

2009

# Mobile Echocardiography v. DAT : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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**IN THE MATTER OF THE  
APPLICATION OF BUDDY W.  
GREGORY FOR THE JUDICIAL  
DISSOLUTION OF GREGGORY,  
BARTON & SWAPP, P.C. nka GBS  
LEGAL CLINIC, P.C.**

**APPELLANT'S BRIEF**

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**MOBILE ECHOCARDIOGRAPHY, INC.,**

**Appellant,**

**v.**

**DAT&K, LLC**

**Appellee.**

**Case No. 20090735**

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Appeal from the Fourth Judicial District Court, Utah County, State of Utah  
Honorable Samuel D. McVey, Case No. 050401014

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**JUL 08 2010**

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UTAH APPELLATE COURTS**

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## STATEMENT OF JURISDICTION

This appeal is taken by Appellant Mobile Echocardiography, Inc. (“Appellant” or “MEI”) from orders and judgments of the Fourth District Court, Utah County, Utah. The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code § 78-2a-3(2)(j).

**STATEMENT OF THE ISSUES AND STANDARD OF REVIEW**<sup>3</sup> and the rule of law commonly known as *nemo dat qui non habet* (“he who hath not cannot give”), see Black’s Law Dictionary 1037 (6th ed. 1990), requires that a debtor cannot give more as a security interest than the debtor owns. This is a question of law, upon which this Court shows the trial court no deference. See C&Y Corp. v. General Biometrics, Inc., 896 P.2d 47, 54 (Utah App. 1995) (addressing “the Correctness of the trial court’s selection and statement of applicable law.”); *State v. Pena*, 869 P.2d 932, 936 (Utah 1994) (“appellate review of a trial court’s determination of the law is . . . ‘correctness’”).

Second Issue: Whether the trial court properly applied Utah Code § 70A-9a-203 and the rule of *nemo dat qui non habet*. Where - as here – the issue is one of the intent of parties to an agreement, and where the parties’ testimony as to their intent is consistent, the trial court’s discretion is limited and the trial court’s decision should be reviewed for correctness. See, e.g., Baladevon, Inc. v. Abbott Laboratories, Inc., 871 F.Supp. 89, 98 (D. Mass.1994) (discussing rule of law that “the undisputed evidence as to both the contracting parties' subjective intent controls the interpretation of the ambiguous contract terms . . . “)

(emphasis added); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.”). In addition, the core challenge is not that the court’s findings of fact are all necessarily wrong, but rather that the application of the facts to the law was incorrect. *See Jones v. Barlow*, 2007 UT 20, ¶ 10, 154 P.3d 808 (“noting that the appellate courts give minimal discretion to the district court in its application of the facts to the law.”) (citations omitted).

### **PRESERVATION OF ISSUES**

The issues at bar were preserved below by papers and presentation of evidence at the February 6, 2009 trial/hearing: (1) Motion for Release of Funds From Registry of Court to Mobile Echocardiography, Inc. [R. 003396 (motion), 003392 (memo), 003521 (reply)]; (2) Notice of Filing of Affidavit of Keith L. Barton [R. 003984]; (3) May 5, 2008 Hearing [R. 006535]; (4) Pretrial Brief of Mobile Echocardiography, Inc. [R. 004823]; (5) February 6, 2009 Hearing [R. 006536]; (6) Closing Arguments of Mobile Echocardiography, Inc. [R. 004996]; and (7) Motion to Reconsider March 4, 2009 Order and Request to Certify Order Under Utah Rule of Civil Procedure 54(b) [R. 005429 (motion), 005530 (memo), 005830 (reply)]. Preservation of the issues for appeal is also reflected at least in part in the trial court’s two orders, a March 4, 2009 decision styled “Findings of Fact, Conclusions of Law and Order Regarding Interpleading Funds” (the “March

Order”);<sup>1</sup> and ii) a July 23, 2009 decision styled “Order Denying MEI’s Motion to Reconsider and Granting MEI’s Motion for Certification as a Final Order” (the “July Order”).<sup>2</sup> [See R. 00522 & 006073].

## **DETERMINATIVE STATUTES AND RULES**

The central rule of law in this appeal is in Utah Code Ann. § 70A-9a-203, which provides that a security interest can attach to collateral “only if the debtor has rights in the collateral.” Utah Code Ann. § 70A-9a-203 (emphasis added).

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

In a broad sense, this case is about whether a secured creditor can make a claim to money in which the debtor which gave the security interest never had any ownership in the first place. See, e.g., Utah Code Ann. § 70A-9a-203 (requiring that “a security interest is enforceable against the debtor and third parties with respect to the collateral **only if . . . the debtor has rights in the collateral . . .**”) (emphasis added). This basic principle of commercial law is sometimes referenced as *nemo dat qui non habet* (“he who hath not cannot give”). See Black’s Law Dictionary 1037 (6th ed. 1990).

More specifically, this case is an appeal by MEI of the trial court’s order dispersing certain funds (the “Escrow Funds”) deposited into the registry of the

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<sup>1</sup> The March Order is attached as Addendum 1.

<sup>2</sup> The July Order is attached as Addendum 2.

Fourth District Court, to a purported secured party, Appellee DAT&K, LLC (“Appellee” or “DAT&K”) even though the undisputed evidence below – in fact stipulation of the parties – demonstrated that DAT&K could not have a security interest in the Escrow Funds because the debtor to DAT&K did not have any rights in the Escrow Funds to give. See, e.g., First Commercial Corp. v. First National Bancorporation Inc., 572 F.Supp.1430, 1435 (Colo. 1983) (holding an unsecured supplier claiming an interest in retained funds took priority over lender’s perfected security interest, because debtor never had rights to payments destined for supplier); Weld Colorado Bank v. E & E Construction, Inc., 653 P.2d 758, 760 (Colo. Ct. App. 1982) (bank’s security interest did not attach to escrowed funds because the debtor, a defaulting contractor, did not have any rights to the escrowed funds, which were paid for materials).

Because the debtor did not have an interest in the Escrow Funds under Utah Code § 70A-9a-203, the only possible exceptions by which DAT&K might intercept the Escrow Funds designated for MEI was under i) a “reimbursement theory”; or ii) a “waiver theory.” However, there was literally no evidence presented below to support application of either, and thus the trial court’s award of the Escrow Funds to DAT&K was erroneous.

## **II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

The instant dispute was addressed in the context of a larger proceeding, to wit, the judicial dissolution of the Gregory Barton & Swapp, P.C. (“GBS”) law firm, once famous for the catchy phrase used by its then-spokesperson Keith Barton,



that clients need only make “One Call, That’s All!”. [See Petition for Judicial Dissolution of Gregory Barton & Swapp, P.C. (the “Dissolution Petition”), R. 000014]. GBS was a personal injury law firm, handling (among others) automobile accident and products liability tort cases. [See Dissolution Petition, R. 000013-10<sup>3</sup>]. After the Dissolution Petition was filed, a receiver was appointed (the “Receiver”), and both secured and unsecured parties, with claims against GBS, filed and submitted claims. [See Memo. Supp. Appointment of Receiver, R. 000023]; [See Receivership Order, R. 000207-195].

During the dissolution proceedings, a dispute arose between Appellee DAT&K, LLC (“Appellee” or “DAT&K”), a secured creditor of GBS, and Appellant Mobile Echocardiography, Inc. (“MEI”). The trial court issued two orders in relation to the dispute, i.e., the March Order and the July Order. [See R. 00522 & 006073]. This appeal followed.

### **STATEMENT OF FACTS**

Although the core challenge is to the trial court’s application of the facts to the law, MEI recognizes the possible application of the marshalling requirements to this case. Thus, the following facts are marshalled and put in the light most favorable to DAT&K. But, it is important to note that with regard to the

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<sup>3</sup> The Record was numbered with the number “000001” on the first page of the trial court’s file, and moving forward. As such, the numbering on pleadings and filings in the record are sometimes reported herein in reverse order, as this is the order in which the pages would be read in the document. [See, e.g., R. 00014-00001, pages 1 to 14 of the Dissolution Petition].

agreements between MEI and GBS, DAT&K did not have any evidence to contradict the testimony from the only qualified parties – that of attorney Keith Barton (authorized agent of GBS) and Alan Fidler (President of MEI).

## **I. BACKGROUND – THE GBS LAW FIRM AND FEN-PHEN CASES**

### **A. GBS and the Texas Firms**

Gregory, Barton & Swapp, P.C., *i.e.*, “GBS” was a Utah law firm that specialized, in part, in the acquisition of mass tort cases, such as claims arising from the use of the pharmaceutical products, sometimes known as “Fen-Phen.” [See March Order at 1, R. 005221]. GBS’s mass tort cases, and in particular “Fen-Phen” cases, were generally referred to one of two Texas law firms, Williams Bailey Law Firm and Blizzard, McCarthy & Nabers, L.L.P. (collectively, the “Texas Firms”). [See March Order at 1, R. 005221].

The cases referred to the Texas Firms by GBS were contingency fee cases. Under the arrangement between GBS and the Texas Firms, clients paid individually allocated costs out of their portion (*i.e.*, the client portion) of the recovery. [See March Order at 3, R. 005220]; [See Fen-Phen Referral Agreement at 1, R. 004036 (“the fee agreements with the clients are on a 40% contingency basis plus reimbursement of costs and expenses (which are deducted from the client’s portion of the recovery))].<sup>4</sup> As between the law firms,

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<sup>4</sup> This document, and others, were stipulated as admissible for the May 2008 argument and February 6, 2009 trial/evidentiary hearing. [See Stipulation for Admissibility of Documents, R. 004106, 004036].

GBS was entitled to a portion (33.3%) of only the attorney fees arising from the referred cases. To state the obvious, neither Texas nor GBS were entitled to, or had any interest in, the clients' portion of the settlements. [See Fen-Phen Referral Agreement at 1, R. 004036]; [See 2-6-09 Trans. at 19-21, 32-34, 87-88 R. 006536].<sup>5</sup>

**B. MEI's Services to the GBS Law Firm**

As indicated by the name of the company, "Mobile Echocardiography, Inc.," MEI provides "mobile" cardiac ultrasound screenings for use by physicians and other healthcare professionals. [See March Order at 2, R. 005221]; [See MEI-GBS Echo Agreement, R. 004039]; [See 2-6-09 Trans. at 7-8, 102-103, R. 006536]. In November 2000, GBS and attorney Keith Barton entered into an agreement with MEI, by which MEI would provide cardiac ultrasound screenings for potential and actual clients of GBS and the Texas Firms, for use in the Fen-Phen litigation. [See March Order at 2, R. 005221]; [See MEI-GBS Echo Agreement, R. 004039]; [See 2-6-09 Trans. at 7-8, 102-106, R. 006536].

In general, MEI provided two types of echocardiogram services: an "Initial Screening" and a "Full Study." An Initial Screening is a short procedure, which is not recorded, whereby the echocardiogram technician reviews the potential client's heart, to determine if the potential client had heart valve damage indicating a possibly viable Fen-Phen claim. If the Initial Screening was

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<sup>5</sup> A condensed copy of the February 6, 2009 Transcript is attached as Addendum 3, for the Court's convenience.

“positive,” then the law firm would “sign up” the client, including by having the client execute the documents described in the next section, and have the client return at a later date for the “Full Study.” [See MEI-GBS Echo Agreement, R. 004039]; [See 2-6-09 Trans. at 106-107, 19-122].

MEI provided Initial Screenings at an agreed-upon price of a few hundred dollars, which was to be paid by GBS on a monthly basis, and provided the Full Study echocardiograms under an agreement that MEI would be paid \$1,850 for each Full Study, at the time the client’s case was settled. [See MEI-GBS Echo Agreement, R. 004039]; [See 2-6-09 Trans. at 106-107, 19-122].

**C. The GBS Client Contingency Fee Agreements, the MEI Screening Forms, and the Lien Agreements**

As part of GBS’s client retention policies, every client signed a “Contingency Fee Agreement.” Under these agreements, the clients agreed to pay from the client's portion of their Fen-Phen settlements certain “costs” related to their case:

(b) I (we) will incur various costs and expenses in performing legal services under this Agreement. You agree to pay for all costs, disbursements, and expense[s] owed by you in connection with this matter, or which have been paid or advanced by me (us) on your behalf and for which [you] have not previously paid or reimbursed to me (us), if I (we) reach a settlement or judgment on your behalf, or if our services are terminated for any reason by you.

[Contingency Fee Agreement (emphasis added), R. 004040].

Unchallenged testimony below established that when a client appeared at GBS for an Initial Screening, every client was required to complete an “MEI

Screening Form” and a “Lien Agreement,” or else no Full Study echocardiogram would have been performed by MEI. [See 2-6-09 Trans. at 16-18, 21-22, 121-122, R. 006536]. Both of these documents gave MEI a lien that was superior to that now claimed by DAT&K. The MEI Screening Form makes clear that the client understood that they were going to pay MEI directly from their portion of the settlement, and provided as follows:

In the event my screening is positive and I choose to go forward with a full workup, the cost of the full workup will be deducted from my total settlement as related to my fen-phen claim. In the event my screening does not meet FDA criteria for an individual claim, the cost of my echocardiogram will not be charged to me. A photocopy of this agreement is to be considered as valid as an original.

[Screening Form (emphasis added), R. 004804]; [See *also* 2-6-9 Transcript at 10-13, R. 006536].

The Lien Agreement confirms that the client gives a lien in favor of MEI, as follows:<sup>6</sup>

I hereby authorize and direct you, GREGORY, BARTON & SWAPP, P.C. my attorneys, to pay directly after settlement or trial such sums as may be outstanding for goods and services rendered, plus any accumulated interest to date of settlement, and to withhold such

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<sup>6</sup> The trial court excluded the Lien Agreements from admissibility [See 2-6-09 Trans. at 24, R. 006536]. That ruling was in error, because Barton’s testimony was clear, unequivocal, and unchallenged: every client that received an MEI Full Study Echocardiogram signed one of these agreements. [See Barton Aff. ¶ 7-8, R. 003979]; [See 2-6-09 Trans. at 21-22, 26-27, 53-54, 82-83, 88, 120-122, R. 006536]. The exact same facts supported the admission of the Contingency Fee Contract, which DAT&K and the trial court accepted as admissible and controlling evidence as to the terms of the agreements with GBS’s clients. Simply put, the only evidence is that one would not be submitted without the other, so if the Contingency Fee Agreement was admissible, so to was the Lien Agreement.

sums from any settlement as may be necessary to adequately protect said provider. I further give a lien on my case to said provider of services against any and all proceeds to any settlement, judgment, or verdict which may be paid to my attorney or me as the result of my injuries for which I have been treated or injuries in connection therewith.

[Lien Agreement (emphasis added), R. 004803]; [See Barton Aff. ¶ 8, R. 003979, 003972]. As further explained by Barton to the trial court, in the Lien Agreement and Contingency Fee Contract, the clients expressly acknowledged their personal liability to pay for litigation costs and services, such as those provided by MEI, and expressly gave a lien on any settlement proceeds they may obtain in favor of any provider of services, which would include MEI, in order to pay any outstanding sums for goods and services rendered on the client's behalf directly from the settlement proceeds. The disputed funds were withheld from the clients pursuant to these contractual obligations . . . the intent of GBS in entering into the Lien Agreements, that such liens granted by the clients attached before any arguable lien could have attached in favor of DAT&K." [Barton Aff. ¶ 8 (emphasis added), R. 003979];<sup>7</sup> [See 2-6-09 Trans. at 21-22, 26-27, 53-54, 82-83, 88, 120-122, R. 006536].

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<sup>7</sup> The Court declined to consider Barton's affidavit at the May 8, 2008 hearing, because MEI had not been able to obtain the affidavit and submit it sufficiently in advance of the hearing. [See 5-8-08 Transcript at 13-14, R. 006535]. DAT&K subsequently had the affidavit for nearly a year, and also had the opportunity to depose Barton, which deposition testimony re-affirmed the statements in his affidavit. [See 5-8-08 Transcript at 14, R. 006535 ("THE COURT: . . . if this does go to an evidentiary hearing or something else, obviously, you'd be able to use Mr. Barton at that point.")].

## **II. MEI'S LAWSUIT AND SETTLEMENT WITH GBS REGARDING ITS ECHOCARDIOGRAM SERVICES**

### **A. The MEI-GBS Lawsuit**

MEI provided echocardiography services to thousands of the GBS firms' Fen-Phen clients, pursuant to the written agreement. [See MEI-GBS Echo Agreement, R. 004039]; [See 2-6-09 Trans. at 7-9, 103-105, R. 006536]. In 2004, After MEI had not been paid for some of these services MEI filed suit against GBS and Keith Barton personally. The lawsuit sought payments for a number of services rendered by MEI, including not just the Full Studies, but also monies owed for the Initial Screenings, monies paid by MEI out of its own pocket for cardiologist readings of certain echocardiograms, and other costs. [See March Order at 4, R. 005219]; [See 2-6-09 Trans. at 103-111, R. 006536].

### **B. The MEI-GBS Settlement Agreement – Payment for Initial Screenings and Other Costs, Excluding Full Studies**

In September, 2004, a settlement agreement was reached between MEI, GBS and the Texas Firms (the "MEI-GBS Settlement Agreement") [See MEI-GBS Settlement Agreement, R. 004024]. Pursuant to this Agreement, \$601,000 was advanced by the Texas Firms as an initial payment to MEI. [See MEI-GBS Settlement Agreement at 3, R. 004022]. This payment was not, however, an advance payment for the costs that would be withheld from the client's portion of the settlements. Rather, the undisputed testimony below (and the related documents) was that the \$601,000 payment was for other debts by GBS and Barton to MEI, including Initial Screenings, monies paid by MEI out of its own

pocket for cardiologist readings of certain echocardiograms, and other costs.<sup>8</sup> In other words, there were no advances that could trigger a right by GBS to be reimbursed from the monies for Full Study echocardiograms, withheld from the client's portion of the settlements. [See 2-6-09 Trans. at 29-34, 37-38, 40-41, 79-81, 87-93, 95, 104-111, 151-152, R. 006536]; [See Barton Aff. ¶¶ 9-10, R. 003978]; [See Trial Ex. 20, R. 003969-003966].

### **C. The MEI-GBS Security Agreement**

Also part of the settlement, GBS gave MEI a security interest (the “MEI-GBS Security Agreement”) and a note (the “MEI Note”). [See MEI-GBS Security Agreement, R. 004071]; [See MEI Note, R. 004074]. The MEI-GBS Security Agreement acknowledged that DAT&K had a prior-in-time security agreement with GBS, in the attorney fees due to GBS from the Fen-Phen cases. [See MEI-GBS Security Agreement at 4, R. 004068].

### **III. THE MEI-DAT&K DISPUTE AND THE INTERIM ESCROW AGREEMENT**

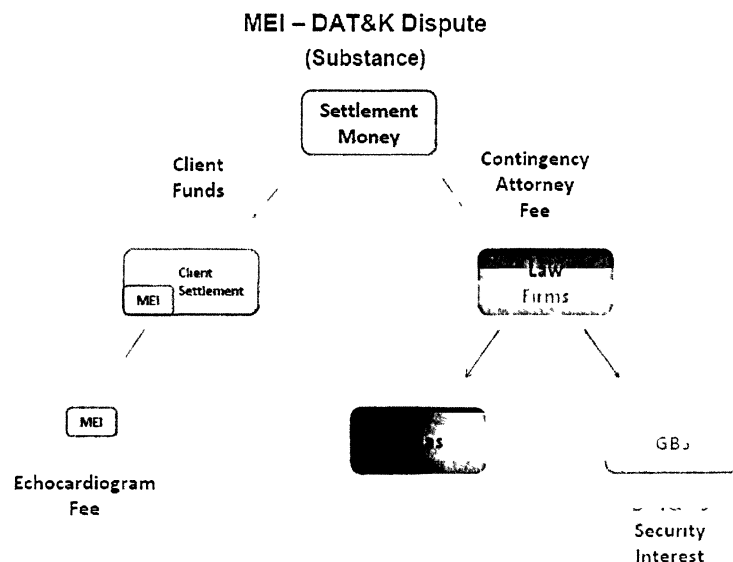
In approximately the Summer of 2006, the Texas Firms settled a large number of the Fen-Phen cases. As part of this process, the Texas Firms withheld \$1,070,517.16 from the client's portion of the settlement recoveries, as repayment of the MEI echocardiogram costs, at a rate of about \$953 per echocardiogram. In other words, the \$1,070,517.16 was reflected as a cost charged to the client in addition to (and separate from) the contingency fee paid

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<sup>8</sup> Again, there was simply no testimony to the contrary, as was admitted by DAT&K's witness, the Receiver. [See 2-6-09 Trans. at 187-188, R. 006536].

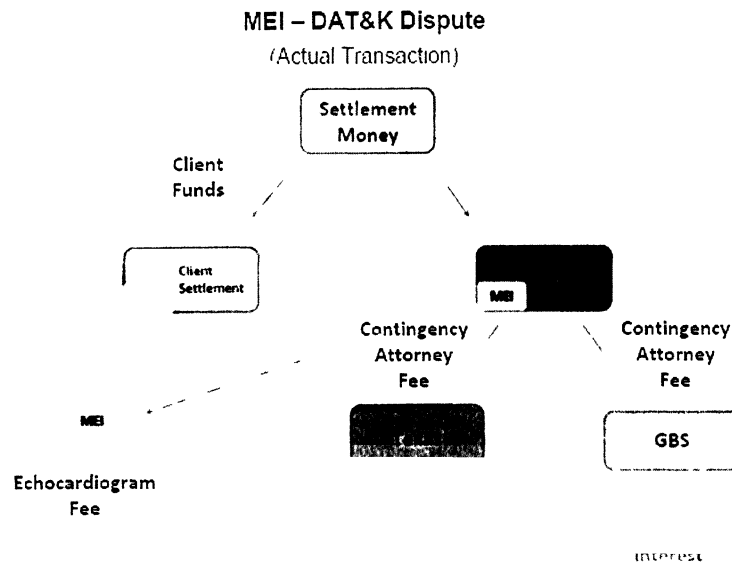


by the client as an attorney fee. The “Escrow Funds” at issue in this case originated with this \$1,070,517.16. [See Escrow Agreement at 8-9, R. 004005-004004]. The origin of these funds, designated the “Echocardiogram Fee,” and the applicability of DAT&K’s security interest, is reflected as follows:



[See Escrow Agreement at 8-9, R. 004005-004004]; [See July Order at 1 (“ . . . the Court finds the funds care from the 60% of the recovery attributed to the client’s amount.”), R. 006073]; [See 2-6-09 Trans. at 31-32 (escrow funds withheld from client’s portion of settlement), 42, R. 006536].

For accounting and logistical reasons, however, the monies withheld from the client's portion of the Fen-Phen settlements were not paid directly by the clients to MEI, but rather were processed through the trust accounts of the Texas Firms, with the planned distribution as follows:



[See Escrow Agreement at 8-9, R. 004005-004004]; [See July Order at 1 (“ . . . the Court finds the funds care from the 60% of the recovery attributed to the client’s amount.”), R. 006073]; [See 2-6-09 Trans. at 31-32, 42, R. 006536].

Despite the fact that the withheld monies were costs withheld from the clients’ portion of recoveries, DAT&K asserted that it was entitled to a portion of such monies, in particular 50% of certain monies. DAT&K acknowledged that under its theory of the case, the other 50% would (if the theory was correct) go to the Texas Firms. [See Escrow Agreement at 1-3, 7-10, R. 004009-004003]. In an effort to resolve this dispute, the Texas Firms and DAT&K entered into an interim agreement that, among other things, provided for the deposit of certain funds into escrow (the “Escrow Agreement”), subject to the presentation of evidence to the trial court. In substance, this agreement did the following:

- a. An undisputed \$97,006.94 would be paid to MEI.
- b. Since the Texas Firms believed that the monies collected from the clients for MEI costs were properly payable to MEI, and

assuming that DAT&K's argument were correct that they were entitled to fifty percent, the Texas Firms paid 'their' portion of the withheld costs (i.e., fifty percent (50%)) to MEI, in the amount of \$442,768.03.

c. The remaining fifty percent (\$442,768.03, plus accrued interest) became the "Escrow Funds," and were placed into the Court's registry for determination as to whom it should be paid.

[See Escrow Agreement at 1-3, 7-18, R. 004009-004003].

#### **IV. THE PROCEEDINGS BELOW, RESULTING IN THE TRIAL COURT'S MARCH ORDER AND JULY ORDER**

The sole issue below in relation to the Escrow Funds was whether the Escrow Funds were monies properly due to GBS (and thus subject to the security interest of DAT&K) or were client costs, withheld from the client's portion of the Fen-Phen settlements (to which DAT&K's security interest could not attach) and were payable to MEI.

##### **A. The May 2008 Hearing**

Both MEI and DAT&K believed that the trial court could decide the issue based on the undisputed facts leading up to the deposit of the Escrow Funds, and thus the parties agreed to simply submit briefing and argue the proper disposition of the Escrow Funds at a motion hearing. [See Motion for Release of Funds From Registry of Court to Mobile Echocardiography, Inc. [R. 003396 (motion), 003392 (memo), 003521 (reply)]; [See *also* 5-5-08 Transcript [R. 006535].

At the conclusion of the May 2008 hearing, the trial court ruled that the agreements were ambiguous, and therefore an evidentiary hearing was required,

so that the Court could consider extrinsic evidence of the intent of the parties to the relevant agreements, GBS and MEI (and possibly the Texas Firms). [R. [See 5-5-08 Transcript at 57-58 (“I can’t determine that as a matter of law based on these documents . . .”), R. 006535]. The trial court ordered that discovery could be had, in order to ascertain the intent of GBS and MEI in the agreements. [5-5-08 Transcript at 16-17, 58-59, R. 006535].

### **B. The February 6, 2009 Evidentiary Hearing**

After depositions of Keith Barton and Alan Fidler, on February 6, 2009, the trial court held an evidentiary hearing. As to the meaning of various agreements between GBS and MEI (and the Texas firms), the only testimony was offered GBS’s Keith Barton and MEI’s Alan Fidler. [See 2-6-09 Trans., R. 006536].

### **C. The March Order**

In March 2009, the trial court issued what became its first order on the disposition of the Escrow Funds. This March Order reached the correct conclusion as to where the money should go – it depends on where it came from:

The issue is resolved by determining whose money it is. If it is the clients’ 60%, those clients can direct the sum go to MEI and Barton was their agent for that purpose. If the funds are GBS’s 40%, DAT&K’s security interest gives the money to DAT&K.

[March Order at 8, R. 005215 (emphasis added)]. Similarly, the trial court emphasized the importance of the source of the Escrow Funds by noting the significance of its concern that there was a lack of “direct evidence from the Texas Firms showing whether the escrowed funds originated from the clients’

60% of the settlement proceeds from the lawyers' 40%, or some combination."

[March Order at 6, R. 005217 (emphasis added)].<sup>9</sup> In fact, many of the findings of fact in the July Order focused on the source of the Escrow Funds (i.e., from client's portion of Fen-Phen settlements, or from contingency fees), an acknowledgement of the determinative nature of this issue. [See March Order, Findings, ¶¶ 4, 5, 6, 8, 10, 14, 17, R. 005222-005216]. For example, the March Order notes that "DAT&K's secured interest did not reach the clients' portion of settlements unless part or all of the portion went to GBS as either a reimbursement for advanced costs or as some other form of income." [March Order ¶ 6, R. 005220]. The March Order thus correctly established and made the findings of fact that the source of the Escrow Funds is determinative.

However, the Order was mistaken in the respect that i) it approached the issue as if there was an actual dispute as to the origin of the Escrow Funds (which there was not); and ii) the trial court incorrectly concluded that the Escrow Agreement (which the trial court called a "settlement agreement") constituted an

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<sup>9</sup> As noted elsewhere, the trial court made a critical mistake in ignoring the undisputed fact that the Escrow Funds originated from the client's portion of the settlements, noting for example in the March Order that "one of the Texas firms (Williams Bailey) paid \$442,768.03 into escrow with the Court but there is no competent evidence that amount came from the client's portion of the settlement." [March Order at 5 (emphasis added), R. 005218]. Part of the trial court's confusion was no doubt caused by DAT&K's initial, and overly simplistic argument that its security interest attached to Escrow Funds because these funds were contingency fees belonging to GBS. [See Memorandum in Support of Motion of DAT&K, LLC for Order Releasing Funds Held by Clerk in Registry at 9-10, R. 003294-003293].

accounting by the Texas Firms as to the origin of the Escrow Funds. In particular, the March Order (incorrectly) explained:

The Texas firms, it is true, paid the half of the funds they retained to MEI. This could indicate an acknowledgment MEI was due the other half now held in escrow because that amount was client money. If it was not, the Texas Firms would not have paid their half to MEI. However, a statement in the Settlement Agreement indicates that is not the case: "Once [the Texas Firms] pay[] \$97,006.94 to MEI, MEI will have been paid \$1,070,517.16, which equals the full amount withheld as MEI echocardiograph charges from Fen-Phen Clients' settlements." (Emphasis added.) This statement appears to be the salient acknowledgment that **the deposited funds were not client funds** because the full amount of client funds had already been paid to MEI.

[March Order at 11-12, R. 005212 - 005211 (emphasis added)].

Based upon this reasoning, the March Order next incorrectly concluded that the Escrow Funds did not come from the clients' portion of the Fen-Phen settlements, and therefore belonged to DAT&K:

The Court concludes by a preponderance of evidence the Settlement Agreement language reflects the Texas Firms' accounting. Since no other client funds were being held to pay MEI the remaining amount from which the \$442,768.03 was taken, that sum did not come from the clients' 60%. . . . Since the parties presented no direct evidence of the Texas Firms' accounting, and since the Settlement Agreement signed off by the Texas Firms is the most persuasive evidence of their accounting of settlement proceeds, the Court concludes the Texas firm accounting directs that the \$442,768.03 escrowed amount is not client funds and DAT&K's prior security interest attaches to them.

[March Order at 12, R. 005211 (emphasis added)].

#### **D. MEI's Motion for Reconsideration**

Simply put, the trial court's March Order was absolutely correct in its

conclusion that if the Escrow Funds originated from the client's portion of the Fen-Phen settlements, then they belonged to MEI. [See March Order at 6, 8, R. 005215, 005217]. The trial court's order was absolutely incorrect in its conclusion the Escrow Funds were not from the client's portion of the Fen-Phen settlements. [See March Order at 12, R. 005211]. Accordingly, MEI was forced to file a motion for reconsideration.<sup>10</sup> [See Motion to Reconsider March 4, 2009 Order and Request to Certify Order Under Utah Rule of Civil Procedure 54(b), [See R. 005429 (motion, 005530 (memo), 005830 (reply))].

#### **E. The July Order**

The trial court was presented with the flaws in its reasoning, in particular its mistaken conclusion that the Escrow Funds were not from the clients' portion of the Fen-Phen settlements, through MEI's motion to reconsider. [See Reconsideration Memo., R. 005530-005430].

In its July Order, the trial court recognized and conceded its mistake, noting that "***MEI is correct on this point*** in that having now reviewed the hearing transcript, ***the Court finds the funds came from the 60% of the recovery attributed to the clients' account.*** The ***parties stipulated to this fact and the Court amends its finding accordingly to reflect the stipulation.***"

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<sup>10</sup> In the March Order trial court bent over backwards to criticize MEI's presentation of the evidence, and to ignore the undisputed testimony. A summary of the flaws in the trial court's reasoning is in MEI's memorandum in support of its reconsideration motion (the "Reconsideration Memo."). [See Reconsideration Memo., R. 005530-005430].

[July Order at 1 (emphasis added), R. 006073].

However, the July Order still distributed the Escrow Funds to DAT&K, even in the face of the new finding that these funds came from the client's portion of the Fen-Phen settlements. While the trial court's "analysis" is not a model of clarity, it appears that the trial court may have been relying upon a finding that the Escrow Funds belonged to GBS under a "reimbursement" theory, or under a "waiver" theory that MEI had agreed to subordinate its rights to DAT&K.<sup>11</sup> Strangely, the July Order also continued to rely upon the "accounting" by the Texas Firms, as purportedly reflected in the Escrow Agreement – even though the Escrow Agreement was clearly not an accounting, and even though the trial court admitted that its earlier conclusion that the "accounting" in the Escrow Agreement showed the monies were not from client funds, was wrong. The relevant portion of the July Order follows:

As stated in the [March] Order, the funds may be from the client's 60% but still allocated to go elsewhere, such as to reimburse Mr. Barton's firm or to pay for the firm's obligations from which it was holding its clients harmless under the contingent fee agreements. The Court's findings indicate MEI had no privity with any contract that would give it a direct right of action against the clients and Mr. Barton's firm assumed liability for ECG costs incurred by MEI. Further, it is evident the disputed funds were not headed for the pockets of the Mr. Barton's Phen-Fen clients. The accounting evidence stated in the various agreements involving the Texas Firms is important and designated the funds' final intended resting place. This evidence was the basis for the Court's [March] [O]rder, as

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<sup>11</sup> To the extent the trial court was relying upon some other exception to the rule of *nemo dat qui non habet*, no such theory was ever advanced by DAT&K, nor identified by the trial court.



argued concisely by DAT&K. No party presented competent evidence, including Mr. Barton's understanding, of a strength necessary to contradict the accounting specified in the Settlement Agreement and other corroborative facts found by the Court. While admissible, a party's understanding<sup>12</sup> is neither binding nor

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<sup>12</sup> The trial court's acknowledgement in its July Order of the testimony by Keith Barton and Alan Fidler, including testimony based on their "understanding," was another reversal of the trial court's prior ruling. In particular, in the earlier March Order, the trial court went to great lengths to discount Barton's testimony (which was the only testimony about the source of the Escrow Funds), and in particular to criticize use of the word "understanding" in the questions and answers. [See March Order at 10 and 12, R. 005213, 005211]. However, MEI pointed out in its motion for reconsideration that DAT&K had no contrary witnesses, and the Receiver also admitted he had no evidence or knowledge to contradict Barton's testimony. [See March Order at 9, R. 005214 (acknowledging that the "receiver repeatedly stated he had no first hand, or even second hand knowledge of the category into which the escrowed funds would fall – client funds, reimbursement for advanced costs, or attorney fees.")]. In addition, MEI pointed out that DAT&K and the Receiver both relied upon questions and testimony about the witnesses' "understanding," that DAT&K and the Receiver did not object to MEI's questioning, and that the case law allows this type of testimony. [See Reconsideration Memo. at 5, n. 2 and 3, R. 005526-23]. In fact, demonstrating the trial court's apparent devotion to making sure that DAT&K and the Receiver were victorious, even though the trial court later critiqued MEI's counsel for eliciting purportedly inadequate testimony based upon a witnesses "understanding," the trial court took the opposite position at the hearing, for the benefit of DAT&K:

THE COURT: [To DAT&K counsel] You can ask what his — you could ask for his understanding on this. That's happened throughout this proceeding. So he can answer the question.

