES.

Cimasi utilized and testified about the same methodologies employed by Peltz including: (1) Company Approach; (2) the Transaction Approach; and (3) the Black-Scholes Method (Cimasi Report, §§ 5.15, 5.16, 7.13; Peltz Report, §§ 2.2 and 2.21).

Notwithstanding the Court's concerns raised at trial, the Court permitted Cimasi to testify about these methodologies extensively, including the Black-Scholes Model.[4] (Trial Trans., 8/29/05, pp. 311-320). In fact, the Court even stated:

> You're now going to validate the Black Shoals [sic] method for purposes of calculating this value? Go ahead. I'll remember this testimony when we get to Mr. Peltz because it seems what's sauce for the goose is sauce for the gander.

(Trial Trans., 8/29/05, pp 314, ll. 4-8) (emphasis added).

Ironically, the Trustee now contends that Peltz's methodologies, which are also utilized by Cimasi, are flawed and are somehow incapable of withstanding the scrutiny of Federal Rule of Evidence 702. If the Court denies Peltz the opportunity to testify on these methodologies and excludes Peltz's expert report, then the Court must also strike all of Cimasi's testimony and Cimasi's report. Addus invokes the "goose rule" as colloquially referred to by Mr. Steinberg at trial on September 14, 2005 – that the Court cannot exclude one party from testifying on an issue and then permit another party to testify on the very same issues. Moreover, Addus submits that

[4] The Court allowed Mr. Cimasi to testify for approximately three days and further examination will be taken on September 21, 2005 telephonically per the Court's recommendation.

Peltz's testimony will assist the Court as the trier of fact and will be able to shed light in connection with these methodologies where Cimasi was unable to do so.

VI. THE TRUSTEE'S MOTION IN LIMINE MISCHARACTERIZES AND MISREPRESENTS PELTZ'S EXPERT REPORT AND DEPOSITION TESTIMONY.

In support of his motion in limine, the Trustee frequently mischaracterizes and misrepresents a number of statements made in Peltz's report and during Peltz's deposition. First, the Trustee paints the picture that Peltz did not perform an analysis of the overall purchase price by repeatedly contending that Peltz did not conduct a "valuation." In doing so, the Trustee mischaracterizes Peltz's testimony. Peltz did not issue a formal valuation report. Instead, he utilized valuation methodology to determine whether the purchase price under the Stock Purchase Agreement was reasonable for purposes of fraudulent transfer law. Indeed, Peltz testified to this very fact:

> Q: You started with the assumption that there was an arm's length buyer and seller negotiation based on the documents you reviewed; is that true?
>
> A: Yes.
>
> Q: Then you conducted the valuation that's reflected in Exhibit C as part of a test as to whether the assumption was valid; is that fair?
>
> A: Was reasonable, yes.

(Peltz Dep. Trans., p. 100, lines 19-22) (emphasis added).

Furthermore, the lack of a formal valuation opinion is not a basis for excluding Peltz's testimony. Section 548 does not require an expert to issue a formal valuation, but simply requires a party to employ methodologies to ascertain whether reasonably equivalent value was received. For example, in multifamily real estate transactions, an expert may utilize the comparable sales approach to determine whether reasonably equivalent value was given. Such methodology does not mandate that the expert audit the debtor's financial statements regarding

rents, net operating income, capital expenditures, etc. In the same way, the Company Approach and the Transaction Approach do not require a formal valuation opinion in order to be employed.

Under the Trustee's argument, a formal valuation report would have to be issued in each and every fraudulent transfer action commenced before all bankruptcy courts. This Court should not establish such a precedent as it is neither consistent with the Bankruptcy Code nor is it required. Finally, Addus doubts whether a formal valuation is even required as to the sale price under the Stock Purchase Agreement for purposes of fraudulent transfer law since no "transfer" occurred under the Stock Purchase Agreement, but instead the payment was made pursuant to the First Amendment.[5]

As a related matter, the Trustee would lead this Court to believe that all Peltz did was assume that the sale price was reasonable because it was the sale price. (Trustee's Motion, p. 7) Such an argument could not be farther from the truth. What Peltz did was start with the *proposition* that the sale price was based on an arm's length transaction. Then Peltz tested that proposition under valuation methodologies (i.e., the Company Approach and the Transaction Approach) to determine if that assumption was accurate. In other words, the arm's length price was the starting proposition for his valuation methodologies, but it was no means the actual valuation methodology he employed.