THE WITNESS: My understanding is that they have a right to legal and other services rendered and to be rendered for costs and expenses advanced.

[2-6-09 Trans. at 66-67, R. 06536 (emphasis added)]. Similarly, DAT&K not only elicited other evidence relating to a witness' "understanding," but actually cross-examined MEI's Alan Fidler with his deposition testimony as to his "understanding." [2-6-09 Trans. at 129, 134-135, 138, R. 006536]. Later on, the Court similarly allowed questioning by DAT&K, over MEI's objection: "THE

persuasive in this case given the second-hand knowledge enjoyed by Mr. Barton and the varying accounts of the MEI witness.

Further, contrary to MEI's assumption, the Order was not based on a single sentence in the Settlement Agreement but incorporated findings based on financial data, agreements and other evidence. . . .

The broad scope of DAT&K's security interest allowed it to attach to the funds as they went through GBS or its predecessor destined for someone other than the clients' personal bank accounts. As reflected by the Court's findings, the settlement agreement and other documents indicated the nature of the funds.

[July Order at 1-2 (emphasis added), R. 006073-72].

MEI appeals the July Order, and any reliance by the July Order upon the faulty reasoning of the previous, March Order.

### **SUMMARY OF THE ARGUMENT**

There were only three possible grounds upon which the trial court could have awarded the Escrow Funds to DAT&K, none of which can apply in this case.

First, if the Escrow Funds were monies in which GBS had a direct and immediate right, i.e., contingency attorney fees owing to GBS under the Contingency Fee Agreements, then DAT&K's security interest in those fees would trump any claim by MEI. However, the trial court reversed its initial finding, and ultimately found that the Escrow Funds were not from the contingency

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COURT: Well, the document speaks for itself. We've already covered that. We're just asking for his understanding." [2-6-09 Trans. at 144, R. 006536].

In short, the trial court was highly critical of MEI's case, but did not apply this criticism even handedly, or even to its own actions.

attorney fees in which GBS had an interest, and in fact originated with the client's portion of the Fen-Phen settlements. [See July Order at 1, R. 006073]. This finding, which is not challenged by DAT&K on appeal and remains the law of the case, eliminates the first of the three possibilities, as a matter of law.

Once it made its finding that the Escrow Funds originated from the client's portion of the Fen-Phen settlements, in which GBS did not have a direct right, the trial court could only award the Escrow Funds to DAT&K in contravention of Utah Code § 70A-9a-203 and the doctrine of *nemo dat qui non habet*, if one of two exceptions applied - either (ii) the Escrow Funds belonged to GBS under a “reimbursement” theory; or (iii) MEI waived or surrendered its claim to the Escrow Funds in favor of DAT&K.<sup>13</sup> As to these two exceptions, the only evidence presented to the trial court – both before and at the February 6, 2009 hearing - proved that the Escrow Funds could not belong to GBS as a reimbursement, and that MEI never waived its right to be paid by the clients.

Accordingly, the Utah Court of Appeals should reverse the trial court’s ruling, and order that the Escrow Funds should have been dispersed to MEI, and direct the trial court to take all action necessary to have DAT&K and the Receiver obtain the delivery and return of these funds (plus accrued interest) to MEI.

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<sup>13</sup> As noted, neither DAT&K or the trial court advanced or articulated any other theory.

## ARGUMENT

To understand the trial court's error, including its improper conclusions about the evidence, it is necessary to first discuss the applicable law, followed by a discussion of trial court's orders and the evidence. As explained *infra*, even applying the strict marshalling standard (which should not apply to the trial court's application of the facts to the law), the trial court must be reversed.

### I. THE APPLICABLE LAW REGARDING WHEN A SECURITY INTEREST CAN ATTACH

#### A. The Law of Security Interests

As noted, DAT&K did not contest below – and has not appealed - the basic rule of law applicable to this dispute, i.e., that a party with a security interest cannot gain more from a debtor than the debtor has to give.

In particular, the Utah Uniform Commercial Code (the “UCC”) governs security interests, such as that held by DAT&K and which gave rise to the instant dispute. Specifically, Utah Code Section 70A-9a-203, provides that a security interest can only attach to collateral in which the debtor giving the security interest has rights:

(1) A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(2) Except as otherwise provided in Subsections (3) through (9), a security interest is enforceable against the debtor and third parties with respect to the collateral *only if*:

(a) value has been given;

(b) *the debtor has rights in the collateral* or the power

to transfer rights in the collateral to a secured party; and

(c) one of the following conditions is met:

(i) the debtor has authenticated a security agreement that provides a description of the collateral . . . 3 (emphasis added).

This simple, but important, rule is sometimes referenced as the basic principle of commercial law, *nemo dat qui non habet* (“he who hath not cannot give”). See Black’s Law Dictionary 1037 (6th ed. 1990). Stated otherwise, the security interest held by a creditor can only extend to the rights the debtor possesses in the subject property, and no further. The principal is so well established that none of the case law submitted by MEI to the trial court was challenged by DAT&K. [See Memorandum in Support of Motion for Release of Funds From Registry of Court to Mobile Echocardiography, Inc. and Opposition to Motion of DAT&K for Order Releasing Funds at 5-10, R. 003388 - 003383]. And, not surprisingly, the case law applying this rule of the law of security interests is legion. See, e.g., Fifth Third Bank v. Comark, Inc., 794 N.E.2d 433, 51 U.C.C. Rep. Serv. 2d 533 (Ind. Ct. App. 2003) (validity of security interest dependant on debtor having rights in collateral); Heinrichsdorff v. Raat, 655 P.2d 860, 861-862 (Colo. Ct. App. 1982) (reversing trial court’s grant of summary judgment in favor of bank, because the debtor did not have any rights to the escrow funds); United Parcel Services, Inc. v. Weben Industries, Inc., 794 F.2d 1005 (5th Cir. 1986) (reversing summary judgment to secured party, holding that monies in court escrow belonged to service / materials provider because debtor

had no right to these funds and therefore bank's perfected security interest could not attach); Himes v. Cameron County Construction Corp., 444 A.2d 98 (Pa. 1982) (secured lender could have no greater rights than possessed by the debtor, and since the disputed monies would have never belonged to the debtor, monies had to be paid to third parties that provided services to debtor); First Commercial Corp. v. First National Bancorporation Inc., 572 F.Supp.1430, 1435 (Colo. 1983) (holding an unsecured supplier claiming an interest in retained funds takes priority over lender's perfected security interest in all present and future accounts receivable); Weld Colorado Bank v. E & E Construction, Inc., 653 P.2d 758, 760 (Colo. Ct. App. 1982) (bank's security interest did not attach to escrowed funds because defaulting contractor did not have a right to payment).

With this law in mind, the next step in the analysis is to review the trial court's March Order and July Order.

**B. The March Order – The Trial Court's Initial, and Correct, Interpretation of the Law**

The Court's March Order implicitly adopted the correct rule of *nemo dat qui non habet*, by acknowledging as follows:<sup>14</sup>

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<sup>14</sup> Frustratingly, the trial court's March Order and July Order did not discuss or cite to any applicable law. [See March Order, R. 006073]; [See July Order, R. 005222]. However, given that MEI was the only party that discussed Utah Code § 70A-9a-203 and the rule of *nemo dat qui non habet*, that DAT&K never challenged this law, that the trial court endorsed this rule of law at the May 2008 hearing, and the trial court's March Order applied the rule, it is obvious that in at least the March Order, the trial court reached the correct conclusion as to the

The issue is resolved by determining whose money it is. If it is the clients' 60%, those clients can direct the sum go to MEI and Barton was their agent for that purpose. If the funds are GBS's 40%, DAT&K's security interest gives the money to DAT&K.

[March Order at 8 (emphasis added), R. 005215]. The Court recognized the determinative importance of the source of the Escrow Funds by basing its March Order upon the (erroneous) conclusion that the Escrow Funds originated from the contingency fees in which GBS had an interest:

. . . the Court concludes the Texas firm accounting directs that the \$442,768.03 escrowed amount ***is not client funds*** and DAT&K's prior security interest attaches to them.

[March Order at 12, R. 005211]. Thus, the trial court's March Order applied the correct rule of law, albeit based upon an incorrect factual conclusion, discussed in the next section.

### **C. The Trial Court's July Order**

After issuance of the March Order, MEI asked the Court to reconsider its ruling as to the source of the Escrow Funds, based (among other things) upon the trial court's clear misunderstanding of the stipulated and undisputed facts as to the origin of the Escrow Funds. [See Reconsideration Memo., R. 005530-13]. In response to MEI's reconsideration motion, the trial court corrected itself. Specifically, on July 21, 2009, the trial court issued the July Order, in which it acknowledged its mistake, and made a specific finding that the escrow funds "came from the 60% of the recovery ***attributed to the clients' accounts***" and

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applicable rule of law. Finally, DAT&K did not challenge or appeal the application of this rule.

that the “parties stipulated to this fact and the Court *amends its findings accordingly* to reflect the stipulation.”<sup>15</sup> [July Order at 1 (emphasis added), R. 006073]. In that ruling, the trial court did not expressly reject its previous, implicit acceptance of the law of *nemo dat qui non habet*. [See July Order at 1-2, R. 006073-72].

However, the trial court’s finding in its second order of July 2009 that the Escrow Funds were from the client’s portion of the Fen-Phen settlements requires as a matter of law that the Escrow Funds belong to MEI, unless one of two exceptions to the rule of *nemo dat qui non habet* apply. Thus, the trial court’s conclusion that DAT&K should still be given the Escrow Funds may be an indication that the trial court was reversing itself and rejecting the rule of law that a secured party cannot have a greater interest in collateral than that which the debtor held. To the extent the trial court reached such a conclusion, the trial court was in error, as a matter of law, and this Court should so rule, in order to clarify and make clear the record and the law of this state.

## **II. THE “REIMBURSEMENT” AND “WAIVER” EXCEPTIONS TO THE DOCTRINE OF *NEMO DAT QUI NON HABET* DO NOT APPLY**

Given that the doctrine of *nemo dat qui non habet*, and the trial court’s finding in its July Order that the Escrow Funds were from the client’s portion of the Fen-Phen settlements, there are only two remaining possible scenarios under

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<sup>15</sup> Also notable, DAT&K has not challenged or appealed this finding by the trial court.



which GBS (and thus DAT&K) could have rights to the Escrow Funds superior to those of MEI: First, that GBS has some right to the Escrow Funds because GBS advanced monies owed by the clients to MEI for the Full Study echocardiograms,<sup>16</sup> and therefore has a right to be reimbursed. Second, that MEI waived or surrendered its right to be paid directly from the clients, when it entered into the MEI-GBS Settlement Agreement and/or the Security Agreement.

However, because the only evidence presented to the trial court established that neither of these happened, the trial court must be reversed.

**A. Where the Parties to Agreements Testify Consistently, the Intent of the Parties is Established As a Matter of Law**

As noted, the trial court concluded at the end of the May 5, 2008 hearing that there was a dispute of fact and the documents were ambiguous. The trial court later awarded DAT&K the escrow funds based upon the various agreements. [See July Order at 2, R. 006072 (referring to “the various agreements involving the Texas Firms,” “the accounting specified in the Settlement Agreement,” and “agreements and other evidence”).

Where documents are ambiguous, the courts necessarily turn to extrinsic evidence to resolve the ambiguity. In particular, courts look to the intent of the parties:

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<sup>16</sup> As explained *infra*, not only did GBS not advance monies to MEI, but even those monies that were paid by the Texas Firm’s were not advance monies for the Full Study echocardiograms, but rather were for past-due payments for Initial Screenings and other of MEI’s claims in the MEI-GBS Lawsuit, and thus could not trigger the “reimbursement” exception to the rule of *nemo dat qui non habet*.

¶ 17 The underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract. Peterson v. Coca-Cola USA, 2002 UT 42, ¶ 9, 48 P.3d 941; SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc., 2001 UT 54, ¶ 14, 28 P.3d 669. “ ‘In interpreting a contract, the intentions of the parties are controlling.’ ” Dixon v. Pro Image, Inc., 1999 UT 89, ¶ 13, 987 P.2d 48 (quoting Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991)); see also Peterson v. Sunrider Corp., 2002 UT 43, ¶ 18, 48 P.3d 918.).

In this case, the only evidence as to intent necessarily came from the parties to the relevant agreements – MEI and GBS. Under these circumstance, the trial court was obligated to interpret the agreements consistent with the intent of MEI and GBS:

The leading modern authority suggests that - ***in the rare case where evidence shows the two parties to an agreement to have a common understanding*** of a disputed provision at the time of contracting - the Corbin-Restatement-subjectivist rule has prevailed. See 2 Farnsworth on Contracts § 7.9, at p. 246 (1990) (“***Such authority as there is supports giving effect to a common meaning shared by both parties in preference to an objective meaning.***”). For instance, the Third Circuit has held that where “there is no dispute between the contracting parties over the meaning of the terms, extrinsic evidence should [be considered] ... as providing an explanation of the parties' contractual understanding. ***Their harmonious recital of what these words mean is conclusive.***” Sunbury Textile Mills v. Comm'r, 585 F.2d 1190, 1196 (3d Cir.1978); see also Berke Moore Co. v. Phoenix Bridge Co., 98 N.H. 261, 269, 98 A.2d 150, 156 (1953) (similar). . . .

. . . the Court concludes that ***the undisputed evidence as to both the contracting parties' subjective intent controls the interpretation of the ambiguous contract terms.*** . . . ) (emphasis

added); see also RESTATEMENT (SECOND) OF CONTRACTS § 201(1)

(“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.”).

Here, the only testimony as to the intent of the agreements was consistent – GBS did not advance funds to MEI for Full Study echocardiograms and MEI did not waive its right to be paid directly by the clients.

**B. The Only Evidence Below Proved that the “Reimbursement” Exception to the Rule of *nemo dat qui non habet* Did Not Apply**

1. The Trial Court **May** Have Relied Upon a “Reimbursement” Theory

If the trial court’s July Order was not a rejection of Utah Code Section 70A-9a-203,<sup>17</sup> then the next possible basis upon which DAT&K could assert a claim to the Escrow Funds would be if GBS had a claim to those funds as specific reimbursement for Full Study echocardiogram costs that GBS had already advanced on behalf of the clients. Indeed, at the conclusion of the May 5, 2008 hearing, the trial court hinted that it thought the Contingency Fee Agreement might support such a conclusion. [See 5-5-08 Transcript at 57-58 (“THE COURT . . . it seems like the contingency fee contract almost gets us there.”), R. 006535]. In addition, the trial court’s July Order hints<sup>18</sup> at this conclusion, when it states that “the funds may be from the client’s 60% but still allocated to go elsewhere, such as to reimburse Mr. Barton’s firm or to pay for the firm’s obligations from

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<sup>17</sup> And, as noted, if the trial court’s July Order was a rejection of the rule of *nemo dat qui non habet*, then it was reversible error.

<sup>18</sup> However, it is important to note that the trial court did not make an actual finding in this regard, even acknowledging only that this “may” be the case. [See July Order at 1, R. 006073]. Nor did DAT&K appeal the trial court’s failure to make such a finding, and it cannot do so now. Thus, the Court can easily resolve this issue without further analysis. That said, MEI still marshalls the evidence, and then demonstrates how a “reimbursement” theory cannot be sustained.

which it was holding its clients harmless under the contingency fee agreements.”

[July Order at 1, R. 006073].

Acknowledging the possibility of the marshalling requirement, MEI now reproduces the relevant language of the Contingency Agreement:

(b) I (we) will incur various costs and expenses in performing legal services under this Agreement. You agree to pay for all costs, disbursements, and expense[s] owed by you in connection with this matter, or which have been paid or advanced by me (us) on your behalf and for which [you] have not previously paid or reimbursed to me (us), if I (we) reach a settlement or judgment on your behalf, or if our services are terminated for any reason by you.

[Contingency Fee Agreement (emphasis added), R. 004040]. However, the plain language of this agreement is clear – GBS does not have a right of reimbursement unless GBS had already advanced payment for the costs at issue. In other words, the client does not have any obligation to pay (i.e., reimburse) GBS any costs, unless those costs have already been advanced by GBS.

Thus, to prevail, DAT&K would have had to present at least some evidence that the \$601,000 or other monies paid to MEI were paid by GBS, for Full Study echocardiograms. But, DAT&K had no witnesses of its own at the February 6, 2009 hearing. Instead, DAT&K tried to present testimony from the Receiver. However, as even the March Order explained, the Receiver had no evidence to support that the Escrow Funds were a reimbursement, noting that “[t]he receiver repeatedly stated he had no first hand, or even second hand, knowledge of the category into which the escrowed funds would fall – client

funds, reimbursement for advanced costs, or attorneys fees.” [March Order at 9, R. 005215 (emphasis added)].

Thus, as to whether the money previously paid to MEI was for Full Study echocardiograms or was for something else, the only competent witnesses were – not surprisingly – the parties to the MEI-GBS Settlement Agreement, i.e., MEI’s President, Alan Fidler, and Keith Barton, who signed the agreement both personally and on behalf of GBS. The testimony from Barton<sup>19</sup> and MEI was clear and simple – the funds paid to MEI under the MEI-GBS Settlement Agreement did not come from GBS, and were not advance payments for the Full Study echocardiograms.

2. There Can Be No “Reimbursement” Exception to the Rule of *nemo dat qui non habet*, Because the Monies Paid to MEI Were Not Paid by GBS

First, it was undisputed that the monies paid to MEI originated from the Texas Firms, and were not advance payments by GBS. [See 2-6-09 Trans. at 20-21, 29-31, 35, 37, R. 006536]; [See Supplement to Referral Agreement at 2, R. 004031]. Indeed, DAT&K cannot point to a shred of evidence in the record to

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<sup>19</sup> Barton was not represented by MEI’s counsel. In fact, Barton had every reason to be a hostile witness – he had been sued personally by MEI, resulting in a settlement in which he personally guaranteed a payment of more than \$2 million. In addition, if DAT&K obtained the Escrow Funds, those monies would relieve Barton and GBS of debt owed to DAT&K, at a much higher (25% interest) rate. In other words, economically, it would have been better for Barton to support DAT&K. However, he did not, because – as he testified – the truth was the truth. The trial court committed error when it ignored this, and the only other evidence, demonstrating that the prior payments to MEI were not advance payments for Full Study echocardiograms.

indicate that GBS paid MEI (for Full Study echocardiograms or for anything else).

3. There Can Be No “Reimbursement” Exception to the Rule of *nemo dat qui non habet*, Because the Monies Paid to MEI Were **Not** for Full Study Echocardiograms

Second, the only evidence was that the monies previously paid to MEI were not advances for Full Study echocardiograms. For example, the \$601,000 initially paid to MEI under the MEI-GBS Settlement was not an advance payment for MEI Full Study echocardiograms, but was rather payment for past-due amounts owed by GBS to MEI for – among other things – hundreds of thousands of dollars of work for “initial screenings.” [2-6-09 Trans. at 20-21, 29-31, R. 006536]. MEI presented evidence not only through testimony, but specifically with regard to the relevant documents, which included the MEI-GBS Settlement Agreement, and a security agreement and promissory note. [2-6-09 Trans. at 29-30, R. 006536]; [See *also* MEI-GBS Settlement Agreement, R. 004024-4011; MEI Security Agreement, R. 004071-004061; and MEI-GBS Note, R. 004074-72; (identified at 2-6-09 Hearing as Exs. 8, 9, 10)]. In fact, there was no objection to the simple question to Barton regarding the \$601,000:<sup>20</sup>

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<sup>20</sup> Even though DAT&K very rarely objected to counsel’s questioning of MEI and Barton, the trial court went out of its way to criticize MEI’s counsel for asking “leading” questions, implying that the questions, or the witness, were perhaps not candid because the questions were leading in nature. [See March Order at 11, n. 2, R. 005212]. Certainly, counsel was not trying to mislead the trial court, or shade the testimony. Also, Barton was not represented by MEI’s counsel, and had every reason to be a hostile witness. DAT&K’s counsel did not object to the questions as leading. Finally, if the trial court was concerned about the form of questions, to which no objections were being raised, then the court could have so instructed MEI’s counsel who would have gladly rephrased the questions. Furthermore, DAT&K’s counsel asked at least as equally leading questions of the

Q. Okay. And let me ask you to go to Exhibit 10, which is the settlement agreement, and the third page. Are you with me? Third page. An initial payment was made as part of this settlement; is that right?

A. That's correct.

...

Q. And what's the amount?

A. \$601,000.

Q. Now, was that initial payment an[] advance payment for full-study echocardiograms or was it for other monies that MEI was owed, or claiming it was owed, as part of the lawsuit?

A. It was **other** monies that were owed.

[2-6-09 Trans. at 29-30 (emphasis added), R. 006536]; [See *a/so* MEI-GBS Settlement Agreement at 3, R. 004022]. The only other party to the agreement, MEI, testified consistently with Barton. [See 2-6-09 Trans. at 104-111 (discussing components of \$601,000 payment); 111-119, 161-167 (discussing settlement agreement); 122-123, 133<sup>21</sup>, 145-148, 151, 155-156, 160, 164 (discussing MEI-GBS Security Agreement), R. 006536].

Similarly, MEI went on to introduce documents, including communications leading up to the MEI-GBS Settlement Agreement, and testimony from Keith Barton himself, which accounted for the initial \$601,000 payment and clearly allocated to payment to things other than the Full Study echocardiograms from

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Receiver, [2-6-09 Trans. at 230-231, R. 006536], yet the trial court did not critique this questioning and in fact purported to rely upon the testimony adduced by DAT&K. Again, the trial court was not even handed.

which the Escrow Funds arose. [See 2-6-09 Trans. at 20-21, 30-31, 79-81, R. 006536 and Ex. 20, R. 003457-55]. In particular, the last communication before the MEI-GBS case settled for (among other things) an initial payment of \$601,000, detailed the amounts compromising the initial payment:

Option # 2:

Payable Now

Initial Screenings, with interest	\$335,443
Stat Readings.	\$2,900.00 (no interest)
Material Costs not reimbursed:	\$1,075.96 (no interest)
Technician Cost:	\$41,125.00 (no interest)
Rawling readings paid directly by MEI:	\$139,400.00 (no interest)
Initial Screenings that did not receive Full Study from MEI – 557 @ \$125	\$69,625 (no interest)
Plane Tickets – New York	\$1,000
<b>Total Now:</b>	<b>\$650,568.96</b>

[Ex. 20, R. 003455, and 2-6-09 Trans. at 29-31, 79-81, R. 006536]. Again, MEI's testimony was consistent with that of Barton. [See 2-6-09 Trans. at 104-106 (MEI performed about 10,000 "Initial Screenings," some of which were paid by \$601,000 payment); 105-107 (discussing Ex. 20); 107-111 (discussing other components of \$601,000 initial payment), R. 006536].

Barton was clear in his rejection of DAT&K's argument that the \$601,000 was an advance for the full study echocardiograms:

Q. Okay. Have you thought the \$601,000 in the settlement agreement was an advance payment for the full studies?

A. It could not have been.

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<sup>21</sup> At this point in the testimony, DAT&K's lawyer did not like Mr. Fidler's answer, and so just decided to "move on."



Q. And why not?

A. That wasn't what we agreed to.

[2-6-09 Trans. at 31, R. 006536, (emphasis added)]. Indeed, Barton testified that because the Escrow Funds originated from the client's portion of the Fen-Phen settlements, that if the money did not go to MEI, then ethically the GBS firm had an obligation to return the monies to the clients. [See 2-6-09 Trans. at 31-34, 87-88, R. 006536]. The only exception to this ethical prohibition would have been if GBS had advanced payment to MEI, on behalf of the clients, but that never happened. [See 2-6-09 Trans. at 20-21, 87-88, 92-93 R. 006536].

As to additional payments to MEI beyond the \$601,000, GBS and MEI also both testified consistently that these payments were also not advance payments for Full Study echocardiograms, and that therefore GBS did not have any recoupment or right to reimbursement.<sup>22</sup> [See 2-6-09 Trans. at 40-41, 151-152,

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<sup>22</sup> Through cross-examination, DAT&K tried to advance the argument that because the Texas Firms had recouped monies they had paid to MEI from the contingency fee portion of the client's settlements, the result was a reduction in the amount due to GBS, which thus reduced the amounts ultimately paid to DAT&K. [See 2-6-09 Trans. at 91-2, R. 006536]. However, this argument is irrelevant – the Texas Firms reduced the overall contingency fees available to both GBS and the Texas Firms by first recouping non-recoverable client expenses “off the top”, such as advertising or other expenses that were not allocable to the particular clients. The payments previously made to MEI fell into this category, and MEI was entitled to retain those payments without losing its independent rights to be paid for other services, i.e., the Full Study echocardiograms, directly from the client's portion of the Fen-Phen settlements. Indeed, DAT&K did not make any claim to the other “off the top” payments for things like advertising. Barton's testimony on these points went uncontested at the February 6, 2009 hearing. [See 2-6-09 Trans. at 88-92, R. 006536]. Furthermore, DAT&K reviewed the agreements between GBS and the Texas

R. 006536].

Barton also testified as to the release by GBS and the Texas firms to the \$442,768.03, and that the claims to this money were released because GBS and the Texas Firms understood and believed that DAT&K's arguments were wrong, and the money belonged to MEI. [See 2-6-09 Trans. at 42-43, R. 006536]; [See Escrow Agreement at 8, R. 004005].

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Firms, and knew full well that the Texas Firms retained the right to repay themselves for advances made "off the top" before GBS would be entitled to any of the contingency attorney fees in which DAT&K was taking a security interest. [See 2-6-09 Trans. at 91-92, R. 006536]. In other words, DAT&K knew the risks of its loan, and cannot be heard to complain now. Nor has DAT&K suffered – it had made literally millions of dollars from this loan.

Indeed, the questioning by DAT&K's own lawyer acknowledged that the money previously paid to MEI and recovered by the Texas Firms 'off the top' could only have been subject to DAT&K's security interest if it had not been properly recouped by the Texas Firms:

Q. And if there hadn't been that deduction and that money had been paid to Gregory, Barton & Swapp, or paid to you as receiver, would you have in turn paid that money to DAT&K?

A. Yes, I would have.

Q. And that would have been because that money would have been subject to DAT&K's security agreement, correct?

A. Exactly.

[2-6-09 Trans. at 178, (emphasis added) R. 006536]. The Receiver also testified that he understood and acknowledge the 'off the top' rights of the Texas Firms. [See 2-6-09 Trans. at 195-196, R. 006536]. Thus, even though DAT&K (and the Receiver and the trial court) did not like the fact that the Texas Firms had made payments to MEI which were not subject to DAT&K's security interest, the bottom line is that the doctrine of *nemo dat qui non habet* precludes DAT&K from making claim to the Escrow Funds, and the Texas Firms properly reimbursed themselves

Similarly, Barton was the only witness as to the meaning and intent of the agreements between GBS and the Texas Firms, and testified unequivocally that these documents – in particular the last agreement between GBS and the Texas Firms, a “supplement” to earlier agreements, was not intended to (and the language did not support) that the payments made to MEI were advances for Full Studies. [See 2-6-09 Trans. at 35-40, R. 006536, R. 004032-25].

**C. THE “WAIVER” EXCEPTION TO THE DOCTRINE OF *NEMO DAT QUI NON HABET* DOES NOT APPLY**

The final theory under which DAT&K could claim an interest in the Escrow Funds is a “waiver” argument. Again, the only evidence – from both MEI and GBS - was that MEI did not waive its rights to be paid directly from the client’s portion of the settlements by signing the various documents with GBS.

1. The Law of Waiver

“A waiver is the intentional relinquishment of a known right.... [T]here must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it.” Geisdorf v. Doughty, 972 P.2d 67, 72 (Utah 1998) (emphasis added) (quoting Soter’s Inc. v. Deseret Fed. Sav. & Loan Ass’n., 857 P.2d 935, 942 (Utah 1993) (other citation omitted)). The “the intent to relinquish a right must be distinct.” Soter’s, 857 P.2d at 942 (emphasis added).

2. The July Order May Have Relied Upon a Waiver Theory

As noted, the trial court’s July Order is not a model of clarity. Furthermore,

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“off the top” for other payments made to MEI, before DAT&K’s security agreement could attach to the contingency attorney fees.

it is even less clear whether the trial court relied upon a waiver argument in awarding the Escrow Funds to DAT&K. But, there is language in the July Order that refers to, or which can be interpreted to implicitly refer to, a purported waiver by MEI of its right to be paid for Full Study echocardiograms from funds withheld from the client's portion of the Fen-Phen settlements. [See July Order at 1-2, R. 006073-72]. But, even if this Court were to generously construe the trial court's July Order to include a finding that MEI waived its right to be paid directly from the client's portion of the Fen-Phen settlements, the only evidence below was to the contrary.

3. The Only Evidence Presented to the Trial Court Was that MEI Never Waived its Rights to Be Paid Directly From the Clients

To the extent the trial court purported to rely upon a waiver theory, its analysis fails as a matter of law.

First, there is no written waiver. Even under the “marshalling” standard, the most that can be construed to support a waiver by MEI is the language in the MEI-GBS Security Agreement, by which MEI acknowledged that DAT&K had a security interest in the GBS contingency fees (called “attorney fees” in the document) that came before MEI’s interest in the GBS contingency fees:

After an Event of Default has occurred, at the request of MEI, Barton shall receive, as the sole and exclusive property of MEI and as Trustee for MEI, subject to the Pennitted Liens, all monies, checks, drafts and all other payments for and/or Proceeds of Collateral which come into the possession or control of Barton and immediately upon receipt thereof, Barton shall remit the same (or cause the same to be remitted), in kind, to MEI or at MEI's direction, except as required pursuant to the Pennitted Liens. In other words, once the obligations

satisfied by the Permitted Liens are satisfied or otherwise resolved, then MEI is and shall be entitled to priority position against any and all other claim to the Barton Fen-Phen Fees, and shall be entitled to execute upon the security interest granted by this Agreement upon an Event of Default

[MEI-GBS Security Agreement at 4-5 (emphasis added), R. 004068-004067].

However, this language is not clear and unequivocal, and at most reflects exactly what it is – an acknowledgment by MEI that DAT&K had a superior interest in the contingency attorney fees that were due to GBS. It simply cannot be read to mean anything more.

Second, the trial court's rejection of exactly this same argument by DAT&K, at the end of the May 2008 hearing, was based upon a conclusion that the relevant documents, including the MEI Security Agreement, were ambiguous. [See 5-5-08 Transcript at 57-58 ("I can't determine that as a matter of law based on these documents . . . ."), R. 006535]. Because it was not a party to that agreement, DAT&K had no evidence to offer as to intent. And, as noted, where the agreement is ambiguous,<sup>23</sup> and there is no dispute as to the intent of the parties, that intent controls:

. . . the undisputed evidence as to both the contracting parties' subjective intent controls the interpretation of the ambiguous contract terms. . . .

Abbott Laboratories, Inc., 871 F.Supp. at 98 (emphasis added); *see also*

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<sup>23</sup> MEI continues to believe that the agreement is not ambiguous, and that it plainly does nothing more than acknowledge that DAT&K has a security interest in the contingency fees due to GBS only. Indeed, MEI could not – by its agreement – expand the scope of DAT&K's security interest.

RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.”).

In this case, the only evidence presented to the trial court was that the parties to the MEI-GBS Settlement Agreement did not intend that MEI was waiving or surrendering its right to be paid directly from the client's portion of the Fen-Phen settlements, and that the MEI-GBS Security Agreement which gave MEI a security interest in the GBS contingency fees was an additional means by which MEI was to be paid. First, the trial court was presented with the unchallenged deposition testimony of both Keith Barton and MEI's Alan Fidler, before the February 6, 2009 hearing. [See MEI's Pretrial Brief at 13-15, R. 004811-004809]. Second, the testimony of Keith Barton and MEI's Alan Fidler at the February 6, 2009 hearing was also to this effect. In fact, both Barton and Fidler testified that the intent of the MEI-GBS Security Agreement (and other documents) was to give MEI additional rights, *i.e.*, a secured interest in the contingency agreement fees, and this was never intended as a swap or surrender of MEI's independent right to be paid directly by the clients. [See 2-6-09 Trans. at 32-34, 39-40, 58, 68-71, 82, 94-95, 112-113, 119, 162-164, R. 006536].

Simply put, DAT&K did not present any testimony or other evidence below to demonstrate that the intent of MEI and/or GBS was other than that which Keith Barton and MEI's Alan Fidler testified – that MEI never waived its independent

right to be paid directly from the client's portion of the Fen-Phen settlements.