Furthermore, Peltz can credibly testify as to the factors he considered regarding the arm's length transaction, such as the due diligence performed by R. J. Gold. Unlike Cimasi and Nielson, who declined despite the Court's invitation, to discuss what measure of due diligence is

[5] As averred in Addus' Trial Memorandum and throughout the litigation, Addus also disputes that a "transfer" was made under the First Amendment for purposes of 11 U.S.C. § 548 and state fraudulent transfer law. In re Wey, 854 F.2d 196, 197 (7th Cir. 1988); see also In the Matter of Commodity Merchants, Inc., 538 F.2d 1260, 1263 (7th Cir. 1976).

appropriate in a acquisition such as this, Peltz can and will discuss this issue and address the void left by Cimasi and Nielson.

Indeed, Peltz's arm's length testimony will be of critical importance since courts have repeatedly held that an "important factor in assessing reasonably equivalent value is whether the sale was 'an arm's length transaction between a willing buyer and a willing seller.'" In re Churchill Mortg. Inv. Corp., 256 B.R. 664, 678-79 (Bankr. S.D.N.Y. 2000); see also Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp., 351 F. Supp. 2d 79, 106 (S.D.N.Y. 2004) (noting that among the factors for determining whether reasonably equivalent value has been given is "'whether the sale was an arm's length transaction between a willing buyer and a willing seller.'"). Neither Cimasi nor Nielson addressed the critical issue of whether the transaction was arm's length. Peltz has done so and will do so if permitted to testify. To exclude this key factor from a fraudulent transfer action leaves the Court with one less tool to evaluate the reasonableness of the transaction.

Second, the Trustee contends that Peltz refers to the Company Approach and the Transaction Approach as "preliminary calculations." (Motion, pp. 7-10). However, the Motion takes Peltz's statement completely out of context. Indeed, Peltz's report specifically states, "Nonetheless, **I independently valued Addus' equity at February 12, 2002** based on Addus' audited (therefore, adjusted) financial statements for the year ended December 31, 2001. I compiled industry pricing multiples from similar publicly traded companies and merger and acquisition transactions . . . ." (Peltz Report, p. 10-11).

Third, the Trustee incorrectly contends that "Peltz is a CPA – he has no specialized knowledge or degree in contract negotiations." (Motion, p. 5). Not only is this allegation utterly without support, it is patently wrong. Peltz has substantial expertise within the mergers and

acquisition context as well as in connection with his extensive restructuring experience, which if permitted to testify, he can discuss.

Fourth, in yet another instance of selective quoting, the Trustee argues incorrectly that "Peltz failed to consider that Med had written off over $200 million in good will . . . ." (Motion, p. 6). In fact, what Peltz actually stated in his deposition is that he had considered it, but rejected it as a basis for modifying his calculations:

> Q: But my question, though, sir, is: How did these write offs of goodwill affect your conclusions, if they did at all?
>
> A: I was again aware of them while I performed my estimate of value of the assets or the stock to be acquired.
>
> Q: But where is it reflected in your report as to the impact of those?
>
> A: The impact of those write offs had nothing to do with the Addus acquisition.
>
> Q: The impact of those write offs had nothing to do with your opinion as to the indicia of value; is that true?
>
> A: I think it certainly would have created a skepticism in my mind prior to performing the estimate of value.
>
> Q: Beyond creating skepticism in your mind, did it have any impact on your final opinion?
>
> A: I would say no.

(Peltz Dep. Trans., p. 77, lines 9-24; p. 78, lines 1-3) (emphasis added). Moreover, even if Peltz had ignored the write off – which he did not – it would only go to the weight to be accorded to Peltz's report rather than the admissibility.