**III. TO THE EXTENT IT RELIES UPON SOMETHING BESIDES i) THE “REIMBURSEMENT EXCEPTION; OR ii) THE “WAIVER” EXCEPTION, THE TRIAL COURT’S JULY ORDER MUST BE REVERSED**

As noted, the trial court’s July Order is not a model of clarity. In particular, it makes ambiguous reference to (among other things) the Escrow Agreement, “accounting” and “other agreements.” [See July Order at 1-2, R. 006073-72].

**A. Any Argument That Does Not Fall Into i) the “Reimbursement” Exception; or ii) “Waiver” Exception, Fails As a Matter of Law**

As noted, the only possible exceptions to the applicability of Utah Code § 70A-9a-203 and the rule of *nemo dat qui non habet* are the “reimbursement” and “wavier” exceptions. No other legal argument was presented by DAT&K, and the trial court did not articulate any law that would allow it to ignore the restrictions of Utah Code § 70A-9a-203-9a-203. [See Memorandum in Support of Motion of DAT&K, LLC for Order Releasing Funds Held by Clerk in Registry, R. 003302]; [See March Order, R. 005222]; [See July Order, R. 006073]. And, DAT&K has not appealed any of the trial court’s orders or findings.

Thus, the law of the case is that any evidence or findings by the trial court that do not relate to one of the two articulated exceptions to Utah Code § 70A-9a-203 and the rule of *nemo dat qui non habet*, cannot be considered by this Court. Notwithstanding, as explained in the next section, any reliance by the trial court on the Escrow Agreement, any purported “accounting,” any other “agreements,” or any “other evidence,” cannot support the trial court’s orders.

**B. Any Reliance By the Trial Court on the Escrow Agreement (which it termed the “Settlement Agreement”) is Misplaced**

In its July Order, the trial court continued to rely upon the Escrow Agreement as providing an “accounting”, giving a basis for its conclusion that DAT&K should be given the Escrow Funds. [See July Order at 2, R. 006072 (stating that “[n]o party presented competent evidence . . . of a strength necessary to contradict the accounting specified in the Settlement Agreement . . . .”); (“As reflected by the Court’s finding, the settlement agreement and other documents indicated the nature of the funds.”)]. However, the trial court did not explain its reasoning in detail – and in fact admits that its conclusion as to the source of the Escrow Funds in the March Order, based upon the “accounting” in the Escrow Agreement, was wrong. [See July Order at 2, R. 006072].

Regardless of its reasoning, any reliance by the trial court on the Escrow Agreement as a basis for awarding the Escrow Funds to DAT&K is not supported by the evidence, because i) the trial court’s finding in its July Order that the Escrow Funds were from the client’s portion of the Fen-Phen settlements, defeats reliance upon the Escrow Agreement as to “the nature of the funds;” ii) the context of the Escrow Agreement makes clear that it was not purporting to be an “accounting”, but rather an interim agreement for escrowing the disputed funds; and iii) the only testimony as to the intent of the Escrow Agreement supports MEI.

First, the trial court admitted that its initial conclusion in its March 2009



Order that the Escrow Agreement (termed the “Settlement Agreement” by the trial court) constituted the Texas firms’ “accounting” and purportedly (and incorrectly) indicated that the Escrow Funds were not from the clients’ portion of the Fen-Phen settlements, was incorrect. [See March Order at 11-12 (noting that “Settlement Agreement” contained “the salient acknowledgement that the deposited funds were not client funds.” R. 005211)]. The trial court’s later reversal is a necessary concession as to the correct interpretation and meaning of the language in the Escrow Agreement. Thus, the trial court’s apparent continued reliance upon the language of that agreement in the July Order is clearly misplaced. In other words, even marshalling the “evidence” that is the Escrow Agreement in favor of DAT&K, the trial court’s own finding in the July Order renders it impossible to construe the Escrow Agreement in DAT&K’s favor.

To the extent this Court is interested in continuing to review the language of the Escrow Agreement (which it does as a matter of law, for correctness), the language and context of the agreement make clear that the document does not give DAT&K any claim to the Escrow Funds.<sup>24</sup> The core sentence relied upon by the trial court in its March Order, from Section III (2) of the Escrow Agreement, must be read in its context, that of an interim, negotiated settlement agreement that recognizes that the parties (MEI and DAT&K) had an existing dispute that

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<sup>24</sup> Although not raised below by DAT&K, to the extent the trial court found the Escrow Agreement to constitute a waiver, such a finding is contrary to the language of the agreement and the evidence from MEI and Barton, that MEI never waived its right to be paid directly by the clients.

was going to be resolved by an interim solution of depositing the disputed funds into the trial court's registry, subject to final resolution. [See Escrow Agreement at 7-8, R. 004006-004005]; [See 2-6-09 Trans. at 42-43, R. 006536]. In other words, the sentence in the Escrow Agreement stating that the amount previously paid to MEI "equals the full amount withheld as MEI echocardiograph charges from Fen-Phen Clients' settlements" was not an "accounting" as to the source of the funds, as the trial court incorrectly concluded in its March Order, but instead a summary of the math used to determine the amount in dispute, i.e., the amount of the Escrow Funds.

**C. The Other Evidence Purportedly Relied Upon by the Trial Court – Financial Data, Agreements, and "Other Evidence" Cannot Support the Trial Court's Award**

Given that the trial court's continued reliance on the Escrow Agreement in its July Order cannot support the award of the Escrow Funds to DAT&K, the next step – even marshalling the evidence – is to consider the trial court's vague reference to "financial data, agreements, and other evidence."

**1. Financial Data**

As noted, the trial court purported to base its award of the Escrow Funds to DAT&K, at least in part, upon the "financial data" presented below. [See July Order at 2, R. 006072]. There were only two types of "financial data" below, and even marshalling such evidence, it cannot support the trial court's conclusion.

First, the trial court was presented with some very basic accounting regarding the creation of the Escrow Funds, testified to by the Receiver, and

referenced as Exhibit 18. In short, this data could not be interpreted to support that the Escrow Funds came from the contingency attorney fees in which GBS had an interest, including because the Receiver himself acknowledged that he had no information on this point (as noted by the trial court). [See March Order at 9, R. 005213 (“The receiver repeatedly stated he had no first hand, or even second hand, knowledge of the category into which the escrowed funds would fall – client funds, reimbursement for advanced costs, or attorneys fees.”)]; [See 2-6-09 Trans. at 188, 190-191, R. 006536]. Nor can this Court so conclude, in light of the trial court’s subsequent correction of its findings, that the “[escrow] funds came from the . . . client’s account.” [July Order at 1, R. 006073].

Second, the trial court was presented with accounting evidence from MEI, regarding the accounting of the funds previously paid to MEI under the MEI-GBS Settlement Agreement. In particular, MEI presented documents and testimony that the accounting of the prior payments to MEI were not advance payments by GBS/the Texas Firms for the full study echocardiograms. [See *supra* Section II-B

There was no other “accounting” evidence presented. Furthermore, the trial court’s vague reference to other “accounting” evidence obfuscates the fact that even if there were other accounting evidence, such evidence would be irrelevant unless it could show that the Escrow Funds originated from the contingency fees due to GBS in which DAT&K had a security interest, which obviously cannot be so since the parties stipulated (and the trial court found in the July Order) that this was not the case.

## 2. Other Agreements

The trial court also makes an ambiguous reference to “other agreements” in its July Order. [See July Order at 2, R. 006072]. Given the totality of the evidence in the record, these “other agreements” can only be the Contingency Fee Agreement, MEI Screening Form, the Lien Agreement, the MEI-GBS Settlement Agreement, the related MEI-GBS Security Agreement, the MEI Note, the DAT&K Security Agreement, and the agreements between GBS and the Texas Firms. Other than the Escrow Agreement already discussed above (termed the “Settlement Agreement” by the trial court), there are no other agreements. [See Stipulation to Admissibility of Documents, R. 004106].

These other agreements have all been discussed above, and none can support the award of the Escrow Funds to DAT&K, either based on their plain language (which this Court reviews *de novo*) or based upon the extrinsic evidence of intent (the only evidence of which supports MEI’s position). And, the trial court’s orders do not identify any such evidence (or even make such a finding). [See March Order, R. 005222-10]; [See July Order, R. 006073-72].

## 3. Other Evidence

The trial court did not elaborate upon what it meant by “other evidence.” [July Order at 2, R. 006072]. However, given the utter lack of documentary, testimonial, or accounting evidence that might support the trial court’s award to DAT&K, it is clear that there is no other evidence. Furthermore, as explained above, the only admissible and competent evidence presented to the trial court –

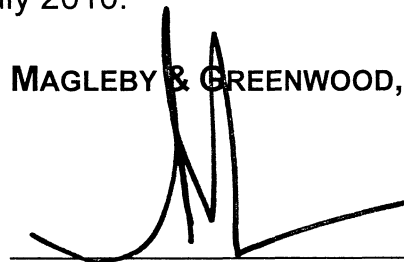
in fact the uncontested evidence presented to the trial court – indicated that the Escrow Funds never belonged to GBS (and thus could not belong to DAT&K), that the Escrow Funds came directly from the client's portion of the Fen-Phen settlements, that MEI never surrendered its right to be paid directly by the clients, and that monies previously paid to MEI were not for Full Study echocardiograms.

### **CONCLUSION**

For the reasons stated, this Court should reverse the trial court's award of the Escrow Funds to DAT&K, and remand this case with an order to return the Escrow Funds (with interest) to MEI. See, e.g., Nicholson v. Industrial Commission, 14 Utah 2d 3, 376 P.2d 386 Utah 1962 (reversing commission's findings where "all the indicia including intent of the parties" was contrary to the findings of fact).

DATED this 6<sup>th</sup> day of July 2010.

**MAGLEBY & GREENWOOD, P.C.**

A handwritten signature in black ink, appearing to read 'J. Magleby', is written over a horizontal line.

James E. Magleby  
Attorneys for Appellant  
Mobile Echocardiography, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MAGLEBY & GREENWOOD, P.C., 170 South Main Street, Suite 350, Salt Lake City, Utah 84101, and that pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing **APPELLANT'S BRIEF** was delivered to the following this 6<sup>th</sup> day of July 2010 by:

☐ Hand Delivery

☒ Depositing the same in the U.S. Mail, postage prepaid

☐ Electronic Mail

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Attorneys for Appellee DAT&K, LLC

A handwritten signature in black ink, appearing to be 'RJ', is written over a horizontal line.

## **ADDENDUM**

March 4, 2009 Findings of Fact, Conclusions of Law and Order Regarding Interpleader Funds.....	1
July 23, 2009 Order Denying MEI's Motion to Reconsider and Granting MEI's Motion for Certification as a Final Order.....	2
February 6, 2009 Transcript of Hearing.....	3

# **Addendum 1**



IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH

IN THE MATTER OF THE APPLICATION OF BUDDY W. GREGORY FOR THE JUDICIAL DISSOLUTION OF GREGORY, BARTON & SWAPP, P.C.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING INTERPLEADER FUNDS  Civil No. 050401014 Judge SAMUEL D. MCVEY
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The Court appointed receiver arranged to deposit \$442,768 into escrow pursuant to the Court's allowing the funds to the interplead in this matter without the need for a separate interpleader action. There are two claimants to the funds: DAT&K, LLC, which holds a security interest in certain collateral of Gregory, Barton & Swapp, which is in receivership in this matter ("GBS"), and Mobile Echocardiography, Inc. ("MEI") which claims the funds as payment for services rendered to GBS and its clients and also has a junior security agreement with GBS.

The Court heard this matter at an evidentiary hearing on February 6, 2009. GBS and MEI presented evidence. Keith L. Barton, Esq. also participated in the hearing. Roger G. Jones, Esq. represented GBS, James E. Magleby, Esq. represented MEI, and Douglas R. Short, Esq. represented Keith Barton. George Hoffman, Esq. appeared for the receiver. Following close of the evidence, the Court allowed counsel to present closing arguments in writing by February 13, 2009. The Court has now received counsel's arguments and enters its findings of fact and conclusions of law. The Court appreciates counsel's indulgence. Normally, the Court gets findings out in a few days but press of business extended this ruling nearly three weeks.

FINDINGS OF FACT

1. DAT&K is the secured party in a 2001 "Master Loan and Security Agreement" (the "2001 Security Agreement") in which GBS pledged collateral:

The Collateral shall consist of any and all of Borrower's present and future rights, title and interest in and to the following described property and rights, together with any and all present and future additions, thereto, substitutions therefor, replacements and proceeds thereof, and all supporting obligations with respect thereto:

1. All accounts, general intangibles, payment intangibles, and all similar rights that Borrower may have of every nature and kind, including specifically and without limitation, all of Borrower's rights to receive payment or otherwise, for legal and other services rendered and to be rendered, and for costs and expenses advanced and to be advanced, and all other rights and interest that Borrower may have in and with respect to each and every Client Matter as defined herein; and
2. All credits, moneys, and properties of Borrower now and in the future in Lender's possession or under Lender's control; and
3. Rights under life-insurance and other policies of insurance with respect to individual Guarantors of Borrowers to Obligations, that may be assigned to Lender under such forms and under such terms and conditions as lender may require; and
4. Such additional collateral as Lender may require from time to time of borrower and individual Guarantors of Borrower's Obligations.

2. The terms "Client Matter" referred to GBS's present and future cases, which would include so-called "Fen-Phen" cases, the proceeds of which are in issue here.

3. GBS would market and attract "Fen-Phen" clients. It would then screen these clients to see whether they might qualify to make a claim under the criteria of a class-action suit. It screened by having an initial "screening" echocardiogram ("ECG") on a client performed by MEI. If the initial ECG resulted in the right evidence, GBS would have MEI perform a "full study" ECG on the client. Based on the results, GBS would send the clients' information to two Texas law firms which would actually make the claim against the class-action defendant with the expectation of getting a settlement. The Texas firms would collect the settlement and split the proceeds with GBS. Sometimes it would also pay costs from the proceeds.

4. GBS agreed to pay MEI out of the clients' shares of the settlement proceeds.

5. GBS took the cases on a contingent fee for 40% of any recovery. Clients were to pay all costs, which would include the ECG expenses, from their 60%. If GBS advanced costs, clients would reimburse it from their portion of any settlement. The contingent fee agreement between GBS and its clients provided in relevant part:

**LEGAL FEES, COSTS, AND BILLS PRACTICES**– As more fully set forth below, I (we) will only be compensated for legal services rendered if a recovery is obtained for you.

(a) The fees to be paid to me (us) will be forty percent (40%) of the gross recovery (the term “gross recovery” means the total of all amounts received by settlement, arbitration award, or judgment).

(b) I (we) will incur various costs and expenses in performing legal services under this Agreement. You agree to pay for all costs, disbursements, and expense owed by you in connection with this matter, or which have been paid or advanced by me (us) on your behalf and for which [sic] not previously paid or reimbursed to me (us), if I (we) reach a settlement or judgment on your behalf, or if our services are terminated for any reason by you.

(c) To aid in the preparation or presentation of your case, it may become necessary to hire expert witnesses, consultants, or investigators be hired [sic].

**LIEN**– you hereby grant us a lien, as provided by Utah Code Ann. 78 –51 –11 (1996) on any and all claims or causes of action that are the subject of our representation under this Agreement. I (our) lien will be for any sums owing to me (us) for any unpaid costs, or attorneys fees, at the conclusion of my (our) services. The lien will attach to any recovery you may obtain, whether by arbitration award, judgment, settlement, or otherwise.

6. The 2001 Security Agreement gave DAT&K, for purposes of this case, a prior security interest in any attorneys fees, as well as in any costs advanced from those fees or from any other GBS assets. DAT&K’s secured interest did not reach the clients’ portion of settlements unless part or all of the portion went to GBS as either a reimbursement for advanced costs or as some other form of income. Under the contingency fee agreement, GBS became the client’s agent for purposes of applying their portion of the settlement to costs before disbursing

the balance to the clients. Beyond that, GBS had no control over the clients' portion of the settlement other than being a mere trustee or conduit through which the 60% of the proceeds, minus costs advanced by GBS or to be paid to providers such as MEI, passed to the clients. The testimony of Mr. Barton on these points was somewhat inconsistent but the definition of "collateral" in the 2001 Security Agreement is clear as Mr. Barton's understanding does not contradict the terms of the agreement.

7. MEI sued GBS and Barton for non-payment of funds before GBS went into receivership. In March, 2007, Keith Barton ("Barton"), GBS (then in receivership), DAT&K, and the Texas firms entered a "Settlement Agreement" referencing a lawsuit between MEI on the one hand and Barton and GBS on the other. That agreement recited in pertinent part:

WHEREAS, in connection with the settlement of the MEI Lawsuit GBS paid MEI \$601,000 and GBS and Barton executed and delivered to MEI that Promissory Note dated September 27, 2004, payable to the order of MEI in the original principal amount of \$2,050,000.00 ("MEI Note");

WHEREAS, since the execution of the MEI Note, MEI has been paid \$372,510.22 of which only \$87,974.16 was recovered from client settlements;

WHEREAS, to secure payment of the MEI Note, GBS granted a security interest in any amounts owing to GBS under the Referral Agreement, which security interest is by its terms junior and subordinate to the security interest of DAT&K;

8. The Settlement Agreement then contained the following relevant terms:

### III. MEI

1. Recovered MEI Echocardiogram Expenses. \$982,543.00 was withheld as MEI echocardiograph charges from Fen-Phen Clients' settlements for those clients whose cases were included in the Final Settlements. \$87,974.16 was withheld as MEI echocardiograph charges from Fen-Phen Clients' settlements for those clients whose cases were included in the Prior Settlements. The total amount withheld as MEI echocardiograph charges from the Fen-Phen Clients whose cases were included in the Final Settlements and the Prior Settlements is \$1,070,517.16. MEI has previously been paid, as part of the settlement of the MEI Lawsuit, a total of \$973,510.22 in payments on the MEI Note. The Parties

agree that [the Texas Firms] shall pay MEI \$97,006.94 (the difference between \$1,070,517.16 and \$973,510.22).

2. Registry Amount. Once [the Texas Firms] pay[] \$97,006.94 to MEI, MEI will have been paid \$1,070,517.16, which equals the full amount withheld as MEI echocardiograph charges from Fen-Phen Clients' settlements. Thus, GBS and DAT&K assert that under the Referral Agreement GBS is entitled to receive an amount equal to one-half of (i) \$982,543.00, which was withheld as MEI echocardiograph charges from Fen-Phen Clients those clients whose cases were included in the Final Settlements less (ii) \$97,006.94, which is the amount to be paid MEI under Section III.1. above. [The Texas Firms] ha[ve] agreed to pay \$442,768.03 (plus accrued interest thereon from the trust account wherein the funds are being held) into the Registry of the Receivership Court (the "Registry Amount") and release any and all right, title and interest therein or claim thereto. Similarly, GBS, Barton and DAT&K have agreed to release any and all right, title and interest in, or claim to, the remaining \$442,768.03 held by [the Texas Firms] (plus accrued interest thereon from the trust account wherein the funds are being held) which [the Texas Firms] ha[ve] agreed to pay to MEI. The Registry Amount shall be disbursed only upon entry of an order from the Receivership Court.

3. Non-Final Settlements and MEI. The Parties further agree that [the Texas Firms'] sole remaining obligation owed to GBS with regard to MEI is to forward to MEI any amounts recovered from client settlements for MEI echocardiograph expenses from the cases included in the Non-Final Settlements. GBS, Barton and DAT&K release any and all interest in or claim to any amounts recovered for MEI echocardiograph expenses from the cases included in the Non-Final Settlements.

8. The applicable amounts reflected in paragraphs III.1&2 of the Settlement Agreement have all been paid out as specified: 1) the Texas Firms held \$1,070,517.16 out of client funds and paid that amount to MEI (actually, MEI was paid the amount the Texas Firms withheld from clients for ECGs, \$982,543.00 plus an additional \$87,974.16 whose source was "prior settlements"; 2) one of the Texas firms (Williams Bailey) paid \$442,768.03 into escrow with the Court but there is no competent evidence that amount came from the clients' portion of the settlement.

9. The Texas firm paid the escrowed funds out of a trust account. The receiver booked the funds as income to GBS when they were deposited with the Court.

10. No party produced bank records or any testimony with any foundation demonstrating the precise type of Texas Firm trust account-- IOLTA or otherwise-- from which the escrowed funds were paid. Thus, there is no direct evidence from the Texas Firms showing whether the escrowed funds originated from the clients' 60% of the settlement proceeds from the lawyers' 40%, or some combination.

11. There is no dispute someone owes MEI for past ECG work in an amount exceeding the escrowed sum. MEI's principal, Alan Fidler, however, gave conflicting testimony at the hearing and in his deposition regarding whether he had any legal (contractual or lien) claim on the 60% clients' share of the settlements.

12. Keith Barton's intent was for MEI to have a contractual right with the clients for payment from their share of the settlement proceeds. However, he also expressly agreed in an initial written agreement with MEI that his firm would be responsible to pay all costs to MEI.

13. DAT&K's security interest is prior to MEI's to the extent both cover the same collateral.

14. Keith Barton had actual authority from his clients to allot payments to MEI from the clients' 60% portion of settlement proceeds or to hold out reimbursement from the 60% for costs advanced to MEI..

15. In a "Supplement to Referral Agreement" dated October 1, 2004 (the "Supplement"), before the receiver was appointed, GBS, Barton and the Texas Firms acknowledged GBS' attorneys fee was subject to deductions for "non-reimbursable client expenses relating to the Fen-Phen cases which are to be paid out of attorneys fees prior to the division between the Texas Firms and GBS including, but not limited to . . . (c) monies used by GBS to pay certain expenses including costs associated with obtaining echocardiograms on behalf of Fen-Phen clients and potential clients, . . ."

16. In a settlement agreement between Barton, GBS and MEI entered 29 September, 2004 (the "MEI Settlement"), "Barton has informed MEI through its counsel of the existence of a security interest granted to Advocate Capital, Inc. which prohibits the granting of security interests in the collateral at issue . . ." This agreement also stated the Texas Firms would hold out \$1,420.65 from each settlement and disburse them directly to MEI on a quarterly basis. In a

November 2004 letter sent shortly after the Supplement and MEI Settlement were executed, the Texas Firms indicated the amount they would hold out of each settlement for MEI was \$1,809.35. By 2006, however, the Texas Firms were only holding out \$953.00 for MEI from each settlement and that full withheld amount was paid to MEI in the total sum of \$982,543. (The reason for this lower withholding is unclear, although it may have been to offset the higher holding reflected in the November 2004 letter—the reason is not material to the ultimate outcome of this case.) The Texas Firms’ accounting thus allocated only \$982,543 of settlement funds (plus another \$87,974.16 from prior settlements) to go to MEI and retained the further funds for some reason other than to make future payments to MEI.<sup>1</sup> Mr. Barton was unable to swear from which pot of money the Texas Firms paid MEI, but could only speculate. However, he acknowledged the sums paid by the Texas Firms to MEI on GBS’ behalf reduced the attorneys fees GBS would receive from settlements collected by the Texas Firms.

17. The Court finds none of the witnesses very credible on the issues of intent of parties and classification of funding sources for the deposited funds, not because they were lying but because they had not sufficient foundation to do anything but speculate and state their “understanding,” as opposed to knowledge, regarding fund sources.

#### DISCUSSION AND CONCLUSIONS OF LAW

The Court must decide this case without having been presented witnesses with adequate factual foundation to testify competently of the nature of the escrowed funds. All such witnesses probably reside in Texas and work for the Texas Firms. DAT&K’s efforts to establish its interest in the funds and MEI and Barton’s inability to say from which pot of money the Texas Firms paid the escrowed funds and advanced costs not just to MEI but to GBS and other service providers on behalf of GBS clients may have been avoided by a deposition or voluntary appearance by someone from the firm with knowledge of how it accounted for these funds. Perhaps “B.Birkholz” whose name appears on Exhibit 24 could have provided testimony. However, there may be reasons unknown to the Court why such testimony never came in.

The Court must therefore look to the Settlement Agreement to resolve the case since it was actually acknowledged by the Texas Firms and thus provides a first hand rendition of their accounting of the funds. The issue is who gets how much of the \$442,768 deposited with the

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1. Counsel for MEI and Barton should review paragraph 35 of Exhibit 10, the MEI settlement agreement, to ensure there is no conflict of interest between them and GBS in this matter considering their relationship to GBS as prior, retained counsel and as a partner or associate of a past member of GBS. No report back to the Court is necessary unless someone sees an issue.

Court. The issue is resolved by determining whose money it is. If it is the clients' 60%, those clients can direct the sum go to MEI and Barton was their agent for that purpose. If the funds are GBS's 40%, DAT&K's security interest gives the money to DAT&K. Further, if GBS advanced the funds for the clients to pay MEI, and the escrowed amount is reimbursement to GBS from the clients' 60%, DAT&K has a security interest in the money because the funds have passed from ownership by the clients to GBS by contract. If the money was held to: 1) reimburse GBS for sums advanced on its behalf by the Texas Firms; 2) reimburse the Texas Firms for any outlay made on the litigation to other contractors, cardiologists, couriers or whomever; or 3) as funds held to reimburse the Texas Firms for the sizeable loan to GBS; then DAT&K gets the money regardless of whether it is attorneys fees or client funds because it is reimbursement to GBS (or the Texas Firms) for advancement of costs or expenses and thus collateral under DAT&K's security interest. The funds could conceivably also come from the Texas Firms' attorney fees simply to settle any potential claims by DAT&K, Barton or GBS against them. Direct evidence of whether the funds fit these, or some other scenarios, will remain a mystery because no Texas Firm witness appeared to testify and help MEI and DAT&K carry their burden of proof-- hence the Settlement Agreement's value in illuminating the nature of funds now in escrow.

### **Mr. Barton's Arguments**

Mr. Barton seeks to have the funds given to MEI. Mr. Barton argues it is undisputed the escrowed funds came from the Texas Firms' client trust accounts. This fact does not resolve the issue. The trust account could have held the entire settlement proceeds pending their distribution including attorneys fees and costs. The Court has no idea what Texas law requires for client accounts, but notes it is common practice in Utah for a firm to accept settlement funds on contingent fees, place them in an IOLTA trust account and hold them there until they are distributed to the client, applied to costs, and paid to the firm. This does not constitute commingling funds since funds are yet to be allocated to fees, costs and client recovery. There just needs to be an accurate record of the different amounts in the account. (*E.g.* ABA Model Code of Professional Responsibility, DR 9-102.1.B.4 (2007)(even lawyer's anticipated portion of funds, if disputed, should be left in the trust account). After a written accounting of costs, etc. is made and the firm and client agree on the precise amounts to be distributed, the firm distributes the amounts determined or otherwise agreed upon from the trust account as soon as possible. The client's portion of the settlement need not be estimated in advance, pulled out and placed in a separately created IOLTA account for that client only. If there are third party claims to the funds, as in this instance, attorney fees should be left in trust.



To be clear, the mere fact funds have their origin in a trust account does not prove the whole amount or any of the account belongs to the client. In fact in this case, the contingent fee agreements recognized GBS could authorize on behalf of the clients payment of costs or reimbursement of costs GBS advanced, which would include advances made on behalf of GBS and the clients by the associated Texas firms. Such funds would be left in trust until resolution of disputes over them.

No witness presented admissible testimony of how the escrowed funds should be accounted. Barton's counsel claims he was on the verge of obtaining this information from the receiver but was "cut off" by the Court from doing so. The Court disagrees. The receiver repeatedly stated he had no first hand, or even second hand knowledge of the category into which the escrowed funds would fall—client funds, reimbursement for advanced costs, or attorneys fees. He stated he simply assumed the Texas Firms accounted for those things and he did not audit, review or even see the particular results of that accounting in accepting the Settlement Agreement. It was therefore unnecessary to waste time on counsel arguing with the receiver over something he had no foundation to testify to. (Utah Rules of Evidence, Rule 403). Had counsel brought in someone, presumably from Texas and, unlike the receiver, with knowledge of the precise accounting of the deposited funds, he would have been allowed to present that evidence to the Court. The receiver's lack of knowledge or foundation on which to form an opinion because he neither prepared nor reviewed the Texas Firms' financial records tracing the funds would have merely resulted in continued denials of knowledge on that point in response to counsel's questions. The lack of knowledge was precisely the reason the receiver had the funds deposited in court. The Court is not required to listen to repeated denials and counsel fails to state exactly how he would have produced admissible evidence from a witness who had no foundation to say what counsel wanted him to say. Denials do not become less convincing by their frequent repetition.

Barton's counsel argues there was no logical distinction between the one half of funds withheld from clients to pay MEI and the other half withheld from clients to send to GBS. Of course, there is. The limited information the receiver had shows the amount withheld from each client matches the amount the Settlement Agreement says the Texas Firms sent to MEI (in addition to the amount from prior settlements.) Counsel presented no similar comparison for the escrowed funds so there is a distinction. Barton wants to raise in closing argument other issues and demands on the Court that have never been pled in this action notwithstanding the Court's earlier invitation to his counsel to file pleadings on its position, which invitation counsel did not accept. This method of case presentation denies other parties of notice and due process.

Counsel also presents the novel theory that the Court must join all of GBS' clients in this matter to protect them. This is an equitable dissolution action. If any clients wanted to submit a timely notice of claim, they could have done so. To the extent Mr. Barton has a duty to protect them, the Court supposes he is doing so and the Court has stated on at least three occasions he would be allowed to do so. The Court is unaware of what recent arrangements Mr. Barton has with his clients, if any, on the matter of the escrowed funds, although he has taken the position he is protecting their interests in this matter. GBS also must protect them but there is no legal authority the Court is aware of and none was presented to the Court requiring the receiver or the Court to join the thousand or so Fen-Phen clients. In any event, if the funds came from the clients' share, the clients will be protected. If the funds are from the attorneys' share or are reimbursement, the clients would have no standing to assert a right in them. The conduct of Mr. Barton and MEI in the litigation between them could indicate their intent that MEI could look only to Barton and his firm for payment (*Bullough v. Sims*, 400 P.2d 20, 23 (Utah 1965)). But none of counsel's assertions have an evidentiary basis and do not help us determine the source of the escrowed funds. The Court also questions counsel's narrow view of the Rules of Professional Conduct respecting trust accounts for the reasons stated above and does not believe they justify the veiled accusations of criminal behavior against the receiver. While Barton correctly identified the issue in the case perhaps better than anyone--tracing funds--he did not obtain evidence on that issue from a competent source and the tone of some of his comments against other parties in his closing argument does not make his case more persuasive.

### **The Settlement Agreement**

Having addressed Barton's argument, the Court now looks to see what, if any, competent evidence demonstrates the source and purpose of the escrowed funds and thus whether DAT&K's security interest attaches to them. MEI argued frequently the only parties with admissible evidence on this matter were MEI and Barton. It turned out neither Mr. Barton nor Mr. Fidler had any foundation for saying which part of the client settlements generated the money now held by the Court, or whether the amounts were for reimbursement. They could only speculate based on their "understanding" and not on any concrete knowledge of how the Texas Firms accounted for the funds. The Texas Firms are actually the ones with first hand knowledge because they collected and distributed the funds. While no party brought them in to testify or provide a deposition, those firms agreed to statements in the Settlement Agreement which are the strongest evidence of their accounting. GBS, Barton and DAT&K acknowledged these statements, admitting them. MEI was not a party to the statements in the Agreement and they are

thus not MEI admissions. On the other hand, Mr. Fidler had no foundation for testifying to the source of the funds but, again, could only speculate.<sup>2</sup>

The Settlement Agreement confirms:

- 1) The Texas Firms previously paid MEI \$973,510.22;
- 2) The Texas Firms were going to pay MEI another \$97,006.94 (the difference between the \$1,070,517.16 amount and the \$973,510.22 previously paid.);
- 3) The \$1,070,517.16 was the full amount withheld as MEI ECG charges from Fen-Phen client settlements;
- 4) Since this payment was made, GBS would be entitled to receive one half of the \$982,543.00 withheld as MEI ECG charges withheld from clients whose cases were in the final settlement (less the \$97,006.94 to be paid to MEI);
- 5) *The one half amount would be \$442,768.03;*
- 6) The Texas Firms would keep the other half and pay it to MEI; and
- 7) GBS, Barton and DAT&K would release any interest in the one-half retained by the Texas Firms.

It is important to note the Texas Firms paid the deposited money to GBS, not to MEI and the funds were paid as partial reimbursement for funds already held out of the Texas Firm-GBS association and paid to MEI. The \$1,070,517.16 paid to MEI was the full amount withheld as MEI ECG charges from the Fen-Phen clients' settlement, plus an amount from prior settlements. At the time of the Settlement Agreement, this sum had been paid to MEI with the exception of the \$97,006.94 from prior settlements which was paid after the Settlement Agreement was entered. Thus, the Texas Firms, GBS and Barton confirmed all client funds that had been withheld for the purpose of satisfying MEI's bill were released by or shortly after the time of the Settlement Agreement. (\$601,000 of the amount paid MEI was for initial screening ECGs). As a consequence, the funds paid thereafter came from settlement proceeds not held out for payment of MEI and thus from a source other than the clients' 60%.

The Texas firms, it is true, paid the half of the funds they retained to MEI. This could indicate an acknowledgment MEI was due the other half now held in escrow because that amount

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<sup>2</sup>Here, the Court notes the leading questions characterizing of the direct examination of *MM*. Barton and Fidler really made it sound like they were being coached to correct some previous statements made by them and this affected their credibility. Although there was no objection to the form of the questions, this case illustrates the danger of resort to extensive leading questions on direct examination.

was client money. If it was not, the Texas Firms would not have paid their half to MEI. However, a statement in the Settlement Agreement indicates that is not the case: "Once [the Texas Firms] pay[] \$97,006.94 to MEI, MEI will have been paid \$1,070,517.16, *which equals the full amount withheld as MEI echocardiograph charges from Fen-Phen Clients' settlements.*" (Emphasis added.) This statement appears to be the salient acknowledgment that the deposited funds were not client funds because the full amount of client funds had already been paid to MEI.