Fifth, the Trustee contends that "[d]uring his deposition, Peltz was unable to identify any professional literature that would support his methodology" regarding using a cash flow from operations multiple for the Company Approach rather than a net cash flow from operations multiple. (Trustee's Motion, p. 10). Once again, this is another instance of the Trustee's

selective quoting. What Peltz testified to was not that he was unable to identify any literature, but that he could not recall the names of the literature:

> Q: Can you point me to any professional literature that would say that this is an appropriate thing to do to use cash flow from operations as opposed to net cash flow in order to determine value?
>
> A: I'm sure if I could if I looked.
>
> Q: Off the top of your head, can you name --
>
> A: Not off the top of my head. To me it's a common multiple that's used as an indicator of value. Operating cash flow is not an uncommon multiple. I'm sure I could find it in a book. I can't tell you which book.

(Peltz Dep. Trans., p. 159, lines 13-24). Yet even if no such book sanctioned such a methodology, this still would not serve as a basis for the Trustee's motion in limine. Amorgianos v. National R.R. Passenger Corp., 303 F.3d 256, 26-67 (2d Cir. 2002) ("In McCullock, for example, we affirmed the district court's admission of medical expert testimony despite the fact that the expert "could not point to a single piece of medical literature" that specifically supported the expert's opinion.").

In short, the Trustee's Motion is rife with mischaracterizations and misrepresentations both with respect to Peltz's report and his deposition testimony. These mischaracterizations and misrepresentations should not and cannot serve as the basis for the Trustee's Motion in Limine

CONCLUSION

For each of the reasons stated herein, the Trustee's Motion in Limine must be denied.

Dated: September 16, 2005

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EXHIBIT A

IN RE: MED DIVERSIFIED V. ADDUS HEALTHCARE

Calculation of Time Value of Contract Extension

As of 2/14/2002

DEAL CONSIDERATION

	Stated $	Due
Cash	$15,000,000	August 31, 2002
Promissory Note 1 - a	$7,500,000	January 8, 2003
Promissory Note 1 - b	$15,000,000	January 8, 2004
Convertible Promissory Note 2	$42,000,000	August 31, 2002
	$79,500,000	

PRESENT VALUE CALCULATION

	Cash	Prom. Note 1 - a	Prom. Note 1 - b	Prom. Note 2	Total
Time Period (Year)	0.54	0.90	1.90	0.54	
Rate (Combined Return on Capital)	12.00%	12.00%	12.00%	12.00%	
Discount Factor	0.9404	0.9032	0.8064	0.9404	
X					
Future Value of Deal Consideration	$15,000,000	$7,500,000	$15,000,000	$42,000,000	$79,500,000
Present Value of Future Deal Consideration	$14,105,620	$6,773,801	$12,096,074	$39,495,735	$72,471,230

Value to Medi in Deferring Payment $7,028,770

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-and-

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Attorneys for Addus Healthcare, Inc., W. Andrew Wright, Mark Heaney, Courtney E. Panzer, and James A. Wright

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re:	CHAPTER 11
	Jointly Administered
MED DIVERSIFIED, INC., et al.,	Case No: 02-88564 02-88568 02-88570 02-88572 02-88573
Debtors.	
CHARTWELL LITIGATION TRUST and GREGORY L. SEGALL AS TRUSTEE OF CHARTWELL LITIGATION TRUST,	Adv. P. No. 04-08680
Plaintiffs,	
v.	
ADDUS HEALTHCARE, INC., an Illinois Corporation; W. ANDREW WRIGHT, an Illinois Individual; MARK S. HEANEY an Indiana Individual; COURTNEY E. PANZER, an Illinois Individual; and JAMES A. WRIGHT, an Illinois Individual,	
Defendants.	

CERTIFICATE OF SERVICE

I, Jill L. Murch, hereby certify that on the 16th day of September, 2005, I caused a true and correct copy of the SUPPLEMENTAL OBJECTION TO TRUSTEE'S MOTION IN LIMINE REGARDING EXPERT TESTIMONY OF SCOTT P. PELTZ, to be served by hand delivery and electronic mail on the following:

Howard J. Steinberg (hsteinberg@irell.com)
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I certify that the foregoing statement made by me is true. I am aware that, if any of the foregoing statements by me are willfully false, I am subject to punishment.

Dated: September 16, 2005

/s/ Jill L. Murch
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