While Mr. Barton testified, without foundation (also without objection) his understanding these funds did not come from his contingent fee, he could only speculate from what source the Texas Firms paid them. His understanding appears to contradict what he agreed to in the Settlement Agreement. In fact, Barton's understanding was the Texas Firms would "contribute" the \$601,000.00 initial screening amount previously paid and then recoup it before it divided attorneys fees with GBS. He stated the \$601,000 paid to MEI was taken "out of attorneys fees" along with another \$129,000 for a total of \$730,000. GBS thus allowed the Texas Firms the use of a considerable sum of its attorneys fees for the payment of MEI (and to resolve other claims with clients), expecting to be paid back for that amount from client funds. Further, in the Supplement to Referral Agreement, Barton allowed the Texas Firms to use attorneys fees to pay MEI directly. Had those payments gone through GBS to MEI rather than directly to MEI from the Texas Firms, presumably the accounting would intercept and route them to DAT&K as attorneys fees to satisfy the DAT&K security interest.

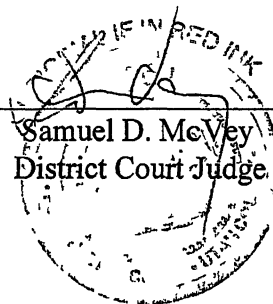
The Court concludes by a preponderance of evidence the Settlement Agreement language reflects the Texas Firms' accounting. Since no other client funds were being held to pay MEI the remaining amount from which the \$442,768.03 was taken, that sum did not come from the clients' 60%. MEI has received what it was entitled to from client funds, plus some, and must collect the remainder from future funds held out from other clients and attorneys fees exceeding the amount of the DAT&K lien in the "Non-Final Settlements." Since the parties presented no direct evidence of the Texas Firms' accounting, and since the Settlement Agreement signed off by the Texas Firms is the most persuasive evidence of their accounting of settlement proceeds, the Court concludes the Texas firm accounting directs that the \$442,768.03 escrowed amount is not client funds and DAT&K's prior security interest attaches to them.

Finally, MEI's theory that if the funds were subject to DAT&K's security interest DAT&K would have also sued the Texas Firms is unsupported by any evidence. Even if DAT&K has not pursued those firms, there would be any number of "innocent" reasons therefore, such as DAT&K choosing the sequence of battle, DAT&K releasing the Texas Firms in the Settlement Agreement to have a chance to gain access to the escrowed funds or DAT&K's lack of a security interest in the Texas Firms' accounts.

CONCLUSION

WHEREFORE IT IS ORDERED the sum of \$442,768.03 held in escrow by the court shall be released to counsel for DAT&K. No further order is necessary to implement the Court's ruling.

Dated this 4<sup>th</sup> day of March, 2009



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050401014 by the method and on the date specified.

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Date: 3/5/09

Call Steph  
Deputy Court Clerk

# **Addendum 2**

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

**IN THE MATTER OF THE  
APPLICATION OF BUDDY W.  
GREGORY FOR THE JUDICIAL  
DISSOLUTION OF GREGORY,  
BARTON & SWAPP, P.C., NOW  
KNOWN AS GBS LEGAL CLINIC, P.C.**

**ORDER DENYING MEI'S MOTION TO  
RECONSIDER AND GRANTING MEI'S  
MOTION FOR CERTIFICATION AS A  
FINAL ORDER**

**Case No: 050401014**

**Judge Samuel D. McVey**

---

MEI has submitted its Motion to Reconsider the March 4, 2009 Order and Request to Certify Order Under Utah Rule of Civil Procedure 54(b). The motion was briefed by MEI and by DAT&K. None of the other parties who appeared at the trial which resulted in the March 4, 2009 order submitted memoranda. No party requested oral argument.

DAT&K initially argues the Order may not be reconsidered for a variety of reasons. While *Gillett v. Price*, 2006 UT 24, ¶ 7, 135 P.3d 861, 863 holds final orders may not be reconsidered (see also *Drury v. Lunceford*, 415 P.2d 662, 663 (Utah 1966) ) the Utah Supreme Court's ruling in *Gillett* applies only to post-final-judgment motions (*Gillett, supra*, at 864). A district court is free to consider at any time the re-argument of issues in a case before entering a final judgment, *Ron Shepherd Ins. v. Shields*, 882 P.2d 650, 653-54 (Utah 1994). There is no final judgment in this matter, at least not until you get to the last sentence of this ruling. Thus, the Court will address MEI's motion on the merits.

The vast verbiage of MEI's Motion to Reconsider motion is directed to the disputed funds coming from the client's portion of the settlement. It contains much repetition as emphasis. MEI is correct on this point in that having now reviewed the hearing transcript, the Court finds the funds came from the 60% of the recovery attributed to the clients' account. The parties stipulated to this fact and the Court amends its finding accordingly to reflect the stipulation. However, that fact does not alter the Court's ultimate ruling because there is a great deal more to the story as stated in the original order which took care to point out it did not matter, without more evidence, whether the funds were in the client's trust account. The more evidence that would be needed would be the accounting.

As stated in the Order, the funds may be from the client's 60% but still allocated to go elsewhere, such as to reimburse Mr. Barton's firm or to pay for the firm's obligations from which it was holding its clients harmless under the contingent fee agreements. The Court's findings indicate MEI had no privity with any contract that would give it a direct right of action against the clients and Mr. Barton's firm assumed liability for ECG costs incurred by MEI. Further, it is evident the disputed funds were not headed for the pockets of the Mr. Barton's Phen-Fen clients.



The accounting evidence stated in the various agreements involving the Texas Firms is important and designated the funds' final intended resting place. This evidence was the basis for the Court's order, as argued concisely by DAT&K. No party presented competent evidence, including Mr. Barton's understanding, of a strength necessary to contradict the accounting specified in the Settlement Agreement and other corroborative facts found by the Court. While admissible, a party's understanding is neither binding nor persuasive in this case given the second-hand knowledge enjoyed by Mr. Barton and the varying accounts of the MEI witness.

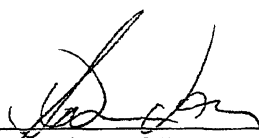
Further, contrary to MEI's assumption, the Order was not based on a single sentence in the Settlement Agreement but incorporated findings based on financial data, agreements and other evidence. The subject matter of the new affidavit accompanying MEI's motion should have been presented at trial and may have been helpful but the Court cannot consider it post-trial. Further, it is hearsay. MEI also has not shown why the evidence was not known or knowable at the time of trial.

The broad scope of DAT&K's security interest allowed it to attach to the funds as they went through GBS or its predecessor destined for someone other than the clients' personal bank accounts. As reflected by the Court's findings, the settlement agreement and other documents indicated the nature of the funds.

The Court certifies the March 4, 2009 ruling as final in that there are no other parties or claims that are affected by the order.

DATED this 21<sup>st</sup> day of July, 2009

BY THE COURT:

  
\_\_\_\_\_  
Samuel D. McVey  
District Court Judge

**MAILING CERTIFICATE**

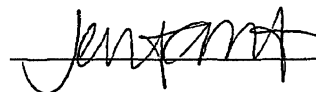
I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this \_\_\_\_ day of \_\_\_\_\_, 2009.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050401014 by the method and on the date specified.

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Date: July 23, 2009

  
Deputy Court Clerk

# **Addendum 3**

ORIGINAL

IN THE FOURTH JUDICIAL DISTRICT COURT – PROVO  
IN AND FOR UTAH COUNTY STATE OF UTAH

IN THE MATTER OF THE  
APPLICATION OF BUDDY W  
GREGORY FOR THE JUDICIAL  
DISSOLUTION OF GREGORY  
BARTON & SWAPP P C NOW  
KNOWN AS GBS LEGAL CLINIC P C I

Case No 050401014

TRANSCRIPT OF HEARING

**FILED**

Fourth Judicial District Court  
of Utah County, State of Utah

3-4-09 08 Deputy

February 6 2009

BEFORE THE HONORABLE SAMUEL D McVEY  
District Court Judge

**FILED**  
UTAH APPELLATE COURTS

**FILED**  
UTAH APPELLATE COURTS

OCT 22 2009

APR 22 2010

Jen Kearbey

Certified Court Transcriber

1230 Gaylene Circle

Sandy Utah 84094

(801) 666 4540

**FILED**  
UTAH APPELLATE COURTS

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20090135-GA

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and-

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For the Receiver Mark Hashimoto

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Salt Lake City Utah 84111

For Keith Barton

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EXHIBITS

Number

Description

Received

21 Echo seen ring worksheet 13  
18 Payments made on MEI note 177  
19 Summary of amounts withheld for MEI versus amounts paid to MEI 180

PROVO UTAH FRIDAY FEBRUARY 6 2009 9 32 A M

-ooo0ooo-

THE COURT Thank you Please be seated And good morning I will call the case No 050401014 Counsel please State your appearances

MR MAGLEBY Your Honor Jim Magleby and Blake Miller on behalf of Mobile Echocardiography Inc

THE COURT Thank you

MR JONES Roger Jones on behalf of DAT&K LLC

THE COURT Thank you

MR HOFMANN Your Honor George Hoffman appearing on behalf of Mark D Hashimoto receiver

THE COURT Thank you

MR SHORT And Your Honor Doug Short on behalf of Keith Barton

THE COURT Thank you very much Anyone else?

Okay All right Are counsel ready to proceed?

MR MAGLEBY We are Your Honor

THE COURT All right You may proceed

MR MAGLEBY Your Honor would you like an opening statement or would you like us to just call witnesses?

THE COURT Well I think I understand the issue

we re trying to see I think the - corect me if I mean wrong if you want to add anything else but we know what the documents say We re trying to make sure that - we re tryinkg

4

1 to see where these - these funds came from, where they went,  
2 whom they belong to, what types of possessory interests were  
3 they? Was Gregory, Barton & Swapp and their affiliates in  
4 Texas, were they merely a Bailey or a bank for these funds or  
5 did they actually have some interest in them? All of those  
6 types of things, I think, are an issue here today, is my  
7 understanding. There was enough ambiguity in the documents  
8 and so forth, that we needed to resolve those issues to see  
9 what the parties really were doing, so...

10 MR. MAGLEBY: I think that's right, Your Honor. If  
11 the Court has had an opportunity to look at my pretrial brief,  
12 then -

13 THE COURT: I did, but -

14 MR. MAGLEBY: Okay.

15 THE COURT: - even though there was no ex parte  
16 motion to file an overlength brief, I read it. Okay?

17 MR. MAGLEBY: Thank you, Your Honor.

18 THE COURT: All right.

19 MR. MAGLEBY: Then that is a summary of our points.  
20 And I can give those again, but it sounds like the Court is  
21 familiar with those.

22 THE COURT: All right.

23 MR. MAGLEBY: If you'd like, we'll just call our  
24 first witness.

25 THE COURT: That would be fine. Unless Mr. Jones

5

1 wanted to say anything at this point.

2 MR. JONES: They can go first, Your Honor. I have  
3 no opening statement.

4 THE COURT: Okay. Go ahead.

5 MR. MAGLEBY: All right. Your Honor, first witness  
6 would be Keith Barton then.

7 THE COURT: All right. Sir, would you please come  
8 up and face the clerk and raise your right hand.

9 KEITH BARTON,  
10 called as a witness by Mobile  
11 Echocardiography, being first  
12 duly sworn, was examined and  
13 testified on his oath as follows:

14 THE COURT: Please have a seat right up here.

15 MR. MAGLEBY: And, Your Honor, as I indicated in our  
16 briefing, we have prepared a binder of exhibits for the Court,  
17 the witness, counsel. If I may approach.

18 THE COURT: Thank you.

19 MR. MAGLEBY: Roger, you have a set, right?

20 MR. JONES: I do. Thank you.

21 DIRECT EXAMINATION

22 BY MR. MAGLEBY:

23 Q. Mr. Barton, even though we obviously know who you  
24 are, can you please state your full name for the record.

25 A. It's Keith Lee Barton.

6

1 Q. And, Mr. Barton, are you a member of the Utah State  
2 Bar?

3 A. I am.

4 Q. And how have you been a member of the Utah State  
5 Bar?

6 A. Since 1992 or '93.

7 Q. And at some point in time, did you become involved  
8 in litigating what are sometimes called the Phen-Fen cases?

9 A. Yes.

10 Q. And in the course of that, did you become acquainted  
11 with Mr. Allen Fiddler and his company, Mobile  
12 Echocardiography, Inc.?

13 A. I did.

14 Q. Can you tell us approximately when that was?

15 A. I believe that it was sometime around 2000-2001,  
16 approximately.

17 Q. And did Mr. Fiddler's company, MEI - I'll call it  
18 MEI, if that's okay - perform echocardiogram services for your  
19 law firm?

20 A. They actually performed echocardiogram services for  
21 our clients.

22 Q. For your clients. Okay. And what was the name of  
23 the firm at the time?

24 A. Gregory, Barton & Swapp.

25 Q. Now, I have heard references in the papers and the

7

1 testimony to different rounds of Phen-Fen cases, a first,  
2 second and third round. Are you familiar with that?

3 A. I am.

4 Q. Can you tell the Court generally what is meant by  
5 the first, second and third rounds of the Phen-Fen cases?

6 A. They were a - they were a group of cases that we  
7 took initially. They were the - it seemed to me that they  
8 were the Mississippi cases. We referred to those as the first  
9 round. There were approximately 200 cases in that group of  
10 cases.

11 We then had a group of cases that we called the  
12 Texas cases, which we referred to as Round 2 that settled.  
13 And then we have the - the last group of litigation, which  
14 involved several thousand cases that we referred to as Round  
15 3.

16 Q. And that was a big group, right?

17 A. Yes.

18 Q. Okay. And did MEI perform echocardiogram services  
19 on the first and second rounds?

20 A. My recollection is they did.

21 Q. Okay. And then for the third rounds, did MEI and  
22 Gregory, Barton & Swapp do it a little differently, meaning  
23 they actually entered into a written agreement?

24 A. I don't understand.

25 Q. Let me back up. For the first two rounds, did you

8

1 and MEI have a written agreement?

2 A. I don't believe we did.

3 Q. Okay. For the third round - well, let me ask you to

4 take a look at Exhibit 7 in the binder in front of you and

5 just ask if you recognize that document.

6 A. I do.

7 Q. What is Exhibit 7?

8 A. It is a - it's a fee schedule.

9 Q. And is it also, to your understanding, an agreement

10 between you and your law firm on the one hand and Mobile

11 Echocardiography on the other hand?

12 A. It is as to price per screenings, for echo

13 screenings and for workups.

14 Q. Okay. And at this point, why don't we tell the

15 Court the difference between an initial screening, or a

16 screening and a full workup.

17 A. When - when a new client would come into our office,

18 we would go through what we call an initial screening process

19 in which we would do a screening echo, which was a study that

20 took approximately 10 to 15 minutes. We would then, through

21 that mechanism, we would determine whether or not they

22 qualified for a full study echo. A full study echo took

23 approximately 30 to 40 minutes, depending on the - how

24 difficult the study was to - depending on the patient.

25 And so there was - we had - preliminarily, we did

9

1 screening through the echo screenings to see if they had a

2 case that qualified using the criteria that we were using.

3 And, if they did, then we rescheduled them for a full study

4 workup.

5 Q. So if I'm correct, an initial screening is something

6 quicker than a full study.

7 A. Yes.

8 Q. But at the same time, not everybody who gets an

9 initial screening becomes a client of the firm.

10 A. That would be correct.

11 Q. Okay. And let me ask you to flip to page 20 - or

12 tab twenty - I'm sorry, Your Honor. Let me move for the

13 admission of Exhibit 7.

14 THE COURT: Any objection to Exhibit 7?

15 MR. JONES: No, Your Honor. It was stipulated to.

16 THE COURT: All right. Thank you. Have all of

17 these exhibits in your binder been stipulated or are there

18 some that -

19 MR. MAGLEBY: Some have and some have not.

20 THE COURT: All right.

21 MR. JONES: The vast majority have, Your Honor.

22 There are only three or four that have not. 7 is a stipulated

23 exhibit.

24 THE COURT: All right. Thank you. That will be

25 admitted.

10

1 MR. MAGLEBY: And I will try to be mindful of the

2 stipulation, but I just finished a three-week trial, so I may

3 end up being overly formal on that.

4 Q. Do you recognize Exhibit 21, Mr. Barton?

5 A. I do.

6 Q. And what is Exhibit 21?

7 A. This is an echo screening worksheet.

8 Q. Is this a worksheet that somebody would complete or

9 which would be completed for a potential client when they came

10 in for the screening?

11 A. Yes, that's correct.

12 Q. And, again, the screening is the - the quick and

13 dirty or the initial look.

14 A. The initial look, that's correct.

15 Q. Okay. Let's see. And if we go down to the second

16 paragraph of Exhibit 21, it says: "In the event my screening

17 is positive and I choose to go forward with a full workup, the

18 cost of the full workup will be deducted from my total

19 settlement as related to my Phen-Pen claim."

20 Did I read that correctly?

21 A. Yes.

22 Q. Can you tell the Court what that meant?

23 A. The client was - or potential client was agreeing

24 that, if they - that after a - an initial echo workup, if they

25 decided to go for the full study workup, they've - they've

11

1 indicated in here that they would - that we would postpone the

2 collection of the monies for that full-study workup until the

3 settlement of their claim.

4 Q. And when the case settled, that money would come out

5 of their portion.

6 A. That's correct.

7 Q. Okay. Now, this morning, I just was shown this

8 binder. I believe that you found this in your files; is that

9 correct?

10 A. Yeah. Actually, we - we received a call from

11 Gregory & Swapp, who had this in their - in their storage unit

12 and was cleaning out their storage unit, and asked us to come

13 and retrieve it.

14 Q. Just tell us generally what kinds of documents are

15 in that binder.

16 echo screening information.

17 Q. Similar to what we've got on Exhibit 21?

18 A. Yes.

19 Q. The ones in the binder, have they been actually

20 filled out for clients?

21 A. Yes. They were filled out by the clients.

22 Q. Okay. And how is it you know or believe that every

23 client would have filled out one of these Exhibit 21 echo

24 screening sheets?

25 A. It was our custom and practice to not allow anyone

12

1 to have an echo screening or a full-study done unless they  
2 were - unless they signed the - the paperwork that we put in  
3 front of them.

4 Q. And was it in your financial best interest to get  
5 that paperwork signed?

6 A. Well, it was in our financial interest to get our  
7 contract signed, certainly.

8 Q. Was it also important for the clients to get those  
9 things signed?

10 A. If - if they didn't want to have to pay for their  
11 echocardiogram full studies up front, which was a real benefit  
12 to them, then they needed to - to enter into an agreement with  
13 Mr. Fiddler, yes.

14 MR. MAGLEBY: Your Honor, move for the admission of  
15 Exhibit 21.

16 THE COURT: Any objection?

17 MR. JONES: No objection to the admission of Exhibit  
18 21, Your Honor.

19 THE COURT: Very well. It will be admitted.

20 MR. MAGLEBY: Mr. Barton, let me ask, what happened  
21 if a client who had completed a form of Exhibit 21 came back  
22 with an initial screening that indicated they were eligible  
23 for - to have you represent them in a Phen-Fen case?

24 A. The general procedure was that we would - we would  
25 get the results from the echo screening. If we saw that it

13

1 looked like they were - that they would meet the criteria for  
2 a full-study screening and they would meet the criteria for  
3 the settlement as we understood it, or a potential settlement,  
4 based on the cases that we had already settled, we would then  
5 have them reschedule to come back and have a full-study workup  
6 done.

7 Q. Okay. And, again, the full study is more  
8 comprehensive, correct?

9 A. The full study took a lot more time, yes.

10 Q. And then the full study - well, let me back up.

11 For the initial screening, was that initial  
12 screening recorded or videotaped?

13 A. My understanding - I don't recall.

14 Q. Okay. With regard to the full study, was that  
15 videotaped or otherwise captured?

16 A. Yes.

17 Q. And were certain measurements made?

18 A. Yes, they were.

19 Q. Okay. And that was important to the Phen-Fen cases?

20 A. It was - it was the basis of the settlements.

21 Without that information or without that evidence, there would  
22 have been no case.

23 Q. Okay. So pretty important.

24 A. Yeah.

25 Q. All right. Let me ask you to turn to Exhibit 11.

14

1 THE COURT: Before you do that, is there any  
2 significance to there being two pages to Exhibit 21? Are  
3 those - is there a difference in those, to save me time? I  
4 know they have different Bates stamp numbers at the bottom,  
5 but -

6 MR. MAGLEBY: I believe they are the same, Your  
7 Honor.

8 THE COURT: Okay.

9 THE WITNESS: Your Honor, if I could answer that.  
10 There's some - if you'll notice at the bottom, it says For  
11 Office Use Only on the - on the second one. Oh, actually, it  
12 says it on the first one, too. Yeah. They're identical.

13 Q. (By Mr. Magleby) Were there different iterations of  
14 this document, Mr. Barton? Did it evolve over time?

15 A. The - yeah, the first one that we initially had did  
16 not have the - the For Office Use Only down here in the  
17 bottom. That was something that we asked for Mr. Fiddler to  
18 include so that we could go through these quickly and assess  
19 whether or not they qualified in our minds for a full-study  
20 workup.

21 Q. Okay. So the Office Use Only, something down there  
22 would be filled out which would be useful information for the  
23 law firm.

24 A. Yes.

25 Q. Okay. I understand. Going back to, then, Exhibit

15

1 11, can you tell the Court what Exhibit 11 is.

2 A. This is a - a contingency fee contract for Gregory,  
3 Barton & Swapp.

4 Q. And, let's see, if we go down under - is this kind  
5 of a form agreement?

6 A. It's a form agreement as it relates to - as it  
7 related to the Phen-Fen clients.

8 Q. And if we go to sub-heading 2 where it says Scope of  
9 Services, and if you'll read along with me, it says: "You are  
10 hiring me/us as your attorneys to represent you in the matter  
11 of your claims regarding the taking of weight loss pills."

12 Did I read that correctly?

13 A. That's correct.

14 Q. And the weight loss pills, is that a reference to  
15 Phen-Fen?

16 A. We - we said weight loss pills because it was more  
17 generic and there were some other weight loss pills out there  
18 besides Phen-Fen.

19 Q. Okay. But you don't have any doubt this is a - for  
20 lack of a better word or a more precise term - the Phen-Fen  
21 contingency fee agreement.

22 A. It is, yes.

23 Q. Okay. Was it your policy and practice to make sure  
24 that every client that came in signed one of these?

25 A. Every client that - that came through our office

16

1 that wanted a full-study echocardiogram done had to sign one  
2 of these prior to having that study done.

3 Q. What procedures or protections did you put in place  
4 to make sure that that happened?

5 A. We had -- we had somebody from our office that was  
6 actually liaised with Mr. Fiddler. A lot of the  
7 echocardiograms were done in the building where we had our  
8 lease or where we resided. Those echocardiogram studies were  
9 done on a different floor.

10 We had people, however, in our office that were  
11 required to check in clients or potential clients and have  
12 them sign all of the forms and all of the agreements so that  
13 our paperwork was in order. And if they did not sign this,  
14 they did not get the services.

15 Q. And did your office -- you or your office also inform  
16 Mr. Fiddler he was not to perform a full echo on anybody if  
17 they didn't have these documents signed?

18 A. We did. They -- they would not have gotten past our  
19 people without having these signed.

20 Q. Okay. Going down, then, to subsection (4) -- and,  
21 Your Honor, I believe this has been stipulated to, but just so  
22 there's no confusion. I don't know if stipulated exhibits all  
23 come into evidence or if you only want to consider the ones  
24 that we actually move to be considered by the Court. So I'll  
25 move for the formal admission of Exhibit 11.

17

1 THE COURT: Any objection?

2 MR. JONES: No, Your Honor. But it was my  
3 understanding that we would agree to the admission of all  
4 those that are stipulated to --

5 MR. MAGLEBY: That's fine with me.

6 MR. JONES: So if we could just move to do that and  
7 dispense with dealing with each exhibit, that might save time.

8 THE COURT: That's fine. I will do that.

9 MR. MAGLEBY: And in the front of the binder, Your  
10 Honor, there is a -- an index which goes through Exhibit 23.  
11 I added a couple more, 24 and 25, last night. I've shown  
12 them to Mr. Jones this morning, and I guess -- I don't know if  
13 he stipulates or not, but --

14 Any objection to 24 and 25?

15 MR. JONES: I do not stipulate to 24, but I do to  
16 25.

17 MR. MAGLEBY: Okay. Fair enough.

18 THE COURT: So everything other than 24 in this  
19 binder is stipulated to or are there some others that may not  
20 be?

21 MR. JONES: No, Your Honor.

22 THE COURT: Okay.

23 MR. JONES: 16 through 21 are not stipulated to, and  
24 24.

25 THE COURT: Okay. Subject to those that are not

18

1 stipulated to, the remaining exhibits are, and that would be  
2 1 through, what --

3 MR. MAGLEBY: 15.

4 THE COURT: 1 through 15. And then --

5 MR. MAGLEBY: 22 and 23.

6 THE COURT: 22 and 23 and 25 are admitted.

7 MR. MAGLEBY: Thank you, Your Honor.

8 THE COURT: Thank you.

9 Q. (By Mr. Magleby) Mr. Barton, down under -- back on  
10 Exhibit 11, sub (b), it says -- read along with me: "I/we will  
11 incur various costs and expenses in performing legal services  
12 under this agreement. You agree to pay for all costs,  
13 disbursements and expense owed by you in connection with this  
14 matter..."

15 And if you could read along with me carefully here:  
16 "...or which have been paid or advanced by me/us on your  
17 behalf and for which have not previously paid or reimbursed to  
18 me/us if we reach a settlement."

19 Did I read that roughly correctly?

20 A. Yes.

21 Q. Did you have an understanding that what this meant  
22 was the client was responsible to pay certain expenses out of  
23 the client portion of its settlement, his or her settlement?

24

25 A. That's correct.

19

1 Q. And those client expenses, those are different or  
2 the same as contingency attorney fees?

3 A. Client expenses are different than contingency  
4 attorney fees.

5 Q. Right. And if we look up under 4(a), in fact, that  
6 paragraph talks about the 40 percent contingency fee. That's  
7 the attorney fee, right?

8 A. That's correct.

9 Q. Okay. With regard to that client expense, then,  
10 does that get withheld from the client's side of the  
11 settlement?

12 A. It does.

13 Q. Does GB&S have any right to that money?

14 A. No, we do not.

15 Q. Now, it does say here "or which have been paid or  
16 advanced by me/us on your behalf." So if GB&S actually paid  
17 in advance for certain expense, it could then recoup that from  
18 a client, correct?

19 A. Yes.

20 Q. In this instance, you're familiar with this dispute,  
21 I assume.

22 A. I do -- I am.

23 Q. All right. In this instance, did GB&S ever pay or  
24 advance the full-study echocardiogram costs which were later  
25 withheld from the client's side which are in the registry of

20



1 this court?

2 A. The full-study echocardiogram costs, no, have not  
3 been paid.

4 Q. Okay. And so, looking at this subparagraph 4(b),  
5 GB&S would have no right to recoupment under this paragraph as  
6 against those monies withheld from the client's side, correct?

7 A. That would be correct.

8 Q. All right. Now, let me ask you to flip ahead to  
9 Exhibit 17 and ask you if you recognize Exhibit 17.

10 A. I do. It's a - it's a lien agreement.

11 Q. Now, if I look at Exhibit 17 and I compare it to  
12 Exhibit 11, same - same law firm name on it, right?

13 MR. JONES: Your Honor, Exhibit 17 is not stipulated  
14 to, and we do have an objection to its admission.

15 MR. MAGLEBY: Let me go ahead and lay that  
16 foundation, Your Honor.

17 THE COURT: Okay.

18 Q. (By Mr. Magleby) I'm sorry, Mr. Barton, I may have  
19 asked you this. I'm going to ask it again. I'm not quite  
20 myself today.

21 What is Exhibit 17?

22 A. It's a - it's a lien agreement.

23 Q. Was Exhibit 17 presented to clients at the same time  
24 as the contingency fee agreement that we have marked as  
25 Exhibit 11?

21

1 A. Yes.

2 Q. How can you be sure?

3 A. It was our custom and our practice to have this lien  
4 agreement signed along with our contingency fee contract,  
5 along with medical authorizations for our law firm to gather  
6 medical records. All that would have been done prior to  
7 them - prior to our clients having a full-study echo done.

8 Q. So the same practice and procedure we've already  
9 talked about?

10 A. Yes.

11 Q. Do you have any doubt whether or not this form lien  
12 agreement was signed by the clients that came in to get an  
13 echo from MEI?

14 A. I have no - no doubt about that at all.

15 MR. MAGLEBY: Your Honor, Move for the admission of  
16 Exhibit 17.

17 THE COURT: Mr. Jones?

18 MR. JONES: Objection, Your Honor. Should I  
19 approach or -

20 THE COURT: No. That's fine. You can - we don't  
21 have a jury, so you can - unless you don't want the witness to  
22 hear your objection.

23 MR. JONES: No, that's fine.

24 THE COURT: Okay.

25 MR. JONES: Your Honor, we object to the admission

22

1 of this agreement - to go through some points here, Your  
2 Honor, about the agreement.

3 One, it makes no reference to Phen-Fen, weight loss  
4 pills, it makes no reference to MEI. We can't tell whether  
5 this agreement was executed by a Phen-Fen client because it is  
6 redacted. And it's not executed by Gregory, Barton & Swapp.

7 Now, Mr. Barton would like to testify that these  
8 documents were indeed executed. But, Your Honor, they haven't  
9 been produced. Mr. Barton was unable to produce any of these  
10 documents other than the one you're looking at. Mr. Fiddler  
11 was unable to produce any of these documents other than the  
12 one that you're looking at.

13 Mr. Fiddler and Mr. Bartonn disagree about this  
14 document. Mr. Barton transferred that Mr. Fiddler prepared  
15 it. Mr. Fiddler testified that Mr. Barton prepared, in their  
16 depositions.

17 Your Honor, what we have here is an effort on the  
18 part of MEI to prove the contents of these agreements without  
19 the agreements themselves. There's been no testimony that  
20 these agreements have been lost or can't be located. In fact,  
21 Mr. Barton said he didn't know if he could locate these  
22 documents in his deposition.

23 The best evidence rule would require, Your Honor,  
24 these documents to be produced to the extent that they wish to  
25 offer testimony regarding their contents. They have not been

23

1 produced. To the extent that they wish to pursue this as a  
2 summary of these documents, Your Honor, those documents would  
3 be required to be made available to DAT&K. They have not  
4 been.

5 That's the basis for our objection, Your Honor.

6 THE COURT: All right. Thank you.

7 Did you want to respond on that?

8 MR. MAGLEBY: Yes, Your Honor. Even without the  
9 document, I could have Mr. Barton testify about it and the  
10 Court could take notice of his testimony. It's admissible  
11 evidence. I've also got the document and his testimony as to  
12 what it's content is and who and when signed it.

13 THE COURT: Right now, I don't think you've laid a  
14 proper foundation under Rule 1001. You do have to surmount  
15 the best evidence rule by showing that, for example, something  
16 has happened to the original and it can't be produced. Those  
17 types of things, all those kinds of things that are - that are  
18 indicated in the best evidence rule. So -

19 MR. MAGLEBY: And one of the reasons why they were  
20 not produced, it's not that Mr. Barton couldn't locate them,  
21 it's that they raised an attorney-client privilege objection  
22 because they have a number of these agreements.

23 THE COURT: Well, isn't this gentleman the attorney?

24 MR. MAGLEBY: He is the attorney.

25 THE COURT: So -

24

1 MR. MAGLEBY: But it's not his privilege to waive.  
2 THE COURT: Well -  
3 MR. MAGLEBY: Unfortunately, the privilege belongs  
4 to the clients.  
5 THE COURT: - it may not be his - it may not be his  
6 privilege, but have the clients asserted that privilege?  
7 MR. MAGLEBY: No, they haven't been - the objection  
8 was raised by - well, I guess I don't know because I don't  
9 represent Mr. Barton.  
10 THE COURT: Well, at this point, it sounds like  
11 there's no foundation, that there hasn't been adequate  
12 foundation, so until you can - until you can lay that  
13 foundation, this - and you can ask about this but it's not  
14 going to be admitted.  
15 MR. MAGLEBY: Fair enough.  
16 Q. Mr. Barton, with regard to the documents - strike  
17 that.  
18 With regard to the agreements that you would have  
19 obtained from your clients with your firm, was it important  
20 for you to get an agreement from the clients that the  
21 providers of certain services such as echocardiograms would  
22 have a lien or a right or a claim to be paid from the client's  
23 side of the settlement?  
24 MR. JONES: Your Honor, I object. Because what Mr.  
25 Barton is doing, he's testifying as to the contents of

25

1 agreements that are not admissible and have not been produced.  
2 The best evidence rule does not permit him to testify to the  
3 contents of these documents.  
4 THE COURT: And let me ask you also Mr. Magleby, is  
5 it true that Mr. Barton is going to - will say that he did not  
6 prepare this but, rather, Mr. Fiddler prepared it?  
7 MR. MAGLEBY: I don't remember the details of the  
8 deposition testimony. I think a lot of time has passed.  
9 THE COURT: That's what counsel is -  
10 MR. MAGLEBY: Right.  
11 THE COURT: - is recalling at this point. So if he  
12 doesn't - if he didn't - has he ever seen this before? I  
13 mean, there are all kinds of questions out there. There's no  
14 foundation for this, so that objection's sustained at this  
15 point.  
16 MR. MAGLEBY: Let me try to lay some more  
17 foundation.  
18 Q. Mr. Barton, have you seen this agreement before?  
19 A. I have.  
20 Q. Is this a standard form agreement you use with  
21 regard to the Phen-Fen cases?  
22 A. Yes.  
23 Q. Was it your practice and procedure to have every  
24 client sign one of these?  
25 A. Yes.

26

1 Q. Was it in the best interest of you and your client  
2 and the service provider to get one of these signed?  
3 A. It was in the best interests of our client, yeah,  
4 and the service provider, yes.  
5 Q. Okay. And do you have any doubt that every one of  
6 these, every client that came in and got a full study from MEI  
7 signed one of these?  
8 A. They absolutely did.  
9 MR. JONES: Objection, Your Honor.  
10 THE COURT: Right. And let me ask you again. Why  
11 would this be privileged? It's the client's name. The name's  
12 not - the name of the client is not privileged.  
13 MR. MAGLEBY: Your Honor, I didn't raise the  
14 objection. They weren't my documents. If I had them, I'd  
15 have produced them.  
16 THE COURT: Okay. But you're the sponsor of the  
17 document and I presume that, if you're going to surmount the  
18 best evidence rule, you've got to come up with a reason why  
19 the original could not be produced, why it was lost or  
20 something of that nature.  
21 MR. MAGLEBY: I couldn't produce it because  
22 privilege was asserted. And I didn't have possession.  
23 THE COURT: Did you - did you seek a - an order of  
24 the court -  
25 MR. MAGLEBY: No.

27

1 THE COURT: Well -  
2 MR. MAGLEBY: And neither did Mr. Jones.  
3 THE COURT: - to me, it would seem like such a  
4 privilege assertion might be bordering on frivolous because  
5 I don't see, really, anything here that would be - would be  
6 privileged. But anyway...  
7 MR. JONES: Your Honor.  
8 THE COURT: Yes, sir.  
9 MR. JONES: If I may add, Mr. Barton did not raise  
10 a privilege objection to these documents. Mr. Barton raised  
11 a privilege objection in his deposition. It's page 8 of his  
12 deposition, Your Honor - only to echo screening information,  
13 the information itself.  
14 What Mr. Barton testified to about these documents  
15 varies. Either he looked for them or he didn't look for them.  
16 When I asked him directly was he unable to locate his  
17 document - these documents, his only answer was "I don't  
18 know."  
19 THE COURT: All right. Well, the objection's  
20 sustained.  
21 MR. MAGLEBY: Okay.  
22 THE COURT: There's no foundation.  
23 MR. MAGLEBY: And it's a minor point, Your Honor.  
24 THE COURT: Okay. Thank you.  
25 MR. MAGLEBY: So I'm happy to move on.

28

1 THE COURT: All right.

2 Q. (By Mr. Magleby) Mr. Barton, let me have you take

3 a look very briefly at Exhibits 8, 9 and 10, which are a

4 promissory note, a security agreement and a settlement

5 agreement and mutual release.

6 Once you've done that enough that you can tell us

7 whether or not you're familiar with those documents, let me

8 know.

9 A. I am familiar with these documents.

10 Q. And are those at least some of the documents that

11 were executed as part of a settlement involving you and

12 Gregory, Barton & Swapp on the one hand and MEI, Mobile

13 Echocardiography, Inc., on the other hand?

14 A. Yes.

15 Q. Okay. And let me ask you to go to Exhibit 10, which

16 is the settlement agreement, and the third page. Are you with

17 me? Third page.

18 An initial payment was made as part of this

19 settlement; is that right?

20 A. That's correct.

21 Q. And if we look down under subsection (11)(b), can

22 you see a reference to that payment there?

23 A. Yes.

24 Q. And what's the amount?

25 A. \$601,000.

29

1 Q. Now, was that initial payment and advance payment

2 for full-study echocardiograms or was it for other monies that

3 MEI was owed, or claiming it was owed, as part of the lawsuit?

4 A. It was other monies that were owed.

5 Q. And let me have you flip ahead to Exhibit 20. Tell

6 me if you've seen that document before.

7 A. Yes.

8 Q. And do you recognize Exhibit 20 as a settlement

9 offer from my office to the offices of your attorneys that

10 were working for you in the MEI-GBS lawsuit?

11 A. Yes.

12 Q. And if we go to the third page of that document, up

13 at the top it says Option No. 2 Payable Now. Do you see that?

14 A. I do.

15 Q. And it references a number of payments and it comes

16 down to a total of \$650,000, correct?

17 A. That's correct.

18 Q. Now, if we compare that amount to Exhibit 10, the

19 third page where we refer to the \$601,000, is there any

20 relation?

21 A. Yes.

22 Q. What's the relation?

23 A. The relationship is that the \$601,000 that we paid

24 was a reduced amount of the \$650,000 that's being offered here

25 for a settlement.

30

1 Q. And that payable now figure, did that represent

2 monies for initial screenings? In other words, those quick

3 looks that were done by MEI that did not result in somebody

4 becoming a client of the firm and other out-of-pocket costs

5 that MEI had literally paid on behalf of either the law firm

6 or the clients?

7 A. Yeah. These were for out-of-pocket expenses that

8 MEI had in relation to his, as it related to initial

9 screenings.

10 Q. Okay. Have you thought the \$601,000 in the

11 settlement agreement was an advance payment for the full

12 studies?

13 A. It could not have been.

14 Q. And why not?

15 A. That wasn't what we agreed to.

16 Q. Okay. Let's see, let's go down to, now, with regard

17 to the escrow money in this case, you're familiar with the

18 \$442,000-some-odd that's deposited with the court's escrow,

19 correct?

20 A. I understand that that is deposited with them, yes.

21 Q. Okay. What is your understanding as to where that

22 money came from?

23 A. My understanding is that, pursuant to directives to

24 pay that we had received from our clients, that our clients -

25 that money was withheld from their settlements to pay for the

31

1 Mobile Echocardiography full-study workups.

2 Q. If it hadn't been withheld - strike that.

3 It didn't come from your contingency fee.

4 A. No, it did not.

5 Q. If it doesn't go to MEI, what's your understanding

6 as to where the money has to go?

7 A. It's client money. We were directed to pay that

8 money by our clients for the services that were provided by

9 Mobile Echocardiography. If it doesn't go to pay that, then

10 it should be returned to the clients.

11 Q. Okay.

12 THE COURT: I'm sorry, what was that total again?

13 MR. MAGLEBY: I think it's about \$442,000.

14 THE COURT: Thank you.

15 MR. MAGLEBY: It's whatever amount is in the escrow

16 report.

17 Q. And in fact, Mr. Barton, do you think that Gregory,

18 Barton & Swapp would have an ethical duty to return that money

19 to the clients?

20 A. I do believe that we have - we would have an ethical

21 duty to - to return that money to - to the clients, and

22 that's - that's why I'm here today.

23 Q. And have you advised the receiver of that?

24 A. We have on multiple occasions.

25 Q. Okay. Now, with regard to the settlement agreement

32

1 security agreement, that was drafted through an exchange  
2 between lawyers representing you and GBS and lawyers  
3 representing MEI; is that correct?

4 A. That's correct.

5 Q. Okay. With regard to your understanding and intent  
6 in entering into that agreement, was it ever your  
7 understanding that Gregory, Barton & Swapp was taking over  
8 MEI's right to be paid directly from the clients?

9 A. No.

10 Q. Was it ever your understanding that MEI was waiving  
11 its right to be paid directly from the clients in the event  
12 they hadn't already been paid under the settlement agreement?

13 A. Can you - can you repeat that question?

14 Q. Sure. Was it ever your understanding that MEI was  
15 waiving its rights to be paid directly by the clients?

16 A. No.

17 Q. And did the settlement agreement, security agreement  
18 and the related documents, did they give MEI extra protection,  
19 extra rights, an ability to be paid from the fee side as  
20 opposed to the client side?

21 A. That was our intent.

22 Q. Okay. Now, at the time that the settlement  
23 documents were executed, GB&S owed a great amount of money to  
24 DAT&K, I guess. Is that fair?

25 A. That's correct.

33

1 Q. Okay. notwithstanding that fact, you've just said  
2 it was your understanding that MEI was getting an interest in  
3 getting contingency fee money to pay this debt, if possible,  
4 or an extra way to get paid, right?

5 A. My understanding of the - the agreement that we  
6 executed with MEI was that it was additional collateral or  
7 additional security, if in fact they did not receive payments  
8 from the clients.

9 Q. Okay. And at the time that you executed it, was it  
10 your belief that there would be plenty of money to go around?

11 A. Yes.

12 Q. That, in fact, DAT&K could be paid, other creditors  
13 could be paid and MEI could be paid.

14 A. That was my understanding.

15 Q. And if the Phen-Fen cases in the third round had  
16 settled at the same - I don't - maybe rate or similar amounts  
17 as the cases that settled in the first and second round, would  
18 there have been plenty of money?

19 A. Yes.

20 Q. All right. Now, when the agreement was - the  
21 settlement agreement and the related documents, 8, 9 and 10,  
22 were signed, at the same time you entered into - or Gregory,  
23 Barton & Swapp entered into an agreement with the Texas firm;  
24 is that right?

25 A. That's correct.

34

1 Q. Okay. And let me have you look at Exhibit 25, which  
2 Mr. Jones has stipulated as admissible, and tell me if you  
3 recognize Exhibit 25.

4 A. Yes. It's a supplement to our referral agreement  
5 with the Texas firms.

6 Q. Okay. And if we go to the recitals, let's just make  
7 sure we've got the parties. Do we have Williams & Bailey and  
8 Blue McCarthy. We call those the Texas firms, right?

9 A. That's correct.

10 Q. Okay. And then it reference Gregory, Barton &  
11 Swapp, P.C., GBS. That's your old law firm, correct?

12 A. That's correct.

13 Q. Okay. And then we go down to the third Whereas  
14 clause, and it says: "Whereas the limited one-third attorney  
15 fee interest vesting in GBS is subject to and is limited by  
16 deductions for non-reimbursable client expenses relating to  
17 Phen-Fen cases."

18 Did I read that correctly?

19 A. Yes.

20 Q. Tell the Court what is a non-reimbursable client  
21 expense?

22 A. Non-reimbursable client expenses, as - as we defined  
23 them, meaning the Texas law firms, taken together as a whole,  
24 and Gregory, Barton & Swapp, were that there were certain  
25 expenses that we were going to have in pursuing this

35

1 litigation that would not be able to be reimbursed because it  
2 wasn't a cost that we could otherwise charge to the client.  
3 Things like the costs for the MEI lawsuit, costs for marketing  
4 that we had done collectively or - or separately. There may  
5 have been some travel expenses that we may not have been able  
6 to - to deduct. There are a lot of things that fall under a -  
7 a what we would consider a non-reimbursable expense.

8 Q. And, in fact, the expense for the initial  
9 screenings, the initial screenings, MEI got paid or was  
10 promised to be paid for those even those clients did not  
11 become clients of the firm, right?

12 A. That's correct. That would have been a non-  
13 reimbursable expense.

14 Q. Okay. And if we go down to the end of this  
15 paragraph, referring to non-reimbursable expenses, and we go  
16 up one, two, three lines on the left-hand side, it says - it  
17 is a reference to echocardiograms on behalf of Phen-Fen  
18 clients and potential clients. Do you see that?

19 A. I don't, I'm sorry.

20 Q. So it's the third Whereas clause.

21 A. Okay.

22 Q. Third line up from the bottom. There's a reference  
23 to "echocardiograms on behalf of Phen-Fen clients and  
24 potential clients." Do you see that?

25 A. Okay. Yes.

36

1 Q. And is that a reference in this paragraph about non-  
2 reimbursable client expenses to echocardiograms that could not  
3 be withheld from the client's side.

4 A. That - that's correct. Among other things, yes.

5 Q. Among other things, right. Okay. Now, if we go to  
6 the next page and we go down to subheading B, it says: "The  
7 Texas firm's contribution." Are you with me?

8 A. Yes.

9 Q. It says: "The Texas firms have agreed to contribute  
10 the sum of \$601,000 to cover the up-front payment in the MEI  
11 lawsuit."

12 Did I read that correctly?

13 A. Yes.

14 Q. Is it your understanding that reference to that  
15 \$601,000 is the same as the \$601,000 referenced in the  
16 settlement agreement?

17 A. That's correct.

18 Q. Okay. And then it refers to some other litigation  
19 that was going on, but if you'll read with me down to about  
20 the middle of the paragraph where it says "these payments."  
21 Do you see that? I can come -

22 A. Yes.

23 Q. Okay. It says: "These payments are case expenses  
24 that arise out of the representation of the Phen-Fen referral  
25 clients." In other words, these are non-reimbursable case

37

1 expenses, right?

2 A. That's correct.

3 Q. And, in other words, the \$601,000 is a non-  
4 reimbursable case expense, meaning it's not for full studies.

5 A. That would be correct.

6 Q. Then if we go to the next page, up at the top,  
7 there's a paragraph 4(a). Tell me when you're there.

8 A. Okay.

9 Q. Okay. And it says: "Texas firm's contribution and  
10 right to recoup." If we go down to about the middle of the  
11 third line down where there's a reference, \$730,000. Do you  
12 see that?

13 A. Yes.

14 Q. That's the figure that includes the \$601,000 and  
15 some other monies for the other litigation, correct?

16 A. Correct.

17 Q. And it says: "...is and will be considered a case  
18 expense that shall be recouped by the Texas firms for any  
19 division of attorney fees is made under the referral  
20 agreement."

21 Did I read that correctly?

22 A. Yes.

23 Q. And does that mean that this case expense is  
24 recovered out of the attorney fee or contingency fee side as  
25 opposed to the client cost side?

38

1 A. Yes.

2 Q. And that gets recouped by the Texas firms before the  
3 contingency fees are divided.

4 A. That's correct.

5 Q. Okay. And then if we go down to the bottom of  
6 paragraph 4(a), maybe the second line up, it says: "Will be  
7 recouped before any division of attorney fees." Do you see  
8 that?

9 A. Yes.

10 Q. Again, a reference to these - the \$730,000,  
11 including the six oh one, being attorney fees, not client  
12 costs.

13 A. That's correct. We took those out of attorneys  
14 fees.

15 Q. Right. Okay. And then if we go down to subsection  
16 5 - and I want you to go to about the middle of the paragraph,  
17 and it says: "Then the Texas firms will have the options."  
18 Tell me if you're there.

19 A. Okay.

20 Q. It says: "Then the Texas firms will have the option  
21 of paying directly to MEI out of the remaining attorney fees,  
22 if any. The balance owed to MEI under the MEI note as a case  
23 expense." Did I read that correctly?

24 A. Yes.

25 Q. And is that consistent with your understanding of

39

1 the settlement documents, which is MEI was gaining an  
2 additional right to be paid out of the attorney fees.

3 A. That's correct.

4 Q. Okay. And then if we go to the next page, paragraph  
5 7, and if you can go with me under subsection - subsection  
6 little (c). Are you there?

7 A. Yes.

8 Q. "The disbursement by the Texas firms' payment of any  
9 MEI note payments by the Texas firms utilizing any money  
10 that's withheld as a case expense from attorney fees."

11 Again, is that a reference to attorney fees,  
12 contingency fees, as opposed to something from the client  
13 side?

14 A. That's - that's correct. This is referencing the  
15 reconciliation.

16 Q. Okay. Now, under the settlement agreement, there  
17 were also a series of orderly payments that were made to MEI.  
18 Do you recall that?

19 A. Yes.

20 Q. And we asked you in your deposition whether or not  
21 those payments were made as advance payments on full studies  
22 or something else. Do you recall that?

23 A. I - I believe that that was asked me, yes.

24 Q. Okay. Well, I'm sorry. Let me just ask it a  
25 different way. Those advance payments - or, excuse me, those

40

1 quarterly payments, were those being paid for full-studies or  
2 were those being paid for something else?

3 A. For something else.

4 Q. All right. And, in fact, isn't it true, under the  
5 settlement agreement, you got some additional benefits for our  
6 clients - for your Phen-Fen clients from MEI that MEI was not  
7 otherwise obligated to provide, correct?

8 A. That's correct.

9 Q. And that included redoing some measurements or  
10 adding measurements to a number of the full studies; is that  
11 right?

12 A. Yes.

13 Q. And that included agreeing to testify for a certain  
14 rate, which I can't remember. But MEI formally agreed to  
15 testify, if necessary, correct?

16 A. Yes.

17 Q. And were those potentially a good benefit to the law  
18 firms and the clients?

19 A. Without the information that was provided to us by  
20 MEI, we would not have been able to make a basis for these -  
21 for these cases. It was the - that and the - I mean, that  
22 referencing the - the echocardiogram study and the testimony  
23 of the cardiologist that was actually reading those studies  
24 formed the basis for which DAT&K has been compensated in these  
25 cases and for which our clients were compensated. So, without

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1 that, we didn't have anything.

2 Q. Let me ask this: Did you ever explain to DAT&K, to  
3 Dan Tomic, what you've explained to the Court here today, that  
4 these escrow funds don't belong to GB&S, that they either have  
5 to go to MEI or they have to go to the clients?

6 A. We've made - we've made that abundantly clear  
7 repeatedly.

8 Q. Now, let me close by asking you to look at Exhibit  
9 14, which I believe has been stipulated to. And if you go  
10 to - it's title page 8 of 27, even though it's not the eighth  
11 page.

12 By the way, do you have an understanding this was  
13 a - an agreement reached by Gregory, Barton & Swapp, the Texas  
14 law firms and DAT&K with regard to this about \$900,000 that  
15 was withheld from the client side of the settlements?

16 A. Yes.

17 Q. Okay. And if we go to page 8 of 27, paragraph 2,  
18 next to the last sentence says: "Similarly, GBS, Barton and  
19 DAT&K have agreed to release any and all right, title and  
20 interest in or claim to the remaining \$442,768.03 held by  
21 Williams & Bailey, BM&N, plus accrued interest thereon from  
22 the trust account where the funds are being held, which  
23 Williams & Bailey, BM&N has agreed to pay to MEI."

24 Did I read that about right?

25 A. Yes.

42

1 Q. All right. Was that because Texas believed these  
2 were client costs that they didn't have a right to?

3 A. Absolutely.

4 Q. They didn't want to touch them?

5 A. That's my understanding.

6 Q. All right. Was it your understanding that, under  
7 the theory asserted by DAT&K in this case, if Texas had joined  
8 in that theory, Texas would have a claim to that \$442,000 that  
9 they gave to MEI?

10 A. Yeah. Based on that, yes.

11 Q. Yeah. But Texas never made that argument, did they?

12 A. No.

13 MR. MAGLEBY: No further questions, Your Honor.

14 THE COURT: Cross-examination?

15 CROSS-EXAMINATION

16 BY MR. JONES:

17 Q. Mr. Barton, I believe the first question or one of  
18 the first questions that your counsel posed to you asked you  
19 whether MEI rendered services to your law firm. Do you recall  
20 that question? I think your response was that, no, those  
21 services were rendered to the clients. Do you recall that?

22 A. I do recall that.

23 Q. Could I ask you to take a look at what is marked as  
24 Exhibit 10.

25 A. Okay.

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1 Q. And if you'll look at the preamble paragraph 2, Mr.  
2 Barton. Do you see that sentence?

3 A. I do.

4 Q. "In 2002, a dispute rose between the parties  
5 regarding the services provided by MEI to Mr. Barton." Is  
6 that correct?

7 A. I see that sentence.

8 Q. Did you execute this agreement?

9 A. Yes, I did.

10 Q. And the parties to this agreement were - the Barton  
11 there is Gregory, Barton & Swapp and you personally, correct?

12 A. I don't know what that Barton is referring to, if  
13 it's me personally or if it's the law firm.

14 Q. We can look at the defined term in paragraph 1, Mr.  
15 Barton.

16 A. Okay.

17 Q. It defines it as Gregory, Barton & Swapp and Keith  
18 L. Barton.

19 A. Okay.

20 Q. And so you executed a settlement agreement which  
21 states expressly that the services were not provided to the  
22 clients but, instead, were provided to your law firm.

23 A. The services were provided to our clients.

24 Q. So can you tell me why you executed an agreement  
25 that expressly recites that they were provided to your firm?

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1 A. It was the settlement of a dispute.

2 Q. Why would - why would this preamble be necessary to

3 the settlement of a dispute, Mr. Barton?

4 A. I don't know. You'd have to talk to the attorneys

5 that drafted it.

6 Q. Did you review it before you signed it?

7 A. I'm sure I must have.

8 Q. And I take it this did not catch your attention -

9 A. It did not, because -

10 Q. - or to make a change in it.

11 A. I didn't catch my attention because the services

12 were provided to our clients.

13 Q. Mr. Barton, the dispute that you settled here, it

14 related to how much the - whether the clients really ought to

15 pay, whether any money was owed to MEI for the work that they

16 had done; is that correct?

17 A. No.

18 Q. Mr. Barton, didn't - wasn't there a dispute - we can

19 go back and look at your testimony. The dispute was that -

20 regarding the quality of the work performed by MEI; is that

21 correct?

22 A. That's correct.

23 Q. And so did you, at any time, tell MEI that you

24 were - you were not going to pay or MEI was not going to be

25 paid for the work that they had performed because of the

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1 problems with the work that they had done?

2 A. I think in the process of our dispute that that -

3 there was an allegation of that, yes.

4 Q. And that's what resulted in - in the litigation

5 between Gregory, Barton & Swapp and MEI; is that correct?

6 A. I don't know why Mr. - Mr. Fiddler filed suit.

7 You'd have to ask him.

8 Q. Well, isn't it true that Mr. Fiddler filed suit to

9 collect the amount he claimed Gregory, Barton & Swapp owed him

10 for the work that he had done?

11 A. I guess that could have been part of that.

12 Q. Okay. Was there some other part of it, Mr. Barton?

13

14 A. I don't know. Do you have a question?

15 Q. Well, you said that was part of it. I'm asking what

16 other claims that were made. If that was not - if that was

17 not all of it, what was it?

18 A. You'd have to ask Mr. Fiddler.

19 Q. You're not familiar with the pleadings or the

20 documents in that litigation?

21 A. I don't think it deserves a response, so...

22 Q. So there was a dispute about whether MEI should be

23 paid but, yet, the clients were not a party to that dispute,

24 were they?

25 A. Not to my knowledge.

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1 Q. Were they a party to the litigation?

2 A. No.

3 Q. Were they a party to the settlement agreement?

4 A. Not to my understanding.

5 Q. So to the extent that you claim it was their money

6 and it was their obligation to pay MEI, why were they not a

7 party to this and why were they not a party to the lawsuit?

8 MR. MAGLEBY: Objection. Lacks foundation.

9 THE COURT: Overruled. It's cross-examination.

10 You can answer, sir.

11 THE WITNESS: Okay.

12 Could you restate the question?

13 MR. JONES: Let's provide some foundation.

14 Q. Mr. Barton, were the clients made a party to the

15 lawsuit between MEI and Gregory, Barton & Swapp?

16 A. No.

17 Q. Were the clients a party to the settlement agreement

18 and mutual release marked as Exhibit 10?

19 A. No.

20 Q. I believe you testified that you believe the that

21 clients had an obligation to pay MEI and it was their money.

22 If that is the case, why were they not a party to this

23 agreement or party to the lawsuit?

24 MR. MAGLEBY: Same objection.

25 THE COURT: Overruled.

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1 THE WITNESS: I don't - I don't know why Mr. Fiddler

2 didn't - didn't see them individually, if that's your

3 question.

4 Q. (By Mr. Jones) Did you think that the clients

5 should be added as parties to this?

6 A. What benefit would that be?

7 Q. I believe, Mr. Barton, your argument is that it's

8 their money; why wouldn't they be a party to determining how

9 much of their money ought to be paid to MEI.

10 A. So you're saying that I should have third-partied in

11 all my clients?

12 Q. Your testimony is it's their money. I don't want to

13 be argumentative. Let's move on, Mr. Barton.

14 Mr. Barton, could I ask you to take a look at

15 Exhibit 7.

16 A. Okay.

17 Q. You testified about this document earlier; is that

18 correct?

19 A. Yes.

20 Q. Do you recall that? Is this the only written

21 agreement between MEI and Gregory, Barton & Swapp regarding

22 the services to be provided by MEI?

23 A. I believe that it's the only written agreement.

24 Q. And does this agreement set forth the terms of

25 payment for the services to be provided by MEI?

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1 A. It sets forth the fee schedule.  
2 Q. Well, let's look more closely. It says: "Payment  
3 will be due 30 days upon receipt of statement."  
4 A. That was for echo screenings.  
5 Q. Actually, if you read the prior sentence, you'll see  
6 that it also includes the full workup and there's no reference  
7 in that sentence to just echos.  
8 A. Well, I can tell you what our practice was, and our  
9 practice dealt with echo screenings.  
10 Q. But the document that you signed provided for  
11 payment of both 30 days upon receipt of an invoice from MEI.  
12 A. I believe that we're here today to - to have  
13 evidence given about what the intent of the parties was. And  
14 I can tell you that the intent of the parties and the  
15 operation and how we - how we actually operated with these  
16 agreements was something different.  
17 Q. And so what you're telling me is that the intent of  
18 the parties is contrary to the express terms of their written  
19 agreement.  
20 A. I'm telling you that the - the intent of the parties  
21 was different than this document and, in practice, it was  
22 different as well.  
23 Q. Mr. Barton, did MEI provide monthly invoices to  
24 Gregory, Barton & Swapp?  
25 A. I believe that they did.

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1 Q. So they billed Gregory, Barton & Swapp on a monthly  
2 basis in accordance with this agreement.  
3 A. Well, we received the - the billing statements, but,  
4 again, those statements were for our clients.  
5 Q. What do you mean the statements were for your  
6 clients?  
7 A. The statements that we would have received would  
8 have been a - an obligation of our clients and so we would -  
9 would have - we would have duly noted that and...  
10 Q. You would - so you received an invoice from MEI.  
11 How did Gregory, Barton & Swapp account for an invoice once it  
12 was received?  
13 A. We put it in as a - as a - something that needed to  
14 be paid out on the file ultimately so that we would be able to  
15 protect that.  
16 Q. Did you - did you include it in the accounts payable  
17 of Gregory, Barton & Swapp?  
18 A. I don't remember.  
19 Q. You don't recall?  
20 A. I don't recall.  
21 Q. Is it possible that you included in the - on your  
22 general ledger or your balance sheet as an accounts payable  
23 owing by Gregory, Barton & Swapp?  
24 A. I have no idea.  
25 Q. Can I ask you, Mr. Barton, to take a look at the

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1 contingency fee agreement.  
2 A. Which number -  
3 THE COURT: Which exhibit is that?  
4 MR. JONES: The form. It's 11.  
5 THE COURT: 11?  
6 THE WITNESS: Okay.  
7 Q. (By Mr. Jones) Do you know whether this was the  
8 form of document that was used with respect to all the Phen-  
9 Fen clients?  
10 A. I believe that it was, yes.  
11 Q. Do you know?  
12 A. Sitting here today telling you, yes, I would tell  
13 you that - that there was an agreement like this executed in  
14 every case.  
15 Q. Was this your standard form contingency fee  
16 agreement or was it modified for the Phen-Fen fee cases -  
17 Phen-Fen cases?  
18 A. It was modified for the Phen-Fen cases.  
19 Q. And can you tell me what modifications were made to  
20 this document for the Phen-Fen cases?  
21 A. Under the scope of services generally let, that's -  
22 that's left blank. And, here, we've modified it to say that  
23 it - that "we're representing you in a matter of your claims  
24 regarding the taking of weight loss pills."  
25 Q. Right. You mentioned that earlier. Were there any

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1 other changes to this document from your standard form?  
2 A. There was a change to the - to the fees. Normally,  
3 we would have a scaling fee that would go from thirty-three  
4 and a third percent to forty percent. There would be language  
5 in there that talked about that. We took all of that out and  
6 put 40 percent because we knew that all of these cases were  
7 going to litigation.  
8 Q. Mr. Barton, do you see anywhere in this agreement  
9 where you informed clients as to whether or not - as to - that  
10 they would be responsible for paying MEI for the work done,  
11 even if there were not a recovery in the case?  
12 A. I don't see anything like that in this document, but  
13 I think there's plenty of other documents that have that  
14 information in it.  
15 Q. But there's nothing in this document that tells them  
16 that, is there?  
17 A. It says: "You agree to pay all costs, disbursements  
18 and expenses owed by you in connection with this matter." I  
19 would consider that - that the MEI matter would be an expense  
20 that the client was obligated to pay.  
21 Q. Doesn't it - doesn't it go on to say: "If we reach  
22 a settlement or judgment on your - your behalf, or if our  
23 services are terminated for any reason by you"? So there's a  
24 qualifier there, isn't there, Mr. Barton?  
25 A. Yes.

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1 Q. So there was no disclosure to clients that they  
2 might be liable to MEI if there was no recovery.  
3 A. That's not true.  
4 Q. No disclosure in this document?  
5 A. That mischaracterizes my testimony.  
6 Q. Okay. Well, would you point me to the disclosure in  
7 this document?  
8 A. In this particular document -  
9 Q. In this document.  
10 A. Okay. In this particular document, no. But if you  
11 take the - the documents as a whole, which I think we're -  
12 we're here to do that today, to get to the bottom of it, to  
13 get to the truth of what it is, then - then taken as a whole,  
14 then those documents expressly indicate that those are the  
15 clients' responsibility.  
16 Q. Well, the only two documents we have here today, Mr.  
17 Barton, are Exhibit 11 and Exhibit 21, which address the echos  
18 and do not even address the full studies.  
19 Are you familiar with the Rule 1.5 of the Utah Rules  
20 of Ethics?  
21 A. I think that there's another document in here that  
22 we looked at earlier today.  
23 Q. We did, but it wasn't admitted, Mr. -  
24 A. This lien agreement. You - in your objection,  
25 though, you mischaracterized my testimony earlier. You said

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1 that - that there was - that I had indicated that I did not  
2 look through my office for this. What I indicated to you, and  
3 it's in my deposition, was that it was complicated, because  
4 we'd a split of the firm. We'd asked the receiver on various  
5 occasions to help us get back all of the documents that were  
6 with Gregory, Barton & Swapp. And I can tell you that every -  
7 that this document, this lien agreement, was signed in every  
8 single file, in every single case.  
9 Q. Mr. Barton, we've been through that and that's not  
10 my question.  
11 A. No, we haven't. Your objection -  
12 THE COURT: Whoa, whoa. Let me assert some control  
13 here. He asks the questions, you answer the questions, then  
14 we'll get through this. This isn't an argument. Okay?  
15 Let's go ahead.  
16 Q. (By Mr. Jones) Mr. Barton, I'm just asking whether  
17 there's any disclosure in this contingency fee agreement, any  
18 obligation on the part of the client to pay in the event  
19 there's not a settlement or recovery.  
20 A. If the agreements are taken as a whole and - and all  
21 of the forms are integrated like they're supposed to be, there  
22 is disclosure, yes.  
23 MR. JONES: Your Honor, I'm try - tried to just get  
24 through a simple question. There is no -  
25 THE COURT: Why don't you restate the question.

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1 Q. (By Mr. Jones) Mr. Barton, can you point me to  
2 anywhere in Exhibit 11 where it is disclosed to the client  
3 that they will be liable to pay MEI even in the event there is  
4 no recovery in the case.  
5 A. That document taken in conjunction with other  
6 documents that were signed at the time that we - that the  
7 services were provided indicate that to the client, yes.  
8 There as disclosure.  
9 Q. Mr. Barton, is it in this document or some other  
10 document?  
11 A. It's in other documents that were signed.  
12 Q. But it's not in Exhibit 11, correct?  
13 A. (No response.)  
14 Q. Correct?  
15 A. Again, if you take it in conjunction with the other  
16 documents, then it's there.  
17 MR. JONES: We'll move on, Your Honor.  
18 Q. Mr. Barton, could I direct your attention to  
19 paragraph 6 of that document?  
20 A. Which document is that?  
21 Q. Paragraph 5, I'm sorry, of Exhibit 11.  
22 A. Okay.  
23 Q. Do you see that? This is the provision whereby the  
24 client has granted you a lien on their recoveries. Do you see  
25 that?

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1 A. I see that.  
2 Q. And that lien, it states, is to secure unpaid costs.  
3 Do you see that? "Unpaid costs or attorneys fees at the  
4 conclusion of my services."  
5 A. I see that.  
6 Q. Okay. Well, I believe your testimony is MEI was an  
7 unpaid cost or there were substantial unpaid costs to MEI -  
8 A. I think my testimony was -  
9 Q. - at the end of these cases, correct?  
10 A. - that they could have been an unpaid cost.  
11 Q. And they actually were an unpaid cost, weren't they,  
12 Mr. Barton?  
13 A. They were an expense that was associated with the  
14 file.  
15 Q. How is that distinguished from an unpaid cost,  
16 Mr. Barton?  
17 A. A cost is - is something - and we've been over this.  
18 We've talked about this for years now, Roger. We talked about  
19 it Texas years ago when we satt down and talked with the Texas  
20 firms, we've talked about it in my deposition. But a cost is  
21 something that we actually pay out on a file.  
22 Q. And would you point me to where it says that in  
23 your - in paragraph 5?  
24 A. I'm telling you what the practice is.  
25 Q. If it was actually paid - if it was actually paid

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1 out, it wouldn't be an unpaid costs, would it?

2 A. It would be an unreimbursed cost, an unpaid cost.

3 Q. Let's take a look at paragraph 4(b) for a moment.

4 Do you see that? You testified about it earlier.

5 A. Yes.

6 Q. Mr. Magleby asked you a question that said "that

7 paid in advance." But, actually, the language is "paid or

8 advanced." Do you see that?

9 A. I see that.

10 Q. Okay. So we have two - we have two possibilities

11 here; one, reimbursement for a cost that was paid by GB&S,

12 correct? And another possibility is one that was advanced by

13 GB&S. Do you see that?

14 A. I see that.

15 Q. Okay. And so there - there's something other than

16 just cost that GBS had paid that is to be reimbursed here;

17 isn't that true, Mr. Barton?

18 A. I don't know what you're referring to.

19 Q. Well, you tell me. What does "advanced" mean in

20 this document?

21 A. If we advanced a cost. In other words, if we paid

22 for a - a medical record or if we paid for a deposition, that

23 would be a - an advanced cost.

24 Q. Mr. Barton, isn't it true that an advanced cost

25 would also include obligations that the firm had incurred?

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1 Isn't that an advance?

2 A. I don't believe so. Not in the context that you're

3 trying to use it in.

4 Q. Why not, Mr. Barton?

5 A. Because that's not the way it's done in practice.

6 Q. Let's go back through this.

7 You have entered into an agreement with MEI to pay

8 them on a monthly basis for the services that they provide.

9 We looked at that. And we'll -

10 A. They were services that - for the - for the echo

11 screenings not for the full studies. This agreement was only

12 to operate as additional collateral for the full studies.

13 Q. Additional collateral for the full studies? I'm

14 sorry, Mr. Barton, I have no -

15 A. Additional security, I'm sorry.

16 Q. What agreement?

17 A. The agreement that you're referring to, the

18 settlement agreement.

19 Q. No. I'm not referring to the settlement agreement.

20 I'm referring to the November 14th, 2000 agreement where MEI -

21 THE COURT: Could you state that exhibit number

22 again?

23 MR. MAGLEBY: Exhibit 7, I believe.

24 MR. JONES: It's Exhibit 7, Your Honor. I'm sorry.

25 THE COURT: All right.

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1 Q. (By Mr. Jones) Exhibit 7 is your November 14, 2000

2 agreement with MEI.

3 A. That's a fee schedule.

4 Q. Okay. And so - but Gregory, Barton & Swapp was

5 obligated to pay MEI, was it not?

6 A. We were directed by our clients to pay MEI, yes.

7 Q. Was GBS obligated by contract to pay MEI?

8 A. I did not believe so, no.

9 Q. How do you explain this agreement that says exactly

10 that, Mr. Barton?

11 A. No. 7?

12 Q. Yes.

13 A. We were obligated to pay for - we were obligated to

14 pay for echo screenings, we were obligated to - to help with

15 the readings, we were obligated to pay some employee salaries,

16 but the echo full workups were to be paid by our clients.

17 Q. Aren't they - aren't the echo full workups expressly

18 provided for in this agreement, Mr. Barton?

19 A. They are - they are expressly provided for in this

20 agreement, yes. But I can tell you that, in practice, it was

21 something completely different.

22 Q. We have the agreement, but that was not the

23 practice.

24 A. I've already testified to that, yeah.

25 Q. Mr. Barton, could I ask you to take a look at

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1 Exhibit 6.

2 A. Okay.

3 Q. You've seen this exhibit before, haven't you,

4 Mr. Barton?

5 A. I believe I have.

6 Q. And is this the proof of claim that MEI filed in the

7 receivership case?

8 A. It appears to be.

9 Q. And attached to that, Mr. Barton, are the note and

10 security agreement that your counsel asked you about earlier,

11 correct?

12 A. Yes.

13 Q. Okay. If you'll note, Mr. Barton, the amount of the

14 claim is less than the - is less than the face amount of the

15 note, which would indicate, Mr. Barton, I believe, some

16 payments were made on this note after its execution. Can you

17 tell me what payments were made on this note after its

18 execution?

19 A. I think I've already testified that there was - that

20 there were payments that were made, six hundred and one

21 thousand.

22 Q. Mr. Barton, \$601,000 was paid prior or concurrently

23 with the execution on this note, and so that was not made

24 after the payments were credited to the note. So I'm asking

25 about payments that were made on the note itself.

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1 A. I believe that there were some payments made.  
2 Q. Do you know the amount of those payments?  
3 A. I don't.  
4 Q. Do you know who paid those payments?  
5 A. It would have been Williams and Kurker and the Texas  
6 firms collectively.  
7 Q. Williams Bailey would have paid those amounts?  
8 A. Yes.  
9 Q. If I could direct your attention to Exhibit 14,  
10 which is labeled page 2 of 27.  
11 MR. JONES: Your Honor, I would note this is not a  
12 complete agreement; it is the agreement that was noticed in  
13 the case and there were confidentiality issues, so it is a  
14 redacted agreement.  
15 THE COURT: Thank you.  
16 Q. (By Mr. Jones) You see page 2 of 27?  
17 A. Yes.  
18 Q. At the time this agreement was entered into in 2007,  
19 the Whereas at the top of the page says "Since the execution  
20 of the note, MEI has been paid \$372,510.22." Do you see that?  
21 A. I see that.  
22 Q. And you signed this agreement, did you not,  
23 Mr. Barton?  
24 A. I did.  
25 Q. Okay. So are those the payments that were made on

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1 this note by the Texas firms?  
2 A. I don't know if they were payments on the note or  
3 what they were for, but they were payments that were made.  
4 Q. It says they were payments on the note. Do you  
5 dispute that?  
6 A. I have no reason to.  
7 Q. That recital also, Mr. Barton, recites that  
8 \$87,974.16 was taken from the clients' settlements. Do you  
9 see that?  
10 A. I see that.  
11 Q. So those - those monies were taken from client funds  
12 and paid on the MEI note; is that correct?  
13 A. I don't know if that's correct or not. It just says  
14 that \$87,974.16 was recovered from client settlements.  
15 Q. Isn't that what that means, Mr. Barton?  
16 A. I don't know what it means.  
17 Q. Did you read it before you signed it?  
18 A. I'm sure I did.  
19 Q. So you have no idea what that means.  
20 A. Not sitting here today.  
21 Q. Okay. If monies were not paid from - it says  
22 \$87,974.16 was recovered from the client settlements, what was  
23 the source of the remainder of the \$372,000 in payments?  
24 A. I have no idea.  
25 Q. You have no idea.

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1 A. I didn't make the payment.  
2 Q. Okay. Well, why would Williams Bailey make a  
3 payment?  
4 A. I don't know. You could have asked them. You could  
5 have deposed them.  
6 Q. You don't know why Williams Bailey made payments of  
7 \$372,000 on an obligation on which you are personally  
8 obligated. You don't know that.  
9 A. I believe that there's something in here that  
10 indicates that there were quarterly payments to be made,  
11 Roger.  
12 Q. So was it made pursuant to an agreement between  
13 Gregory, Barton & Swapp, MEI and you?  
14 A. I suspect.  
15 Q. Do you know, Mr. Barton, whether those payments were  
16 considered, to the extent they were not from client portion of  
17 the recovery, were those loans to Gregory, Barton & Swapp?  
18 A. I think that they were considered non-recoverable  
19 expenses that were paid out.  
20 Q. Okay. To the extent that they were considered a  
21 non-recoverable expense, would they have been - would that  
22 amount have been subtracted from the attorneys fees that  
23 Gregory, Barton & Swapp otherwise would have been paid?  
24 A. No. They would have been - they would have been  
25 subtracted from the full - from the full amount of the

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1 attorneys fees before attorneys fees were split by all the  
2 parties.  
3 Q. The monies that - you're talking about the \$372,000.  
4 Are you suggesting that, to the extent that those were not  
5 from client recoveries, that 50 percent of that was Gregory,  
6 Barton & Swapp and 50 percent of that was the Texas firms?  
7 A. I don't - I don't know what percentage. I have no  
8 reference point for that.  
9 Q. Mr. Barton, we can look at the settlement agreement.  
10 But the settlement agreement provides that those payments are  
11 going to be recovered off the top from -  
12 A. I think that's what I said.  
13 Q. - the attorneys fees that otherwise would have been  
14 paid Gregory, Barton & Swapp.  
15 A. No. They were off the top from the attorneys fees  
16 from all of the parties.  
17 Q. Go back and take a look at that just a second,  
18 Mr. Barton. What about the \$601,000 that the Texas firms  
19 advanced to make payment to MEI? Was that \$601,000 deducted  
20 from the amount of attorneys fees that otherwise would have  
21 been paid Gregory, Barton & Swapp?  
22 A. I think that that \$601,000 was treated as a non-  
23 recoverable expense.  
24 Q. Well, didn't - didn't you go through with your  
25 attorney on Exhibit 25 that the six oh one and the other

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1 expenses paid added up to \$730,000 were going to come back in  
2 full to - to the Texas firms from your portion of the  
3 attorneys fees?

4 MR. MAGLEBY: Your Honor, I'll just object. I'm not  
5 Mr. Barton's attorney.

6 THE COURT: Well, I - I caught that. I understand  
7 that.

8 THE WITNESS: Yeah. I think it indicates in here  
9 that those are a - a non-recoverable expenses.

10 Q. (By Mr. Jones) I direct your attention to page 3 of  
11 that document is document 25. Exhibit 25, 4(a). Do you see  
12 that provision?

13 A. I do.

14 Q. Doesn't it expressly say that that money's coming  
15 off the top before any division of attorneys fees?

16 A. I think that's what I've already stated.

17 Q. Okay. So the effect of Williams Bailey making  
18 payments for you on the note or providing the \$601,000  
19 ultimately reduced the amount of attorneys fees or the amount  
20 of money that GBS would receive under the referral agreement;  
21 isn't that correct?

22 A. Yes.

23 Q. And that, in turn, reduced the amount of money that  
24 DAT&K would receive, because it had a security interest in  
25 those amounts; isn't that correct also?

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1 A. The only thing that DAT&K had a security interest  
2 was in our attorneys fees and any costs that they had  
3 advanced.

4 Q. We can look at the prior court's order and the  
5 documents on that. That's inconsistent with both. But -

6 MR. MAGLEBY: Your Honor, objection. Argumentative.

7 THE COURT: Sustained.

8 Q. (By Mr. Jones) Mr. Barton, let's just assume for a  
9 moment that - that DAT&K had a security interest in all monies  
10 to be paid Gregory, Barton & Swapp under the referral  
11 agreement. The fact that those payments were made to MEI  
12 reduced the amount that would have been paid to GBS under the  
13 referral agreement and reduce the amount that would have been  
14 paid to DAT&K.

15 A. DAT&K had an interest in our attorneys fees. They  
16 also had a - they also had an interest in the - in the costs  
17 that we had advanced.

18 Q. That's not my question, Mr. Barton.

19 A. I understand, but -

20 Q. My question is: Did these payments result in a  
21 corresponding reduction in the amounts that would have been  
22 paid Gregory, Barton & Swapp and, in turn, pay DAT&K, assuming  
23 they had a security interest in all amounts -

24 A. Well, non-recoverable expenses -

25 Q. - owed on the referral agreement?

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1 A. Non-recoverable would have reduced everybody's -  
2 would have reduced everybody's take. But DAT&K has received  
3 and is continuing to receive the monies that they contracted  
4 for.

5 Q. They've continued to receive the monies they  
6 contracted for.

7 I believe the answer to the question is yes. There  
8 is a reduction in the amount that was paid as a result of  
9 those advances to MEI, correct?

10 A. DAT&K has an interest in our attorneys fees and they  
11 have an interest in the - in the amounts or the expenses that  
12 we would have actually advanced on behalf of the client.

13 Q. Mr. Barton, can I ask you to take a look at Exhibit  
14 1. Is that the master loan and the security agreement between  
15 Advocate, DAT&K's predecessor, and Gregory, Barton & Swapp?

16 A. It appears to be.

17 Q. If I could ask you to take a look at page 3. The  
18 Description of Collateral. Do you see that, Mr. Barton?

19 A. (No response.)

20 Q. If you read paragraph 1 under the description of the  
21 collateral, can you tell me where that description would limit  
22 DAT&K - DAT&K's collateral to just the expenses that they  
23 advanced?

24 MR. MAGLEBY: Objection. Calls for a legal  
25 conclusion, document speaks for itself.

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1 THE COURT: You can ask what his - you could ask for  
2 his understanding on this. That's happened throughout this  
3 proceeding. So he can answer the question.

4 THE WITNESS: My understanding is that they have a  
5 right to legal and other services rendered and to be rendered  
6 for costs and expenses advanced.

7 Q. (By Mr. Jones) Advanced by Gregory, Barton & Swapp;  
8 isn't that correct?

9 A. Advanced by Gregory, Barton & Swapp.

10 Q. Thank you. Can I ask you to take a look at - take  
11 a look at Exhibit 9. I believe you testified about this  
12 document earlier, Mr. Barton. Do you recall it? Is this the  
13 security agreement that Gregory, Barton & Swapp executed in  
14 favor of MEI?

15 A. Yes.

16 Q. And this was executed pursuant to the settlement  
17 agreement that we discussed earlier, correct, Mr. Barton?

18 A. Yes.

19 Q. Okay. Could I call your attention to a couple of  
20 paragraphs in this document. Do you see paragraph E on page  
21 2?

22 A. Okay.

23 Q. There's a definition of permitted liens there that  
24 expressly provides that the security interest being granted  
25 MEI is subordinate to various liens. Do you see that?

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1 A I see that  
2 Q And tath would have included Advocate/DAT&K would  
3 it not?  
4 A Yes The purpose of this - this security agreement  
5 was to provide additional security  
6 Q It would have - those permitted liens that were  
7 senior to this interest would have included Advocate/DAT&K  
8 isn t that correct Mr Barton?  
9 A Yes  
10 Q Now Mr Barton was Gregory Barton & Swapp in  
11 default of its obligations to Advocate/DAT&K at the time this  
12 document was executed?  
13 A I believe that they were - they could have been I  
14 don t know  
15 Q I call our attention to paragraph 2 11 which  
16 expressly says "Barton herein provides notice that Advocate  
17 Capital s assignee is taking the position that Barton is in  
18 default with respect to the loans made to Barton " Do you see  
19 that?  
20 A I m sorry where are you at?  
21 Q Paragraph 2 11 on page 5  
22 A I m sorry what was your question?  
23 Q It expressly provides that you disclose to MEI that  
24 Gregory Barton & Swapp was in default of its obligations to -  
25 A I think that we said Barton herein provides notice

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1 that Advocate Capital Inc s assignee has taken the - the  
2 position that Barton is in default with respect to certain  
3 loans made to Barton "  
4 Q Do you dispute that?  
5 A Why would I?  
6 Q Okay And what was the - what were the defaults  
7 under Gregory Barton & Swapp s obligations to Advocate/DAT&K?  
8 A I don t remember  
9 Q Had Gregory Barton & Swapp received any  
10 correspondence regarding those defaults from Advocate or  
11 DAT&K?  
12 A I m sure that they probably had  
13 Q Can I ask you to take a look at Exhibit 10  
14 Mr Barton We looked at this earlier  
15 Could I call our attention to paragraph 12 on what s  
16 labeled 4 of 15 Do you see that?  
17 A Yes  
18 Q And this recites that - the note and that is the  
19 note the MEI note recites collateral for that note Do you  
20 see that?  
21 A I see that  
22 Q And it recites that that collateral is a defined  
23 term the Barton Phen Fen fees Do you see that?  
24 A I don t know where you re  
25 Q Do you see the defined term "Barton Phen Fen fees"?

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1 It s used elsewhere in the document I just want to make sure  
2 you see that definition  
3 A Okay  
4 Q Okay? Now the Barton Phen Fen fees refers to  
5 monies - to "attorneys fees and other monies Do you see  
6 that?  
7 A Where are you reading from?  
8 Q The note shall be secured by all fees or other  
9 monies that shall become due Barton " Do you see that?  
10 A I see that  
11 Q And that s defined as the Barton Phen Fen fees  
12 A Again this -  
13 Q Mr Barton I m just going to -  
14 A - this provision of the security interest never  
15 really came into play And I - I testified to that in my  
16 deposition  
17 Q Yeah Well -  
18 A - this was additional security  
19 Q I m trying to ask the questions Mr Barton  
20 A Okay  
21 Q In paragraph 15 I believe you testified earlier  
22 that there was a mechanism or an agreement whereby the acres  
23 firms Williams Bailey would make payments on the MEI note  
24 Do you recall that?  
25 A Yes

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1 Q Is this that agreement? Paragraph 15 of the  
2 settlement agreement?  
3 A No it is not that agreement  
4 Q Okay What does this agreement provide for this  
5 paragraph 15 provide for Mr Barton?  
6 A This paragraph 15 provides that in the event that  
7 everyone else has been paid - in other words the other  
8 security interests that are ahead of - of MEI have been paid  
9 And there are additional fees that are left over That those  
10 additional fees before the shareholders take any money those  
11 additional fees will be used to satisfy this note  
12 Q Mr Barton that s not what paragraph 15 provides  
13 Why don t we take a look at it  
14 MR MAGLEBY Objection Your Honor Argumentative  
15 THE COURT Sustained  
16 Q (By Mr Jones) Mr Barton doesn t paragraph 15  
17 provide a mechanism for making quarterly payments on the MEI  
18 note by the Texas firms? Isn t that what paragraph 15 does?  
19 A I don t see that  
20 Q You don t see that?  
21 A I don t believe that s what it means no  
22 Q What do you believe paragraph 15 means?  
23 A I ve already told you what I believe paragraph 15  
24 means  
25 Q It says If the monies are not sufficient to pay

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1 any quarterly payment as it becomes due, then Barton will make  
2 up the difference."

3 The quarterly repayments referred to there, aren't  
4 they the MEI note, Mr Barton? It's the quarterly payments on  
5 the MEI note

6 A I don't see where you're reading, no.

7 THE COURT: What page are you on, Mr Jones?

8 MR. JONES: Pardon?

9 THE COURT: Which page are you on?

10 MR. JONES: I am on the bottom of page 15, the  
11 bottom of page 5 and the top of page 6.

12 THE COURT: Okay. Thank you

13 Q. (By Mr Jones) Why don't you just read that  
14 provision, Mr. Barton?

15 THE COURT: You're, again, a little bit vague on the  
16 provision you want him to read.

17 MR. JONES: Paragraph 15, Your Honor.

18 THE COURT: We're at paragraph 15. Do you want him  
19 to read the whole paragraph or just -

20 MR. JONES: Yes.

21 THE COURT: - down to the part that - okay.

22 MR. JONES: Paragraph - the entire paragraph.

23 THE WITNESS: Okay.

24 Q. (By Mr. Jones) The fourteen - the \$1,420.65, the  
25 monies to be withheld there, were those monies to be withheld

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1 from the clients' portion of the recovery?

2 A. Those were - those were monies that were supposed to  
3 be withheld from the clients' portion of their money, yes.

4 Q. Okay.

5 A. As directed by the clients.

6 Q. And if there wasn't enough money - if there wasn't  
7 enough withheld from the client portion, it says here that  
8 Barton would make up the difference. Do you see that?

9 A. I see that, yes.

10 Q. But you testified earlier that Gregory, Barton -  
11 neither you nor Gregory, Barton & Swapp made any payments on  
12 the notes. Did the Texas firms make up that deficiency on the  
13 quarterly payments

14 A. Well, if there was a deficiency, first of all I  
15 mean, the - if any payments were made, they were withheld from  
16 client funds, as directed by the clients And so those were  
17 client funds to pay for the echocardiogram studies. If there  
18 was a deficiency on that amount - in other words, if the total  
19 amount that was - that was withheld from the clients did not  
20 amount to the payment that was to be made, then there was an  
21 additional amount that would have been due.

22 Q. Right. And this provided that Gregory, Barton &  
23 Swapp would pay it. But I'm asking you. Did they do that?

24 A. I did not, but - I didn't make a payment, no.

25 Q. Did Gregory, Barton & Swapp make a payment?

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1 A. I don't believe that Gregory, Barton & Swapp made a  
2 payment

3 Q. Did the Texas firms make up that shortfall?

4 A. I believe that they did.

5 Q. And then the Texas firms then recouped that money,  
6 as we talked about earlier, correct?

7 A. That's correct

8 Q. Now, Mr Barton, it uses the term "As an  
9 accommodation, the Texas firms will withhold and set aside  
10 from the Barton Phen-Fen fees earned through their  
11 representation." So the monies withheld and set aside and  
12 included within the definition of Barton Phen-Fen fees were  
13 the amounts deducted from the client portion of the  
14 settlement; isn't that correct?

15 A. Those weren't fees. If it was deducted from the  
16 clients' portion of the settlement, it was client money that  
17 was directed to be paid.

18 Q. I'm just asking about the definition of Barton Phen-  
19 Fen fees in the document.

20 A. That's my definition

21 Q. The document - that's your definition?

22 A. My definition and the definition that everybody in  
23 this, except for you, Roger, has indicated that - I mean, the  
24 Barton Phen-Fen fees doesn't - doesn't have anything to do  
25 with - with these amounts that have been withheld by the

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1 clients.

2 THE COURT: Are you going to have a lot more  
3 questions for Mr. Barton?

4 MR. JONES: Just a few more.

5 THE COURT: I'm just wondering about taking a recess  
6 here.

7 MR. JONES: That's fine

8 THE COURT: Okay. Why don't we take a ten-minute  
9 recess. I'll come back in the courtroom at a quarter till.

10 MR. JONES: Thank you.

11 THE COURT: Court's in recess.

12 (Recess, 10:34 to 10:45 a.m.)

13 THE COURT: Those present when the court recessed  
14 are again present. Mr Barton remains on the witness stand  
15 under oath.

16 You may proceed.

17 MR. MAGLEBY: Your Honor, we were just discussing -  
18 we weren't sure if Mr Barton, had actually been sworn

19 THE COURT: I had him come up and face the clerk and  
20 raise his right hand, yes.

21 MR. MAGLEBY: Okay. Both Roger and I forgotten  
22 that, so...

23 THE COURT: Okay. All right. Thank you.

24 Q. (By Mr. Jones) Mr. Barton, I only have a few more  
25 questions And, again, I'm looking at Exhibit 10 that we were

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1 looking at before the break.

2 Do you see paragraph 14 in that agreement,  
3 Mr. Barton? It's on page 5 of 15.

4 A. Yes.

5 Q. This reflects, Mr. Barton, does it not, that you  
6 were aware and MEI was aware that the execution of the  
7 security agreement in favor of MEI was prohibited under your  
8 agreements with Advocate; isn't that correct?

9 A. I believe that this - this paragraph speaks for  
10 itself.

11 Q. And despite that prohibition in your loan documents  
12 with Advocate, you and MEI decided to go ahead and execute the  
13 security agreement; is that correct?

14 A. We disclosed to - to MEI exactly what the nature of  
15 our security agreements were with Advocate Capital and we made  
16 no warranties regarding their proprietary or enforceability.

17 Q. Mr. Barton, could I ask you to look at the last  
18 sentence of paragraph 15 on the following page? Do you see  
19 that? "In the event legal action by any third party...?"

20 A. I do.

21 Q. Does that refer to Advocate?

22 A. I don't believe so.

23 Q. Okay. Other than Advocate, who did you believe -  
24 who did the parties believe might object to these costs taken  
25 from client funds and paid to MEI, who did the parties believe

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1 would object to that, if not Advocate?

2 A. I'm - I'm not sure what you're referring to. There  
3 were no costs that were taken from client funds. The clients  
4 directed us to pay for the - for the echocardiogram studies  
5 that were performed.

6 Q. I understand, Mr. Barton. We've already talked  
7 about the \$1,420.65 being withheld from client recoveries,  
8 have we not?

9 A. We have, yeah.

10 Q. Okay. And the next sentence says: "In the event of  
11 legal action by a third party which would take issue with the  
12 withholding or disbursing of these funds," I'm just simply  
13 asking you if that sentence does not reflect a concern about  
14 Advocate having a claim to those funds, who - what does it  
15 reflect?

16 A. Well, we had been in protracted litigation with MEI  
17 for several years. And so it's - it's quite possible that we  
18 just needed this issue resolved for the benefit of our  
19 clients, for the benefit of the litigation going forward.  
20 Because, without that, we would not have been able to - to  
21 settle these claims.

22 Q. That's not my question, Mr. Barton. My question is:  
23 Who, other than Advocate would have had a right to object to  
24 the payment of these funds to MEI?

25 A. I think it was - I don't know if - I don't know that

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1 we drafted that specifically with Advocate in mind. I don't  
2 believe that we did. I think it was, really, any litigation.

3 Q. Okay. Can you think of anyone else -

4 A. Does it matter?

5 Q. Yes. I'm just - you can - if the answer's no, the  
6 answer's no, but I - I'm asking whether you can think of  
7 anyone else who would have potentially asserted a claim to  
8 those funds other than Advocate.

9 A. Well, I can tell you that it wasn't drafted with  
10 Advocate in mind, so...

11 Q. You can tell me that, even though you don't know -  
12 you can't think of anyone else who might have had a claim.

13 A. (No response.)

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

15  
16 THE COURT: Thank you.

17 Redirect.

18 MR. MAGLEBY: Yes, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. MAGLEBY:

21 Q. At the beginning of the examination, Mr. Jones asked  
22 you whether part of the dispute with MEI was originally over  
23 the quality of the echocardiograms. Do you recall that?

24 A. Yes.

25 Q. Was part of the dispute also over payment for other

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1 things, such as several hundred thousand dollars with of  
2 initial screenings, \$139,000 that MEI had paid out of pocket  
3 to Dr. David Rawling and other out-of-pocket costs?

4 A. Yes.

5 Q. And were those the costs reflected in the \$601,000  
6 payment?

7 A. They were taken into - to consideration with that,  
8 yes.

9 Q. Okay. And then Mr. Jones asked you some questions  
10 about the language, the specific language of Exhibit 7 and  
11 what the meaning of that document was. Do you recall that?

12 A. Yes.

13 Q. Did you draft that document?

14 A. I did not.

15 Q. Aside from that document, the prior two rounds, had  
16 you worked with a handshake with Mr. Fiddler?

17 A. I had.

18 Q. And even though you signed the document that's  
19 Exhibit 7, you had an understanding as to what the terms of  
20 your agreement with Mr. Fiddler were beyond the scope of that  
21 document, correct?

22 A. Yes.

23 Q. And if we take a look at this Exhibit 7, paragraph -  
24 second paragraph from the bottom, it says: "It is my  
25 understanding that the echo screening will be included in the

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1 price of an echo full weekup should an echo full workup be  
2 necessary."

3 Does that tmean the echo screening, then, would not  
4 be immediately due and payable by the GBS firm?

5 A. That's what - that's how we used that in practice,  
6 yes.

7 Q. Right. And then it says: "Payment will be due 30  
8 days upon receipt of statement." Is that a reference to the  
9 echo screenings that are not included in the cost of a full  
10 workup?

11 A. That's correct.

12 Q. And is that how you proceeded?

13 A. Yes.

14 Q. All right. And, in fact, when you got billing  
15 statements from MEI, they reflected both initial screenings  
16 and the full studies, right?

17 A. Yes, they did.

18 Q. But what you upaid was the initial screenings.

19 A. That's correct.

20 Q. Now, you were asked some questions about the amount  
21 of money withheld from this third roiund. Do you recall that?

22 A. Yes.

23 Q. Or withheld from the client side, I should say.

24 All right. Let's go to Exhibit 24. And tell me  
25 when you're there.

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1 Is it your understanding that the amount that was  
2 actually withheld from the client side was not the \$1,400  
3 reflected in the settlement agreement but, rather, it was  
4 \$953, as reflected on Exhibit 24?

5 A. That's correct.

6 Q. Okay. So when Mr. Jones asked you about the \$1,400  
7 reflected on the settlement agreement, that \$1,400, is that  
8 reflected or intended to be just client costs or is it  
9 actually an additional way for MEI to be paid from attorney  
10 fees if everybody else is paid first?

11 A. It is an additional way - or was it was intended to  
12 be an additional way for MEI to be repaid once everybody else  
13 had been paid.

14 Q. All right. You were asked some questions about the  
15 lien agreement, and I want to ask some follow-up.

16 Is it my understanding, based on what Mr. Jones told  
17 you, that you believe that there are additional copies of the  
18 lien agreement in the possession of either Gregory, Barton &  
19 Swapp or your old partners that you haven't been able to  
20 locate?

21 A. That's correct.

22 Q. And you've asked them for them and they haven't  
23 provided them?

24 A. We've asked them for them repeatedly. We've - we've  
25 asked the receiver to provide the recods that were being kept

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1 by Gregory & Swapp repeatedly, and we haven't been able to get  
2 anything.

3 MR. MAGLEBY: With that, Your Honor, going back to  
4 the lien agreement, whatever exhibit - I think it was 17 - the  
5 documents are unavailable. I didn't realize that Mr. Barton  
6 had tried to get those.

7 THE COURT: Well, I - I know that he hasn't tried,  
8 but I guess you're the proponent of the document. Have you  
9 tried to get it? I guess that's the - that's the issue.  
10 Don't you have to do that under the ten hundred series of the  
11 Utah Rules of Evidence? Are you supposed to - since you're  
12 sponsoring the document, don't you have to try and get it and  
13 then explain why you couldn't get it?

14 Seems to me this document would have been pretty  
15 easy to get over that -

16 MR. MAGLEBY: I guess -

17 THE COURT: - over that attorney-client privilege  
18 objection with a - with a motion to compel or something of  
19 that nature and a subpoena. But, then, I'm just - I'm just  
20 speculating, so I acknowledge that. So - so go ahead and  
21 respond to my question.

22 MR. MAGLEBY: Your Honor, I guess you know the rule  
23 far better than me. That's what I'm realizing as I stand here.  
24 And so I will defer to the Court. But my point is this: I  
25 have just learned they really were not available, that Mr.

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1 Barton tried to get them. He is also a proponent of the  
2 document in that sense. And if the receiver was asked and  
3 refused to turn them over, and if Mr. Barton's former partners  
4 were asked and refused to turn them over, that's why we don't  
5 have them. I think that is enough to meet the rule.

6 THE COURT: Well, of course, the receiver, I don't  
7 think, would have any ability to turn them over or not. Maybe  
8 he would, but - but all it would take, it seems to me, would  
9 be a subpoena. And then when they said it's attorney-client  
10 privilege and you bring in a document like that and claim it's  
11 privileged, I don't think there's much chance of that argument  
12 succeeding.

13 What effort - was there any effort made by the - by  
14 the claimant in this matter, MEI, to obtain those documents,  
15 I guess is what I'm asking.

16 MR. MAGLEBY: Well, Your Honor, there are two  
17 claimants. There is also DAT&K.

18 THE COURT: No. I mean, the -

19 MR. MAGLEBY: DAT&K -

20 THE COURT: - the claimant - the claimant - okay.

21 Let's - don't - bad choice of - bad choice of words, okay?

22 MR. MAGLEBY: The propounding - propounding the  
23 document, yes.

24 THE COURT: Yeah. Yeah. MEI. Was there any - was  
25 there any attempt by MEI to obtain these documents by subpoena

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1 or getting the assistance of the court?

2 MR. MAGLEBY: There was not, because Mr. Jones asked

3 for all documents -

4 THE COURT: Okay.

5 MR. MAGLEBY: - and -

6 THE COURT: Now, now what about the argument that

7 Mr. Jones has, essentially, opened the door for this coming in

8 through his examination.

9 MR. MAGLEBY: I think that as well. I mean, he

10 asked Mr. Barton about it and what they meant and whether or

11 not clients really agreed to this.

12 THE COURT: Right.

13 MR. MAGLEBY: So I think, by cross-examining him,

14 certainly the testimony as to what the practice and procedure

15 and whether a lien was given comes in. And I think the

16 document comes in as well to refresh Mr. Barton's recollection

17 and rehabilitate his testimony.

18 THE COURT: Okay. Mr. Jones, do you want to respond

19 on admissibility of - I mean, it could be admissible for a lot

20 of different reasons, if nothing else, but -

21 MR. JONES: I did not inquire of Mr. Barton as to

22 the lien agreement, Your Honor.

23 THE COURT: It's Exhibit 11, was it, or -

24 MR. JONES: I inquired of the contingency fee

25 agreement.

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1 THE COURT: Oh, you're right. Exhibit -

2 MR. JONES: I did not inquire of the lien agreement.

3 Mr. Barton offered testimony non-responsive to my questions

4 about the lien agreement -

5 THE COURT: Right.

6 MR. JONES: - but I did not.

7 Your Honor, I couldn't tell you what Mr. - I cannot

8 tell you what Mr. Barton has done since I tried to get these

9 documents, but I can tell you that in his deposition testimony

10 he told me he did look for the documents.

11 "Were you able to locate any lien agreements executed by

12 the Phen-Fen clients?

13 "I know that we located at least one.

14

15 "Okay. Were you able to locate any others?"

16 His answer was: "I don't know."

17 Mr. Barton never once testified that these documents

18 were unavailable or he had sought information and couldn't get

19 it. He said he didn't know.

20 MR. MAGLEBY: Your Honor, he has now testified to

21 that effect, but -

22 THE COURT: Well, at this point, I think the

23 documents are out there fairly easily available if proper

24 discovery had been done. I'm going to continue to sustain

25 that objection. And Mr. Jones is correct, I - I was thinking

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1 that we were - that he had asked a bunch of questions on - I

2 was referring, actually, to - to the contingency fee contract

3 in my mind. So I apologize for that.

4 Okay. Go ahead.

5 MR. MAGLEBY: Sure.

6 Q. Mr. Barton, if you can turn to Exhibit 11. And

7 Mr. Jones asked you questions about paragraph 5, the attorneys

8 lien. Do you see that?

9 A. Yes.

10 Q. Is it your understanding that the attorneys lien

11 only applies to costs that were paid - actually paid out-of-

12 pocket by the firm?

13 A. That's my understanding.

14 Q. And, of course, to your attorney fees.

15 A. That's correct.

16 Q. Right. And in this case - Mr. Jones asked you a

17 number of questions about how this could be interpreted. Do

18 you recall that?

19 A. Yes.

20 Q. Under Mr. Jones' interpretation that you would be

21 entitled to money out of the client side that you had not -

22 that GBS had not already paid, is it your understanding that

23 would be a violation of your ethical obligations?

24 A. That is my understanding.

25 Q. And your interpretation that you would not be

87

1 entitled to get that money from the clients if you hadn't

2 actually written a check, is that consistent with your ethical

3 obligations?

4 A. It is consistent with those ethical obligations.

5 The only exception to that is when we have a lien from a

6 health care provider or a services provider would the client

7 has signed off on, the services provider has signed off and we

8 have signed off on stating that we will withhold money from

9 their settlement, and that's what we have in the case of - of

10 the Mobile Echo studies.

11 Q. But that lien is not a lien in favor of Gregory,

12 Barton & Swapp, monies owed to Gregory, Barton & Swapp, it's

13 a lien in favor of the service provider, correct?

14 A. That's correct.

15 Q. All right. Let's go to Exhibit 14, page 2. First

16 Whereas clause.

17 "Whereas, since the execution of the MEI note, MEI's

18 been paid \$372,510.22, of which only \$87,974 was recovered

19 client settlements." Do you see that?

20 A. Yes.

21 Q. It doesn't say that this \$372,000 plus the eighty-

22 seven was an advance on the full studies, does it?

23 A. No.

24 Q. And this eighty-seven thousand, this was comprised

25 of a number of \$953 withholdings, as we saw in Exhibit 24, not

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1 the \$1,400, as we saw on the settlement agreement, correct?

2 A. I don't know.

3 Q. Okay. Fair enough.

4 Mr. Jones asked you some questions about non-

5 recoverable expenses which were taken, quote, "off the top" by

6 Texas. Do you recall that?

7 A. I do.

8 Q. Did DAT&K ever sue Texas to get those monies?

9 A. Not to my knowledge, no.

10 Q. Did they ever make a claim on those monies?

11 A. Through the court system?

12 Q. Yeah.

13 A. Not that I'm aware.

14 Q. Okay. And then you were asked - let's see here,

15 Exhibit 25. The \$601,000, that was treated as a invoice

16 convenient non-recoverable expense not as a client advance; is

17 that correct?

18 A. That's correct.

19 Q. Okay. And it got accounted for between Texas on the

20 one hand and GB&S on the other hand, in the same way as any

21 other non-recoverable expense, correct?

22 A. That's correct.

23 Q. Now, with regard to that, other non-recoverable

24 expenses would include things like money you had paid to

25 advertisers, money you had paid to other providers of

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1 echocardiograms, money you had paid to copy services, those

2 kinds of things, right?

3 A. No. A non-recoverable expense would be something

4 that we could charge back to the client.

5 Q. Right. Okay. Got you. So with - but this expense,

6 the \$601,000 was treated as a non-recoverable expense, right?

7

8 A. Yes.

9 Q. Okay. So give me two or three expenses of a non-

10 recoverable expense. Advertising?

11 A. Advertising costs.

12 Q. Okay. Give me another example of a non-recoverable

13 expense.

14 A. Litigation costs -

15 Q. Okay.

16 A. - that are an outside litigation.

17 Q. Okay. How about - I'm trying to think of something

18 you wouldn't charge your clients for. I mean, your general

19 overhead. Do you - did you have to rent any space that was a

20 non-recoverable cost?

21 A. If we did have to rent space, that would be a non-

22 recoverable cost.

23 Q. Okay.

24 A. It would be very difficult to allocate it between

25 clients.

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1 Q. Right. Right, right, right. And DAT&K has never

2 sued or claimed or argued that, for example, the non-

3 recoverable advertising costs shouldn't have been paid and

4 that they ought to get that money back, have they?

5 A. Not - not to my knowledge.

6 Q. And you said some of these litigation costs. They

7 have never sued any of the people that got that money to get

8 it back, have they?

9 A. Not that I'm aware of.

10 Q. Okay. So if we were going to treat the non-

11 recoverable \$601,000 the same as these other non-recoverable

12 expenses taken off the top by Texas, we would have expected to

13 see DAT&K sue all those other companies?

14 A. I would imagine.

15 Q. Okay. And Mr. Jones asked you questions about,

16 "Well, isn't it true, Mr. Barton, that when Texas withholds

17 this money off the top, that decreases the amount of money

18 ultimately available to GBS for a contingency fee," right?

19 A. That was the question, yeah.

20 Q. Okay. But when DAT&K did this loan, they knew you

21 were working with Texas, right?

22 A. Yes.

23 Q. And they had at least every opportunity to see your

24 referral agreements and all of the agreements under which they

25 were ultimately going to be able to secure repayment, right?

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1 A. That's correct.

2 Q. So they knew that Texas had a right to withhold

3 money off the top that their security agreement wouldn't

4 attached to, wouldn't you say?

5 A. I believe that they understood that, yes.

6 Q. Okay. And they still made the loan anyway, didn't

7 they?

8 A. Yes, they did.

9 Q. You were asked a couple of questions about Exhibit

10 1, the master loan and security agreement between GB&S and

11 DAT&K. And I don't need you to look at it; just one simple

12 question.

13 Was MEI a party to that agreement?

14 A. No.

15 Q. And then you were asked some questions about the

16 lien or the collateral that was given as part of that Exhibit

17 1. Has it ever been your understanding that the collateral

18 you were pledging applied to costs that came out of the client

19 side? Under Exhibit 1?

20 A. Under Exhibit 1. My understanding was is that, if

21 we advanced a cost that - that those advanced costs, once

22 taken out of the clients' portion would have been a part of

23 the collateral that DAT&K had. But a lien like this for a

24 service provider such as MEI has, DAT&K - and we haven't -

25

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1 that's not an advanced cost from us it's not a cost that  
 2 we've paid for out of pocket I mean to me, the ultimate  
 3 proof is Did he get paid? And he hasn't been paid  
 4 Q And with regard to, let's say, monies advanced by  
 5 Texas or paid by Texas, you couldn't give a security agreement  
 6 in favor of that, could you?  
 7 A How do you mean?  
 8 Q You couldn't sign on behalf of Texas?  
 9 A No  
 10 Q And DAT&K knew that when they made you the loan  
 11 A I believe that they understood that  
 12 Q Certainly, Texas is not a party to Exhibit 1,  
 13 correct? The Texas law firms?  
 14 A No  
 15 Q Let's take a look at Exhibit 10 And it was page 4  
 16 of 15 Paragraph 12, MEI's Security Interests. Are you with  
 17 me?  
 18 A Yes  
 19 Q It says "The note shall be secured by all fees or  
 20 other money that shall become due to Mr Barton " Do you see  
 21 that?  
 22 A I do  
 23 Q With regard to the client costs, those don't become  
 24 due to Barton unless you've actually advanced them, correct?  
 25 A That's correct

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1 Q And just to make sure I understand what you're  
 2 saying, let's go to pages 5 and 6 Let's talk about the  
 3 Echocardiogram Expense Hold-Back  
 4 So the hold-back money, to the extent it's not paid  
 5 out of client costs, is extra contingency fee money And what  
 6 you're saying is, by giving MEI what you gave it here, MEI  
 7 would get paid before the partners of the law firm  
 8 A My understanding - and I was - I may have been  
 9 confused earlier about paragraph 15 and paragraph 12 But my  
 10 understanding when we put this note together was that MEI  
 11 would have an additional security interest for being paid  
 12 And my understanding, or the way that I understood it, the way  
 13 it was explained to me was that, if everything went well that  
 14 everybody would be paid And if there was a shortfall - in  
 15 other words, if there weren't sufficient monies that had come  
 16 from the clients to pay down this note that we had agreed to  
 17 pay with MEI, that - that this was additional security  
 18 interest for MEI so that, before the partners of the firm got  
 19 paid that money would go to - to satisfy this obligation  
 20 Q And I don't know if you remember this or not, but do  
 21 you remember that one of MEI's concerns was, "Hey we'd better  
 22 get paid before Barton gets paid"?  
 23 A I remember that there was a discussion about that  
 24 Q Sure And the way that this is set up, was it your  
 25 understanding, if, for example, say, some of the Phen-Fen

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1 cases came in and they were big winners and DAT&K and  
 2 everybody else got paid off, but all of the cases hadn't been  
 3 settled, so MEI hadn't been paid out of every little client  
 4 settlement and you had extra money as a result of that and  
 5 these other security interests had been taken care of then  
 6 was it your understanding that extra money had to be paid out  
 7 under the note?  
 8 A Yes  
 9 Q That didn't happen, did it?  
 10 A It hasn't happened so far  
 11 MR MAGLEBY All right No further questions, Your  
 12 Honor  
 13 THE COURT Thank you  
 14 Recross-examination?  
 15 RECCROSS-EXAMINATION  
 16 BY MR JONES  
 17 Q Just one follow-up  
 18 Mr Barton, when the \$601,000 was paid pursuant to  
 19 the settlement agreement, you'll recall did that - did that  
 20 satisfy Gregory, Barton & Swapp's obligation with respect to  
 21 the screenings?  
 22 A My understanding is that it did satisfy that fore-  
 23 screenings that had taken place where we didn't have follow-up  
 24 full echo study  
 25 Q What about - what about where you had - what about -

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1 so that had been paid So the monies that came in after that  
 2 on the note would have had to relate to full studies would  
 3 they not?  
 4 A Full studies Full studies and, I think under our  
 5 fee schedule up here in Exhibit 7, I think that my  
 6 recollection is is that what we did is, if we had a - if we  
 7 had an echo - a screening or a pre-screening echo that didn't  
 8 turn into a full study, then we were obligated to pay that  
 9 right away If it turned into a full study, then we included  
 10 that cost of the screening in the full study  
 11 Q I understand But in your - when Mr Magleby asked  
 12 you a question about the \$372,000, you said that that was non-  
 13 applicable to the full studies But it was wasn't it,  
 14 because the screens had been paid at the time those payments  
 15 were made  
 16 A Which three hundred and twenty thousand are you  
 17 referring to?  
 18 Q The question he asked you, Mr Barton was in  
 19 relation to Exhibit 14 top of the second page, 2 of 27 He  
 20 asked you whether that \$372,000 related to the full studies,  
 21 and you said no But it does, doesn't it Mr Barton?  
 22 A It says that since the execution of the MEI note  
 23 MEI has been paid \$372,000 It doesn't say that that money  
 24 has been paid pursuant to the MEI note It says that \$87,974  
 25 was recovered from client settlements

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1 Q. Right. All of that related to full studies, did it  
2 not, Mr. Barton?

3 A. No.

4 Q. Okay. Then what payments would have been made if -  
5 the echoes had been paid for, all we have left is the full  
6 studies. So what would that have been applied to if not the  
7 full studies, Mr. Barton?

8 A. The - in other words, the \$372,000 that's - that  
9 it's referencing here?

10 Q. Yes, Mr. Barton.

11 A. Yeah. I don't believe it's - it's referencing full  
12 studies. I think the \$87,974, which was recovered from client  
13 settlements has to do with full studies.

14 Q. And the - MEI wasn't owed any money for the echo  
15 screening at this point in time other than those that were  
16 incorporated into the full studies; isn't that correct?

17 A. I don't - I'm not sure what - what the time frame  
18 was that you're talking about here.

19 Q. But you testified that the echoes, other than those  
20 incorporated into the full studies, had been paid, did you  
21 not?

22 A. What I said was that the - the pre-screening  
23 echoes - the pre-screening echoes were part of our settlement  
24 agreement. If it - if it moved on, if the case moved on and  
25 it had a pre-screening echo, then that pre- screening echo was

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1 pulled up into the full-screen echo and it wasn't due at the -  
2 at that time.

3 Q. So - Mr. Barton, I'll just ask one last time. So  
4 the \$372,510.22 had to relate to the full studies, did it not?

5 A. I don't believe that's what it says.

6 Q. I didn't ask you what it says. I asked you: Didn't  
7 the \$372,000 and change relate to the full studies?

8 A. If you can give me an accounting of it, I'd be happy  
9 to - look at that and answer your question.

10 Q. What else could it have related to, Mr. Barton, if  
11 not the full studies? Give me an alternative explanation for  
12 that payment.

13 A. It's - I don't have a context or a reference for it.

14 Q. You have no alternative explanation for that?

15 A. No. It's not that I don't have an alternative, it's  
16 just that I don't have - I don't have any information that  
17 you've given me that I can intelligently answer it.

18 MR. JONES: Thank you, Mr. Barton.

19 THE COURT: Redirect?

20 MR. MAGLEBY: Yes.

21 REDIRECT EXAMINATION

22 BY MR. MAGLEBY:

23 Q. Mr. Barton, with regard to what these quarterly  
24 payments were for, a large part of it was interest, right?

25 A. That was my understanding.

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1 Q. And at the same time, under the settlement  
2 agreement, you got MEI to agree to do additional measurements  
3 on echoes, correct?

4 A. That's correct.

5 Q. And you didn't have MEI's measurements or - you  
6 didn't have these additional measurements on the echoes at the  
7 time, did you?

8 A. No. And that was part of the problem. Without  
9 those, we would not have been able to settle those client  
10 cases because we would not have had the proof.

11 Q. And that was important.

12 A. It was critical. The \$10 million that - that DAT&K  
13 has received so far is a direct result of Mr. Fiddler and  
14 Mobile Echocardiogram.

15 Q. And those - and that work.

16 A. And that work that they performed.

17 Q. And we looked at Exhibit 25, and you can look at it  
18 if you want to, but this is the agreement between your firm  
19 and you and Texas about how this money paid to MEI is going to  
20 be treated between the firms. Do you recall that?

21 A. Yes.

22 Q. And the quarterly payments treated under Exhibit 25  
23 is non-recoverable expenses, correct?

24 A. Yes.

25 Q. Not allocated to full study, are they?

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1 A. No, they would not have been allocated to full  
2 studies.

3 Q. Okay. So treated just the same as a non-recoverable  
4 expense from an advertising agency or a television station or  
5 a radio station in terms of how it was literally accounted for  
6 between the firms.

7 A. That's correct.

8 Q. All right. And to your knowledge, has DAT&K sued  
9 any of those entities to try to get the money back?

10 A. Not that I'm aware.

11 MR. MAGLEBY: No further questions, Your Honor.

12 THE COURT: Any recross?

13 All right.

14 Thank you, sir. You may stand down.

15 May this witness be excused or would you like him to  
16 remain?

17 MR. MAGLEBY: I think we would like him to remain,  
18 because I'm a pessimist, but...

19 THE COURT: All right, sir. Thank you.

20 MR. MAGLEBY: Your Honor, we would call Alan Fidler.

21 THE COURT: Very well, then. Sir, would you please  
22 come up and face the clerk and raise your right hand.

23

24

25

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1 ALAN FIDLER,  
2 called as a witness by Mobile  
3 Echocardiography, being first duly  
4 sworn, was examined and testified  
5 on his oath as follows:  
6 THE COURT: Please have a seat.  
7 DIRECT EXAMINATION  
8 BY MR. MAGLEBY:  
9 Q. Mr. Fidler, even though we know who you are, could  
10 you please state your name for the record.  
11 A. Alan Eugene Fidler.  
12 Q. And, Mr. Fidler, what is your business?  
13 A. My business is doing echocardiograms for several  
14 hospitals, doctors and clinics throughout a multi-state area.  
15 Q. And do you operate under a business name or a  
16 corporate entity?  
17 A. I do. Mobile Echocardiography, Inc.  
18 Q. And is your wife a co-owner in that company?  
19 A. She is.  
20 Q. Okay. And does - and what's the name of your wife?  
21 A. Diane Fidler.  
22 Q. Diane Fidler. And does she help you do the work  
23 that you do in that company sometimes?  
24 A. She does the accounting and billing for the echoes  
25 that I do.

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1 Q. Okay. And for how many years - well, strike that.  
2 Let me ask a better question.  
3 When did you first start business as MEI or Mobile  
4 Echocardiography?  
5 A. In 1987.  
6 Q. And tell us briefly what MEI does.  
7 A. MEI contracts with - as I mentioned, hospitals,  
8 clinics and doctors throughout the area to perform  
9 echocardiogram tests on their patients. And we do it on a  
10 mobile basis. We take our -  
11 Q. You go - go to the patient.  
12 A. Yes. We go to the clinic, hospital or office and I  
13 take my machine in - it's about 500 pounds - and we use an  
14 exam room where we do the test and then we take the readings  
15 from that test to a cardiologist to be read. That document  
16 from the cardiologist, his interpretation, is then sent back  
17 to the doctor and then he bases his treatment of that patient  
18 on that echocardiogram test.  
19 Q. And just tell the Court briefly, if you would, some  
20 of the physicians or facilities for which you've done  
21 echocardiograms.  
22 A. I did echoes for the Utah Heart Clinic, the LDS  
23 Cardiologists, their group, for over ten years. I've done all  
24 of Hill Air Force Base echoes, hospitals in Roosevelt, Vernal,  
25 Tooele, Nephi, Evanston. I've had 25 different cardiologists

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1 throughout the valley use my work. I've had over 150 doctors  
2 that refer patients to me to do their echocardiogram tests.  
3 Q. So safe to say you were doing echoes before you met  
4 Mr. Barton?  
5 A. About 12 years before.  
6 Q. Okay. Now, at some point in time, you came to sign  
7 an agreement with Mr. Barton to provide echocardiograms for  
8 the third round? Does that sound familiar?  
9 A. Yes, it does.  
10 Q. And will you just look at Exhibit 7 and tell us if  
11 that's the agreement relating to the third round?  
12 A. I don't have a book up here.  
13 Q. Oh.  
14 A. But I'm sure it is.  
15 MR. MAGLEBY: Mr. Barton, did you take (inaudible)?  
16 MR. BARTON: Yes, I did, sir.  
17 MR. MAGLEBY: Your Honor, if I may approach the  
18 witness.  
19 THE COURT: Yes.  
20 THE WITNESS: Thank you.  
21 Q. (By Mr. Magleby) And I'll ask the question again.  
22 Is Exhibit 7 the - an agreement between you on the one hand or  
23 MEI on the one hand and Gregory, Barton & Swapp and Keith  
24 Barton on the other hand for these echo services relating to  
25 the third round?

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1 A. Yes, it is.  
2 Q. Okay. Now, prior to that, you had done  
3 echocardiograms for the first and second round?  
4 A. Yes.  
5 Q. And that was on a handshake?  
6 A. Yes.  
7 Q. This third round - you've got this one-page  
8 agreement, but did you also have discussions with Mr. Barton  
9 about things that were not in the agreement?  
10 A. Yes, I did.  
11 Q. And was that fine with you?  
12 A. Yes.  
13 Q. Was it fine with Mr. Barton?  
14 A. Yes.  
15 Q. With regard to the initial screenings, was it your  
16 understanding, either under this agreement or otherwise, the  
17 initial screenings would be paid within 30 days and payment  
18 for the full studies would be deferred?  
19 A. That is correct. Keith and I agreed that I would  
20 not be paid for the full studies until the cases settled, at  
21 some point years in the future, and then I would be paid for  
22 the full-study echocardiograms.  
23 Q. Now, notwithstanding that fact, you did a bunch of  
24 initial screenings, right?  
25 A. We did approximately 10,000 screenings.

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1 Q Were you able to do 10 000 initial screenings by  
2 yourself?

3 A No No I had eight other technicians that I hired  
4 throughout the valley echoe technicians and four assistants  
5 to help them - to help all of us

6 Q Everybody did -

7 A We were very busy

8 Q And let me back up I missed a question Are you  
9 certified to perform echocardiograms?

10 A I am

11 Q Tell the Court what licenses or certifications you  
12 have

13 A I m registered with the ARDMS which is the American  
14 Registry for Medical Diagnostic Sonographers It s a national  
15 registry that you have to be accredited through in order for  
16 insurance companies to pay for echocardiogram tests done on  
17 their - their patients And that s a recurring - I have to  
18 qualify yearly to maintain that currency

19 Q Okay So prior to doing the work with Barton you  
20 did all or most of the echoes for MEI?

21 A I didn t do all of them I had another technician  
22 that -

23 Q Okay

24 A Yes

25 Q All right

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1 A A lot of them

2 Q Let me just cut to the chase You re hands-on you  
3 did a lot of the work yourself right?

4 A Yes I did

5 Q Okay I should have just asked that question  
6 And then let s talk a little bit about then the  
7 settlement agreement which is Exhibit 10 And if you go to  
8 the third page there s a reference to a \$601 000 payment Do  
9 you see that?

10 A Yes I do

11 Q All right And then I m going to ask you to turn to  
12 Exhibit 20 which is an email from me to Mr Barton s  
13 attorneys Do you recognize that document?

14 A I have seen it yes

15 Q Okay And did you see it and approve the settlement  
16 offer in it before we sent it out the door?

17 A I did

18 Q Very glad you said that  
19 And in fact wasn t it always our practice - well  
20 strike that I m not going to get into attorney-client  
21 communications

22 Let s go to the third page It says Option No 2  
23 Payable Now Do you see that?

24 A Yes

25 Q And it says "initial screenings with interest

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1 \$395 443 " Do you see that entry?

2 A I do

3 Q Those are the initial screenings that you billed Mr  
4 Barton for every month?

5 A Yes

6 Q And I take it at this point in time there were a  
7 number of those bills that hadn t been paid is that right?

8 A Yeah We were several months in arrears of getting  
9 payments for the screenings

10 Q Now when you didn t get paid for the screenings  
11 did MEI still have to go ahead and pay out of pocket its  
12 technicians and all of the other expenses associated with  
13 hiring six to eight technicians to work at Mr Barton s  
14 office?

15 A Yes I did

16 Q All right Was it important to you to get this  
17 initial screening money as part of the initial settlement  
18 payment?

19 A I don t understand the question I m sorry

20 Q Strike that I ll just go back

21 Let s go down to - let s go to "Technician Cost "

22 A Uh-huh (Affirmative )

23 Q Fourth entry down \$41 125 Can you tell us what  
24 that represents?

25 A On our contract that we signed Keith agreed to pay

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1 \$50 000 for one of my technicians that I hired and she hadn t  
2 quite worked a year so that represented her time -

3 Q Pro-rated

4 A Yes

5 Q And did you in fact pay that - you had already paid  
6 that \$41 125 out of pocket?

7 A Yes

8 Q Yes Okay And then there s one that says "Rawling  
9 readings paid directly by MEI \$139 400 " Do you see that  
10 entry?

11 A I do

12 Q Okay And then I m going to ask you to go to  
13 Exhibit 15 and go to the back of Exhibit 15 and flip a few  
14 pages forward four or five until you come to something  
15 called Statement of Account for David A Rawling

16 A It s way back there

17 Q I can come help you if you have trouble finding it

18 A Okay Got it right here

19 Q Okay And is that an invoice from David A Rawling  
20 that was given to Mobile Echo for reading full studies?

21 A Yes During the course of the third round I paid  
22 for Dr Rawling to read 697 echocardiograms at \$200 each And  
23 I made him kind of semi monthly payments the total of which  
24 adds up to \$139 400

25 Q So again that was an actual out-of-pocket expense

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1 that you had made.

2 A. Yes, it is.

3 Q. All right. Now, going back to Exhibit 20, there is

4 an entry on the third page for "Stat readings, \$2,900."

5 What's that entry?

6 A. Occasionally, Mr. Barton's office would ask for a

7 quick reading of one of their patients. Dr. Rawling was a

8 little behind with all the extra work that we gave him to do

9 on top of his regular study, and he agreed to expedite

10 readings on echocardiograms for a certain fee, and Mr. Barton

11 would ask us occasionally for an expedited reading on some of

12 his clients, and that's what that money represented that I

13 paid.

14 Q. So, in other words, you paid that out of pocket?

15 A. Yes.

16 Q. And you wanted that money back when you were

17 settling this case.

18 A. Well, I assumed I would get it back, yes.

19 Q. But, I mean, when we were settling, it was one of

20 the things that you specifically wanted back.

21 A. Oh, yeah. Yes.

22 Q. Okay. And then there's Materials, Costs Not

23 Reimbursed, \$1,075. Tell us in one or two sentences what that

24 reflects.

25 A. That reflects table paper, gowns, the super VHS

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1 tapes that we used were twenty bucks apiece, gel, just the -

2 the costs in performing the test itself.

3 Q. And, again, were those literally out of your pocket?

4 A. They are.

5 Q. Okay. And the next to the last entry, there's

6 another initial screening entry, \$69,625. Does that reflect

7 a request to be paid for additional initial screenings that

8 you had not been compensated for?

9 A. It does.

10 Q. All right. And then, finally, there's one that says

11 "Plane tickets, New York, \$1,000."

12 A. Uh-huh. (Affirmative.)

13 Q. Is that familiar to you?

14 A. Yes, it is.

15 Q. Does that \$1,000 number there have anything to do

16 with the \$1,000 that is tacked onto the \$600,000 reflected in

17 Exhibit 10?

18 A. That is the \$1,000 in addition to the six hundred.

19 Q. And tell me why that \$1,000 was added onto the

20 settlement agreement.

21 A. That was put there by my wife. Basically, we had

22 paid for plane tickets for you and I to travel back to New

23 York to depose cardiologists. They were non-refundable plane

24 tickets that came out of Mobile Echo. At the last minute, Mr.

25 Barton's firm agreed to a settlement and so we didn't have to

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1 fly back there. We lost the money for those and my wife was

2 very upset about that and wanted that back.

3 Q. Right. So -

4 A. So we added - I had to add that in.

5 Q. So does that \$1,000 directly tie this option No. 2

6 Payable Now to the settlement agreement?

7 A. Yes.

8 Q. All right. And, in fact, you recall that the offers

9 went back and forth, and every time they went back and forth,

10 we'd add a thousand dollars to it.

11 A. Yes.

12 Q. So the offer that - the next to the last offer was

13 \$600,000 and we added a thousand dollars to it.

14 A. That is correct.

15 Q. All right. Do you have any doubt that that \$601,000

16 that was paid to you as part of the settlement agreement was

17 for these other things that we've been talking about?

18 A. That's -

19 Q. For the initial screenings, the materials costs -

20 A. That covered what we have written down as our

21 expenses for the initial screenings.

22 Q. Okay.

23 A. And the readings for those full studies that I did.

24 Q. Okay.

25 Whoops, I'm on the wrong outline. I apologize.

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1 Now, with regard to the settlement agreement, which

2 I believe is Exhibit 10 - and you can turn to it, but let me

3 ask some background questions.

4 Are you a lawyer, Mr. Fidler?

5 A. No, I'm not.

6 Q. Did you draft the details of the language in the

7 settlement agreement?

8 A. No, I did not.

9 Q. Notwithstanding that fact, did you have an

10 understanding of, generally, what you were getting and what

11 you were giving as part of this settlement?

12 A. I do have a general understanding.

13 Q. Did you ever think you were giving up your right to

14 be paid directly from the client portion of a settlement? A

15 No. That - that was my guarantee, that I would be paid for

16 the echoes that I did and that this settlement agreement, as

17 Mr. Barton has testified, was another means whereby he could

18 pay me for the client costs for their echocardiograms.

19 Q. Okay. So additional protection for MEI?

20 A. Yes.

21 Q. And was one of the concerns when we were negotiating

22 this agreement, "Look, Keith Barton better not get paid before

23 I do"?

24 A. Definitely.

25 Q. Yeah. In fact, that was kind of a touchy point,

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1 wasn't it?

2 A Yeah At the time

3 Q All right And so the echocardiogram hold-back

4 that's reflected in here, was that an additional protection

5 for MEI?

6 A Yes

7 Q And have you ever waived your right to be paid

8 directly from clients?

9 A I have never waived that right I've known that

10 to -- in my understanding, to be mine and mine only, and no one

11 else can come in and claim the -- the compensation for the work

12 that I did

13 Q All right And then when we negotiated Exhibit 10 --

14 well, let's talk about -- Mr Jones was asking Mr Barton about

15 a term called Barton Phen-Fen Fees Do you recall that?

16 A Yes

17 Q Oh, and if you go to page 4 of 15, there it is in

18 paragraph 12

19 Now, at the time this settlement agreement was

20 executed, did you have any idea how much money Barton was

21 going to get in contingency fees as a result of the Phen-Fen

22 cases?

23 A We'd discussed that just generally, and the hopes

24 were that he would be getting upwards to \$100 million

25 Q And that was a discussion with Mr Barton?

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1 A Uh-huh (Affirmative )

2 Q You have to say yes or no

3 A Yes, it was

4 Q Okay And so did it seem a real possibility to you

5 at the time this settlement agreement was executed that Barton

6 might get enough contingency fees that he would be able to pay

7 you back faster than the cases settled?

8 A More than enough

9 Q Okay Now under the settlement agreement, you

10 agreed to do some additional things for Gregory Barton &

11 Swapp and the Texas firms, is that right?

12 A That's correct

13 Q All right Let's flip ahead to paragraph No 16,

14 which is on page 6 of 15 Tell me when you're there

15 A What exhibit?

16 Q Oh, I'm sorry, Exhibit 10

17 A Exhibit 10 Okay And paragraph 16?

18 Q Paragraph 16

19 A Okay

20 Q And it says 'Duplicate echocardiograms and

21 measurements' is that right?

22 A That's correct

23 Q And it says 'MEI will make one copy and perform

24 additional measurements on request for no charge up to 75

25 echocardiograms ' and then it goes on, is that correct?

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1 A Yes.

2 Q Now, tell me, what does it mean by doing -- or what

3 did it mean, in your understanding, that you would have to do

4 to put these additional measurements on these echocardiograms?

5 A Well, these were on VHS tapes, and so we would have

6 to find the tape, find the patient and go through that

7 person's echocardiogram to the point in the study where they

8 wanted extra or additional measurements made I could then

9 stop the recording and, through some post-processing of my

10 machine, be able to make these measurements and then copy them

11 off for the --

12 Q For the lawyers?

13 A -- for the attorneys Yes

14 Q Okay So did that take a fair amount of time?

15 A Oh, yeah

16 Q Longer -- more or less than doing a full study?

17 A Probably about the same

18 Q And how come?

19 A Well, to get the tape, to put it in, to wind it

20 forward and then to basically almost do the full study over

21 again with the measurements that were on there is a little

22 cumbersome and it takes some time to do that

23 Q And at the time how many tapes of full studies did

24 you have?

25 A Hundreds

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1 Q And in fact, originally, you had done something

2 like 3,000 full studies, your company?

3 A We did approximately 2500 full studies

4 Q Twenty-five Okay So, in your mind, was this a

5 significant contribution that you would be making to the Texas

6 firms and the Barton firm?

7 A Yes And as Keith said I mean, without those

8 measurements, their cases were in jeopardy and that's what we

9 needed to do

10 Q And you weren't obligated to make those measurements

11 under your prior agreement with Mr Barton? Exhibit 7?

12 A Correct

13 Q So you were given something extra

14 A Yes

15 Q And you wanted to be paid for that something extra

16 A Yes

17 Q And that was part of the agreement that we got -- we

18 have here in Exhibit 10, correct?

19 A Yes Yes, it is

20 Q Okay Then, next page, page 7 of 15, there's a

21 paragraph called Original Echocardiograms Do you see that?

22 A Yes

23 Q And you agreed to retain all of the original

24 echocardiograms, but also to keep them safe and make them

25 available as needed, is that right?

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1 A. That's right.

2 Q. And then paragraph 18, MEI Testimony, you agreed

3 that, if you were asked to do so, you would testify for, it

4 looks like, a rate of \$150 an hour; is that right?

5 A. That's right.

6 Q. And that was something you had not previously agreed

7 to do; is that correct?

8 A. Correct.

9 Q. And, in fact, you agreed that you would travel, if

10 you had to, to do that; is that right?

11 A. Yes.

12 Q. Did you have an understanding that it was possible

13 that would be a lot of work?

14 A. Yes.

15 Q. All right. And this work, this testimony and making

16 the duplicate measurements and all that, would that have

17 detracted from your regular business?

18 A. It did.

19 Q. Okay.

20 A. Yes, it would.

21 Q. And then, finally, paragraph 19, Document Retention.

22 Did you and your attorneys also agree that there were certain

23 documents we would give back to the Texas law firms and

24 Gregory, Barton & Swapp?

25 A. In exchange for this agreement, we agreed to give

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1 them back some of the documents they -- that we had.

2 Q. Yeah. Okay. Let's take a look at the security

3 agreement that is Exhibit 9. Are you with me?

4 A. Yes.

5 Q. And go down to the bottom, page 2 of 11,

6 subheading -- I think it's little "j," but it's the bottom

7 paragraph that says Barton Phen-Fen Fees. Do you see that?

8 A. Yes, I do.

9 Q. Okay. And it says: "All fees or other monies that

10 shall become due to Barton under the August 6-8, 2002 Phen-Fen

11 referral agreement between Barton and the Texas firms or any

12 subsequent agreement between Barton and the Texas firms, the

13 subject of which are the recoverable attorney fees arising out

14 the Texas firms' representation of certain Barton MEI

15 clients."

16 Do you see that?

17 A. I do.

18 Q. And is it your understanding that reference to

19 attorney fees is a reference to the contingency fees, not the

20 client side of the costs?

21 A. Could you repeat that again?

22 Q. Sure.

23 A. Sorry.

24 Q. Is it your understanding -- taking a step back --

25 A. Yes.

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1 Q. -- what you know about these agreements --

2 A. Uh-huh. (Affirmative.)

3 Q. What you thought you were getting, what you thought

4 you were giving. Did you have an understanding that what you

5 were getting was additional security and Mr. Barton's attorney

6 fees?

7 A. That's what it says and that's what I thought we

8 were getting, yes.

9 Q. Okay. And, in fact, you were asked some questions

10 by Mr. Jones in your deposition about this paragraph, weren't

11 you?

12 A. I was, and, unfortunately, I didn't turn the page.

13 Q. Yeah. Mr. Jones didn't read to you the second -- or

14 the last part of the sentence that says: "...the subject of

15 which are the recoverable attorney fees," did he?

16 A. No, he did not.

17 Q. Let me have you look at Exhibit 20. Oh, I'm sorry,

18 21. Do you recognize Exhibit 21?

19 A. I do.

20 Q. What is Exhibit 21?

21 A. This is the -- the screening form that every person

22 signed that came in to -- to have an initial screening that had

23 taken the Phen-Fen pills that wanted Mr. Barton to represent

24 them. And --

25 Q. You said it's something that everybody signed. How

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1 do you know that?

2 A. This -- these forms were on a clipboard in the outer

3 office. When someone came in and said, "I'm here for an

4 appointment," they would previously call and set up an

5 appointment to come in and be screened. When they showed up,

6 the secretaries for Mr. Barton's law firm would have everyone

7 fill this form out to get their screening, and then we would

8 put the results of that screening at the bottom.

9 Q. And let me ask you about that. On the bottom where

10 you put the results, would you -- you had to have that form if

11 you were going to report the results to the firm, right?

12 A. Yes.

13 Q. So even if somebody walked in and didn't have a

14 form, would you have had to go get one and fill it out?

15 A. Oh, yeah.

16 Q. Do you have any doubt as to whether or not everybody

17 who came in got this?

18 A. I have no doubt that everyone did.

19 Q. Now, with regard to the full studies, were you --

20 what was the procedure for making sure people who came in for

21 full studies signed the documents?

22 A. After we did their initial screening and we wrote

23 down what the -- the measurements were that we discovered, we

24 would take the patient and this form to one of Mr. Barton's

25 paralegals who would sit down with them in the room and

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1 explain to them that their test was positive, that we needed  
2 to do a full-study echocardiogram to - to document the damage  
3 that the Phen-Fen caused and that, if you wanted to retain our  
4 law firm, we had a contingency fee contract and a lien  
5 agreement that you needed to -  
6 MR. JONES: Objection, Your Honor.  
7 THE WITNESS: - to sign.  
8 MR. MAGLEBY: Well, I think you can talk about what  
9 happened.  
10 THE COURT: Objection?  
11 MR. JONES: My objection is, again, we were - we're  
12 moving - we're talking about the lien agreement, which the  
13 Court has already ruled on in terms of its admissibility.  
14 MR. MAGLEBY: He's not talking about the contents of  
15 the document, Your Honor.  
16 THE COURT: All right. As along as he doesn't  
17 address the contents, the objection's overruled.  
18 MR. MAGLEBY: Thank you.  
19 Q. I'm sorry, so, Mr. Fidler, just to recap, every time  
20 somebody came in, they had to fill out certain documents.  
21 A. That's correct.  
22 Q. And one of them was a contingency fee agreement, one  
23 of them was a lien agreement.  
24 A. Yes.  
25 Q. And had you been instructed that you couldn't do a

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1 full study on anybody unless they had actually signed these  
2 documents?  
3 A. That's correct.  
4 Q. And did you have a financial interest yourself in  
5 having people sign these documents?  
6 A. That was - yes, by having the client portion of  
7 their settlement was what I was to be paid out of for the  
8 full-study echocardiogram.  
9 MR. JONES: Objection, Your Honor. That speaks to  
10 the content of the lien agreement.  
11 THE COURT: Sustained.  
12 Q. (By Mr. Magleby) Aside from the document,  
13 Mr. Fidler, did you have an understanding that you, as a  
14 service provider to MEI, were getting rights to be paid by the  
15 client?  
16 A. Yes.  
17 Q. And did those rights attach to the client portion of  
18 the settlement?  
19 A. Yes.  
20 Q. And not necessarily to Mr. Barton's contingency fee.  
21 A. No, they didn't attach to his contingency fee.  
22 Q. Now, when we negotiated the settlement agreement and  
23 the security agreement, did we get some rights attaching to  
24 his contingency fee?  
25 A. That was my understanding, yes.

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1 Q. But you did understand we were after DAT&K in that.  
2 A. Right. And I -  
3 Q. And others.  
4 A. And at no point did I give up my rights to receive  
5 payment from the client costs for their echocardiograms.  
6 Q. That was an extra. Getting paid from Mr. Barton's  
7 contingency fee was a bonus.  
8 A. Yes.  
9 MR. MAGLEBY: All right. No further questions, Your  
10 Honor.  
11 THE COURT: Cross-examination?  
12 Mr. Hofmann: Your Honor, if I may for a moment?  
13 Inasmuch as this is concerning sealed information, there are  
14 people in the courtroom we don't know who they are or why  
15 they're here, and they probably should not be here during this  
16 hearing.  
17 THE COURT: Well, who would be - are we reserve -  
18 are you just observing there in the back? Is that what you're  
19 doing today?  
20 MALE: Yes, sir.  
21 THE COURT: All right. We'll probably -  
22 MR. HOFMANN: No offense to them, but -  
23 THE COURT: Yeah. Yeah. This is a - this is a  
24 proceeding that's under seal because it's a dissolution. So  
25 if you could go find - if you could go find - maybe you could

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1 go find somewhere else that you could watch a proceeding.  
2 FEMALE: Okay. No problem.  
3 THE COURT: I think there's a - there was a jury  
4 trial going down right below us in courtroom 202. I don't  
5 know if that's final yet, but that might be an interesting one  
6 for you.  
7 Thank you.  
8 MR. HOFMANN: And I was going to say that might be  
9 more interesting.  
10 THE COURT: Yes.  
11 CROSS-EXAMINATION  
12 BY MR. JONES:  
13 Q. Mr. Fidler, I think you testified previously that  
14 you visited the office building where Mr. Barton's offices  
15 were located to conduct the full studies; is that correct?  
16 As - were those done -  
17 A. What do you mean visited?  
18 Q. Were they conducted at Mr. Barton's offices or in  
19 the office building where he was located?  
20 A. Most of them were.  
21 Q. Okay.  
22 A. The full studies or the screenings or - again, I  
23 don't...  
24 Q. Well, let's do both. The screenings?  
25 A. Most of the screenings were done in his office.

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1 Q. And the full studies as well?

2 A. The full studies, some were done in the

3 cardiologist's office, but most of them were done in the - in

4 Mr. Barton's office.

5 Q. Okay. And with respect to those that were done in

6 Mr. Barton's offices, were you present for all of those?

7 A. No, I was not.

8 Q. How many of those were conducted in Mr. Barton's

9 offices?

10 A. Of what, screenings or full studies?

11 Q. Let's do both.

12 A. Of the 10,000 screenings, most of them were done in

13 his office. And of the full studies -

14 Q. No. How many of - of each were you present for, you

15 personally?

16 A. I can only speculate. I didn't keep track of every

17 one I did for the two years that I was there doing them. I

18 would have to say, for a majority, most of them, I was there.

19 Q. Of the echoes?

20 A. I was present for most of them. But I had other

21 technicians doing them. But I was still there doing - doing

22 others on my own.

23 Q. What about the full studies; were you present for a

24 majority of the full studies?

25 A. Not a majority, but I did several hundred.

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1 Q. Okay. Do you recall, Mr. Fidler, I asked in your

2 deposition how many full studies were conducted? Do you

3 recall that? And you told me 2500. Is that correct?

4 A. Approximately, to -

5 Q. Approximately?

6 A. - to my recollection.

7 Q. And I asked you how many you were physically present

8 for, and you told me two to three hundred; is that correct?

9 A. I was -

10 MR. MAGLEBY: Your Honor, if he's going to ask him

11 about his deposition, I'd like him to show him the copy of it

12 rather -

13 THE COURT: Not necessary under the rule. You can -

14 you can go ahead.

15 THE WITNESS: I personally did that many. But if

16 you want to know - there were others going on while I was

17 present. And I can't tell you, but I can say it was probably

18 a majority of the echoes that were done, I was present for,

19 but I didn't personally do them. I personally did, you know,

20 four or five hundred. I was supervising my four other

21 technicians that were doing them full time and all of my

22 assistants.

23 Does that answer your question?

24 Q. (By Mr. Jones) Well, I'm confused. Your

25 deposition, page 54. I'll be happy to show it to you.

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1 I said: "So you were present for two to three

2 hundred of these. Who also was there when you were present?

3 "Answer: It was just the attorneys, the paralegal. The

4 patient and myself were in the room when they would have them

5 sign this."

6 So if you were - you testified earlier about

7 patients or clients being taken into a room where documents

8 would be signed?

9 A. Yes.

10 Q. So, in how many cases of the 2500 were you actually

11 in that room?

12 A. I don't know. More than a hundred.

13 Q. More than a hundred? So a hundred or so out of the

14 2500?

15 A. Yes. We would wait for the - the patients to sign

16 the documents and then, a lot of times, they could do the full

17 study at the time. And then we would take them back again and

18 do that. But a lot of them, we had to reschedule to come

19 back.

20 Q. Did - at the time that you first met the

21 client/patient, did you gather any information from them in

22 terms of billing information?

23 A. We had all of that billing information - well, it's

24 not billing information - personal information from the echo

25 screening sheet. The secretary would - would bring the

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1 patient back from Mr. Barton's office, introduce us to the the

2 patient and give us this echo screening form, which had their

3 name, address, city, date of birth.

4 Q. Mr. Fidler, in your deposition, I asked you: "So

5 did you gather billing information for each of the persons

6 that you performed services for at Mr. Barton's office?

7 "No." Your answer: "No. We never billed the patients."

8 Is that correct? Was your testimony correct at that

9 time?

10 A. Yes.

11 Q. I believe, Mr. Fidler, that you have testified that

12 you - rather than billing the patients or the clients, you did

13 bill on a monthly basis Gregory, Barton & Swapp; is that

14 correct?

15 A. Just for the initial screenings and - and we did

16 send them a bill if we did a full study. That was to be paid

17 when their case was settled.

18 Q. To be paid when - the bill for the full studies, you

19 sent it on a monthly basis, but it was to be paid when the

20 cases settled. Is that - is that correct?

21 A. That was the understanding that Keith and I came to

22 agreement on.

23 Q. Okay. Do you recall when you came to that

24 agreement? Do you recall whether it was before or after the

25 execution of the November 14, 2000 agreement that we have

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1 referred to, I believe, as Exhibit 7, but I stand to be  
2 corrected. Exhibit 7.

3 A. That's the time, approximately, when we came to the  
4 agreement that I would be paid for the full studies when their  
5 cases settled.

6 Q. Okay. You gave me a description of that in your  
7 prior deposition. I'll just read it to you and ask you if  
8 that was correct.

9 "As for the time that they were to be paid, it  
10 does not stipulate when the full studies would be  
11 paid." Again, speaking of Exhibit 7. "We had a  
12 verbal understanding that the full studies would be  
13 paid when he received payments on their cases when  
14 they settled. He didn't have the money at the time  
15 to be paying for full studies. And as we discussed  
16 earlier, all the financial obligations, he had to  
17 borrow from Texas. And he came to me and he told  
18 me, 'I can't pay you for the full studies until I  
19 get paid.' And I agreed to postpone the payment  
20 until that time."

21 Is that correct?

22 A. Yes.

23 Q. Is that an accurate statement of your agreement?

24 A. Yes.

25 Q. Your agreement was you would get paid whenever

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1 Gregory, Barton & Swapp got paid.

2 A. Well, when the - the cases settled and they got  
3 their payment, then they would pay me from the clients'  
4 portion for the echo.

5 Q. I just asked you if that was an accurate statement  
6 of your agreement. You said that you'd get paid whenever they  
7 get paid, right?

8 MR. MAGLEBY: Objection, Your Honor. He's arguing  
9 with the witness.

10 THE COURT: Overruled.

11 THE WITNESS: I get paid when the clients'  
12 settlement pays out of their portion of the settlement was our  
13 agreement.

14 Q. (By Mr. Jones) So you - I asked you - let's come  
15 back.

16 What if - what if there was no settlement recovery,  
17 how would you get paid?

18 A. Mr. Barton told me that I would be paid for that.  
19 And, quite frankly, there was never a case that didn't settle.  
20 And so that was kind of a moot point. It was like, you know,  
21 "This really isn't going to happen, it hasn't happened, but if  
22 it - if it does for some weird reason, don't worry, I'll take  
23 care of paying you for the echo."

24 Q. So if there was no recovery in a case and no client  
25 funds from which payment could be made, then Mr. Barton, or

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1 Gregory, Barton & Swapp would pay you; is that correct?

2 A. That's what the agreement, as I recall, was is  
3 that - I don't know how he would do it, but that's how - that  
4 I would be paid for it somehow.

5 Q. And Mr. Barton told you that. That was part of your  
6 agreement.

7 A. Right.

8 Q. Did it make any difference to you whether Mr. Barton  
9 got paid or not because, in either event, I mean, whether  
10 there was a recovery by the client or not because, in either  
11 event Mr. Barton, Gregory, Barton & Swapp was obligated to pay  
12 you; isn't that correct?

13 A. Only if the cases didn't settle. I was - again, I  
14 was going to be paid from the clients' portion of their  
15 settlement. And if that - those costs didn't come up to the  
16 full costs for all the echocardiograms, Mr. Barton would make  
17 up that difference.

18 Q. You recall in your deposition, Mr. Fidler, I asked  
19 you the following question: "So it's accurate to say what  
20 happened -

21 MR. MAGLEBY: Roger - Your Honor, it's fine if he  
22 doesn't want to give the witness a copy, but if he could -

23 THE COURT: Well, he does not have to do that under  
24 the rule.

25 MR. MAGLEBY: I understand. I'd like him to tell me

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1 what page and line.

2 THE COURT: That would be fine.

3 MR. JONES: I'm on page 44.

4 MR. MAGLEBY: And what line, Roger?

5 MR. JONES: 16. Thank you.

6 Q. "So is it accurate to say what happened in the  
7 underlying lawsuits in which Gregory, Barton & Swapp represent  
8 these clients, you were looking at Gregory, Barton & Swapp to  
9 get paid. It didn't make any difference whether there was a  
10 recovery or not, Gregory, Barton & Swapp owed you the money;  
11 is that correct?"

12 Your answer: "Basically."

13 Do you recall that?

14 A. I recall that in reference to the settlement  
15 agreement.

16 Q. Do you just recall that testimony? Is that an  
17 accurate statement? It's what you testified to before.

18 A. I'd have to look at what the question was to know if  
19 that was an accurate statement. But from the answer that you  
20 read me, that was based on our ability to receive payment from  
21 Keith in addition to the client costs, if they didn't come up  
22 to the - to meet the - the cost for the echoes.

23 Q. How did my question or your answer in any way relate  
24 to the settlement agreement or the security agreement that  
25 you're talking about, this additional collateral or support

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1 that you received? I don't understand that, Mr. Fidler.  
2 Maybe you could explain it.

3 A. Well, why don't you give me a copy of what the  
4 question was and I can read, you know, what - what you're  
5 asking me and then I can try and explain my answer again.

6 Q. Happy to do that.

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

8 THE COURT: Yes.

9 THE WITNESS: Okay.

10 Q. (By Mr. Jones) Do you have any further explanation  
11 with respect to that answer?

12 MR. MAGLEBY: Objection. Ambiguous.

13 THE COURT: It's - he seems to understand the  
14 question. So you can answer, if you can. If you can't  
15 understand it, we can have the question rephrased.

16 THE WITNESS: Yeah. Ask me the question again.

17 Q. (By Mr. Jones) I think, Mr. Fidler, you said that,  
18 if you had a chance to look at it, you might be able to - to  
19 tell me how this answer in any way related to the security  
20 agreement or the settlement agreement by which you obtained a  
21 junior security interest to secure payment of the note.

22 A. Well, those were the two means by which I would be  
23 paid for my echocardiograms. The client cost and the security  
24 agreements...

25 Q. I'll move on, Mr. Fidler.

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1 Mr. Fidler, you - you spoke earlier of a right to be  
2 paid by the client. Could you tell me what right you had to  
3 be paid by the client for the work that you did?

4 A. Mr. Barton explained to me that the costs for the  
5 clients for their echocardiograms would be deducted from their  
6 settlements and that those costs would come to me directly to  
7 pay for their echocardiogram.

8 Q. So Gregory, Barton & Swapp would be paid by the  
9 client and, in turn, pay you; is that correct?

10 A. I don't know how that works. I - I just know that  
11 the costs would be deducted from their settlement and that  
12 they would come to me. Whether through the law firm or the  
13 client, I don't know.

14 Q. You didn't have any right against the client for  
15 payment, did you, Mr. Fidler?

16 A. I felt I did. With the screening information sheet  
17 and the contingency fee contract and the referral contract,  
18 I - I believed that, as a provider of services to the clients,  
19 that I was - they were legally bound to pay me for those  
20 services when their cases settled. And that no one else -

21 Q. Mr. Fidler -

22 A. - had a right to those payments.

23 Q. Mr. Fidler, do you recall that I asked you that  
24 question in your deposition at page 74, line 14? Mr. Fidler,  
25 you testified:

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1 "You did not think you have any right to proceed against  
2 the clients directly to receive payment, correct? That was  
3 your understanding, correct?

4 Your answer: "Yes."

5 A. What rights are you talking about in getting -

6 Q. I asked you whether or not you had - it was your  
7 understanding, "Did you think you have a right to proceed  
8 directly to receive payment from the client?"

9 And your answer was: "No."

10 Your answer was and my understanding is correct, you  
11 did not have a right to receive payment from the client or to  
12 proceed against the client. Isn't that what you testified to,  
13 Mr. Fidler?

14 A. I have a right to be reimbursed by the client for  
15 the cost of their echocardiogram. I don't know if I have a  
16 right to go out and personally sue them. I probably do, if I  
17 want to.

18 Q. When I asked you that question in your deposition,  
19 your answer was to the contrary.

20 MR. MAGLEBY: Objection. Argumentative.

21 Q. (By Mr. Jones) Can you explain that?

22 THE COURT: Overruled.

23 THE WITNESS: I just must have misspoke then.  
24 Because I do have a right. And the contracts that we signed  
25 gave me that right.

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1 Q. (By Mr. Jones) Okay.

2 A. Or that the law firm signed in behalf of the clients  
3 give me that right.

4 Q. We've - we've looked at some exhibits today that  
5 include the contingency fee agreement, which was executed by  
6 the client, and we've looked at the Exhibit 21 for the echoes.

7

8 I think you testified you think the contingency fee  
9 agreement gave you that right to payment directly from the  
10 clients? Is that your testimony?

11 THE COURT: Where is that agreement?

12 MR. MAGLEBY: I believe it's 11, 17 and - well, let  
13 me find them.

14 MR. JONES: It's Exhibit 11.

15 THE WITNESS: All of these agreements, Keith said  
16 collectively, give me the right, as I understand it, by law  
17 for the payment of the echocardiogram costs by the client.

18 Q. (By Mr. Jones) Can you point me to anything in  
19 Exhibit 11 that would afford you a right to receive payment  
20 directly from the clients?

21 A. No. 4, subparagraph (b), "If we reach a settlement  
22 or judgment on your behalf" - let see. "We will incur various  
23 costs and expenses in performing legal services under this  
24 agreement." I believe that those costs and expenses included  
25 the echocardiogram that you - and it says "you agree to pay

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1 for all those costs ' That part of it refers to the service  
2 that I performed for them  
3 I mean I don't see Williams & Bailey mentioned in  
4 here but they got half of the money  
5 Q So, Mr Fidler, unlike Mr Barton you believe that  
6 paragraph 4(b) of the contingency fee agreement does cover the  
7 monies owed MEI for echoes That's what you just testified  
8 to, isn't it, Mr Fidler?  
9 A It partially does And I think that the screening  
10 contract we signed also brings the - the client in to be  
11 paid - or for them to pay me for the - their services  
12 Q I want to - we'll get to Exhibit 21 I just want to  
13 focus back here 4(b) is the provision that provides for  
14 reimbursement of -  
15 A Well, and I have to say 4(c), too  
16 Q Okay  
17 A To aid in the preparation or preparation of our  
18 case, it may become necessary to hire expert witnesses "  
19 Q I understand So you believe that 4(b) and (c)  
20 apply to the services you provided, the echoes that you  
21 provided, is that correct?  
22 A In part Again, you know, this was in the scope  
23 of - regarding to taking weight loss pills I'm not a - a  
24 legal expert on this, so I just have to depend on a lot of  
25 what my attorneys tell me, and that's what they tell me

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1 Q I understand That was your understanding I don't  
2 want a legal conclusion, I just want your understanding That  
3 was your understanding, correct?  
4 A My understanding was that the contracts that we  
5 signed that the clients signed gave me the right to be paid  
6 from the fees - the client costs  
7 Q I wasn't asking about that, I was just asking about  
8 Exhibit 11 That's fine I'll just move on Mr Fidler  
9 Let's move on to something else  
10 Could we move on, Mr Fidler, to Exhibit 9 You  
11 recognize this document, don't you, Mr Fidler?  
12 A Yes I do  
13 Q And this is the security agreement that was executed  
14 by Gregory Barton & Swapp in favor of MEI pursuant to the  
15 settlement agreement, is that correct?  
16 A Who did you say executed this? Was this -  
17 Q It is executed by Keith L Barton and Gregory,  
18 Barton & Swapp P C in favor of MEI, isn't that correct?  
19 A Yes  
20 Q You recall this agreement You're familiar with it,  
21 right?  
22 A Yes, I do  
23 Q Do you recall discussion regarding Advocate  
24 Capital's security interest in the assets of Gregory, Barton  
25 & Swapp at the time this document was executed?

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1 A Yes  
2 Q And what discussion do you recall?  
3 MR MAGLEBY I just want to make sure the witness -  
4 I'm going to object to the extent it calls for attorney-client  
5 communications  
6 MR JONES Your Honor I'm not asking for anything  
7 privileged  
8 MR MAGLEBY And I just want to make sure the  
9 witness understands that Because -  
10 THE COURT All right Don't talk about anything  
11 that you've said to your attorney or he said back to you  
12 But, rather, just discussions that have been made to other  
13 people, okay?  
14 THE WITNESS All right  
15 Q (By Mr Jones) Do you recall any discussions other  
16 than with counsel? I'll phrase it that way  
17 A No  
18 Q Okay What was your understanding of the position  
19 of Advocate Capital/DAT&K at the time this document was  
20 executed?  
21 A That - my understanding was that Keith had some  
22 debts that were - that were ahead of what he owed me security  
23 interests that were ahead of Mobile Echo -  
24 Q And one of those debts was Advocate Capital/DAT&K,  
25 is that correct?

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1 A Right They were ahead of us in - in the payment of  
2 their debt  
3 Q And that's reflected is it not, Mr Fidler, on page  
4 2, paragraph E the discussion of permitted liens? Do you see  
5 that?  
6 A I'm sorry for my stomach there  
7 Q Oh that's okay  
8 A Permitted liens to - where does it say Advocate in  
9 there?  
10 Q Well it doesn't say Advocate in there but it does  
11 say particular liens - liens that were already in effect and  
12 perfected as of August 26, 2004 Mr Fidler, didn't you  
13 understand that to refer to Advocate Capital?  
14 A No probably not  
15 Q Well, then let's look over at section 2.6 of the  
16 agreement on page 4, Mr Fidler  
17 A Okay  
18 Q Do you see section 2.6, which expressly refers to  
19 Advocate Capital?  
20 A There I see that  
21 Q Okay And this provision says that Advocate has a  
22 senior security interest in, and that the execution of this  
23 agreement would be a violation of that agreement does it not,  
24 Mr Fidler?  
25 A What was - could you restate your question now

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1 again?

2 Q. Did you have an understanding that - you said before

3 you didn't understand the permitted liens provision to refer

4 to Advocate Capital as having a senior lien. But it's -

5 Advocate is expressly addressed in section 2.6; is it not?

6 A. It is. It is.

7 Q. And doesn't it also say that Gregory, Barton &

8 Swapp's agreement with Advocate prohibits the execution of

9 this agreement?

10 A. That's what it says, but, you know, that was

11 Mr. Barton's problem and not mine.

12 Q. But you were aware of that at the time you executed

13 this agreement, weren't you?

14 A. I believe I was aware that Advocate had a security

15 interest ahead of Mobile Echo's.

16 Q. Were you also aware that Gregory, Barton & Swapp was

17 in default of its indebtedness to Advocate?

18 A. Not at this time. I didn't know what this -

19 Q. Mr. Fidler, could I direct your attention to section

20 2.11 of that agreement?

21 A. That's right.

22 Q. Page 5 of 11.

23 A. Yes.

24 Q. Do you see what I'm referring to, Mr. Fidler?

25 A. I know I read that in here. Where is it exactly?

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1 Q. 2.11, second sentence: "Barton herein provides

2 notice that Advocate Capital, Inc.'s assignee (DAT&K) has

3 taken the position that Barton is in default with respect to

4 certain loans made to Barton."

5 Do you see that?

6 A. I do.

7 Q. So you knew the loan was in default.

8 A. With Advocate?

9 Q. Yes.

10 A. Yes, I did. You're right.

11 Q. Mr. Fidler, you also knew, did you not, that any

12 collateral that you received a security interest in pursuant

13 to this agreement was subordinate to the security interest

14 Advocate already had? You knew that, didn't you?

15 A. Well, Mr. Jones, this is all legal stuff that - I'm

16 not an attorney, I don't - I don't pretend to understand it

17 completely. I just trusted my attorneys that they knew what

18 they were doing.

19 THE COURT: All right. So you just have to say what

20 you know. I'm not asking you to interpret the agreement, just

21 say what you understood, okay?

22 THE WITNESS: All right. And -

23 Q. (By Mr. Jones) And I mean, just asking you: Was it

24 your understanding that the security interest you were

25 receiving in collateral pursuant to this agreement was

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1 subordinate to the security interest of Advocate Capital in

2 the same collateral?

3 A. I don't know about what the collateral is you're

4 talking about, but I know that we were subordinate to

5 Advocate.

6 Q. I'm just talking about the collateral as it's

7 defined in this agreement. Whatever it - whatever it says in

8 here, that's all I'm talking about.

9 A. I - I just - I can't feel a hundred percent

10 confident in just saying yes, because I don't understand -

11 Q. Okay.

12 A. - completely.

13 Q. We'll let the document speak for itself.

14 Mr. Fidler, could I ask you to take a look at page

15 2 of 11. It's paragraph J that your counsel asked you about

16 earlier.

17 A. Page 2 of 11. Okay.

18 Q. Okay. You see a - there's a definition here, and

19 it's the definition of Barton Phen-Fen fees. Do you see that?

20 A. I do.

21 Q. And it refers to fees and other monies that shall

22 come due to Barton under the August 6-8, 2002 Phen-Fen

23 referral agreement. Do you see that?

24 A. I do.

25 Q. You read that entire language earlier, but what I

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1 want to ask you about is, very specifically, it says "all fees

2 or other monies." So it addresses attorneys fees. What are

3 the other monies that come to Barton under the Phen-Fen

4 referral agreement that's included as a part of the collateral

5 in this agreement?

6 A. Other monies that Mr. Barton would - that would come

7 to his firm, if he so chose to use those to, you know, pay the

8 costs for the echocardiograms if the client cost didn't pay

9 for them. He could use - as it's defined in this, it's

10 recoverable attorney fees.

11 Q. I know it refers to attorneys fees, but I'm focusing

12 on it refers to "attorneys fees and other monies that shall

13 become due Barton."

14 What was your understanding of the other monies that

15 may become due Barton under the Phen-Fen referral agreement?

16 A. Well, none -

17 MR. MAGLEBY: Objection.

18 THE WITNESS: - under -

19 THE COURT: Just a moment.

20 MR. MAGLEBY: Objection. Compound, assumes facts

21 not in evidence, document speaks for itself.

22 THE COURT: Well, the document speaks for itself.

23 We've already covered that. We're just asking for his

24 understanding. But the - why don't you rephrase the question?

25 I believe it was compound.

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1 Q. (By Mr. Jones) Mr. Fidler, what was your  
2 understanding of - what would you - what did you think was  
3 included within the phrase "other monies" when you signed this  
4 agreement? What was your understanding?

5 A. Other monies could mean other attorney fees that he  
6 got from other cases. If his grandmother died and left him  
7 some money, he could use that to - to pay the note. Just  
8 other monies. I don't - it doesn't define what that means.  
9 I specifically just - it just is a vehicle for him to be able  
10 to pay this - the note, you know, in addition to our other  
11 client - the fees from the clients.

12 Q. Mr. Fidler, isn't it true that we do know that it  
13 included monies that - from client recoveries?

14 MR. MAGLEBY: Objection. Argumentative.

15 THE COURT: Overruled.

16 THE WITNESS: I don't know that we know that.  
17 What -

18 Q. (By Mr. Jones) Well, why don't we take a look at  
19 the documents and we can - we can quickly find that out.

20 I'll ask you to take a look at paragraph - Exhibit  
21 10.

22 A. Uh-huh. (Affirmative.)

23 Q. This document, just like the security agreement,  
24 uses the phrase Barton Phen-Fen Fees and defines it the same.  
25 Are you familiar with this agreement?

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1 A. Yes.

2 Q. And you're familiar with its use of the term Barton  
3 Phen-Fen Fees.

4 A. Yes.

5 Q. And you're also familiar, are you not, Mr. Fidler,  
6 with the fact that this agreement provided that certain monies  
7 would be withheld or set aside from the Barton Phen-Fen fees  
8 and paid to you; isn't that correct?

9 A. If Mr. Barton received enough money from his  
10 attorney fees to pay off everyone, including Advocate  
11 Capital, then those fees would come to us and to pay off the -  
12 what he owed me for the echocardiograms. And that was our  
13 understanding. That's my understanding and, you know, other  
14 than that, that's - I'm going to stick by that.

15 Q. Let's talk about that for a second, because  
16 paragraph 15 that we're looking at here, Mr. Fidler, which  
17 addresses Barton Phen-Fen fees, it's addressing - it's  
18 addressing payments that are going to be made and monies aht  
19 are going to be withheld prior to all this money coming in and  
20 paying off everybody, is it not?

21 A. I don't see that it - it means that. You know -

22 Q. Let me ask the question -

23 MR. MAGLEBY: Your Honor, he's -

24 MR. JONES: - Mr. Fidler. I'll follow up.

25 MR. MAGLEBY: - he's interrupting the witness. I

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1 know he -

2 THE COURT: Well, I think the witness was finished.

3

4 You can go ahead.

5 Q. (By Mr. Jones) Mr. Fidler, I'm just asking, the  
6 payments that we're talking about here in paragraph 15 or -  
7 are the -

8 A. Where are we? Where's 15?

9 Q. Page 5 of 15.

10 A. What exhibit?

11 Q. It's Exhibit 10.

12 A. 10? 5 of 15. Okay.

13 Q. Now, that paragraph is addressing the quarterly  
14 payments to be made under the note that was executed at the  
15 same time as the security agreement; is that not correct,  
16 Mr. Fidler?

17 A. Okay. Question again? I'm sorry.

18 Q. Doesn't this paragraph address the quarterly  
19 payments that were to be made under the MEI note that was  
20 executed at the same time the security agreement was executed?

21 A. Well, it talks about the amounts that were to be  
22 withheld.

23 Q. Those amounts to be withheld, they were to be held -  
24 withheld from the client recoveries, were they not,  
25 Mr. Fidler?

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1 A. My understanding is that's after there was a  
2 deficiency, if the client cost didn't pay for my  
3 echocardiograms, then this cost would be withheld from the  
4 attorney fees to, you know, pay off the - the indebtedness  
5 that I was owed for the echocardiograms.

6 Q. And that would have been when all the cases were  
7 settled?

8 A. Well, like it was explained earlier, if some of - if  
9 we - there was a greater amount of recovery by a few cases  
10 that Mr. Barton had the option to, you know, pay off the rest  
11 of the echocardiograms, before we waited for every one of them  
12 to settle on down the line, that this money would be withheld.

13 Q. The \$1,420.65, that was to be withheld from client  
14 recoveries, was it not, Mr. Fidler?

15 A. I don't know.

16 Q. You don't know? Okay.

17 A. I don't know.

18 Q. Could have been?

19 MR. MAGLEBY: Objection.

20 THE WITNESS: Well, it would have been -

21 THE COURT: He said he doesn't know.

22 THE WITNESS: I don't -

23 MR. JONES: That's fine.

24 THE COURT: We're withdrawing the question, looks  
25 like, so -

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1 MR. JONES: I'll withdraw the question.  
2 THE COURT: Okay.  
3 Q. (By Mr. Jones) Did you receive -- did MEI receive  
4 some monies that were withheld pursuant to this provision?  
5 A. I don't know if it was pursuant to this provision,  
6 but we did receive some monies on a quarterly basis for a  
7 short period of time.  
8 Q. And who paid those monies to you?  
9 A. Those came from Texas, the Texas law firm.  
10 Q. Okay. Mr. Fidler, could I ask you to take a look at  
11 Exhibit 14. Do you recall this agreement? It's not an  
12 agreement that you're a party to, Mr. Fidler, it's the  
13 settlement agreement that was entered into in this case that  
14 resulted in the monies being paid in to the court and our  
15 hearing today.  
16 A. Do I recall?  
17 Q. Yes.  
18 A. No, I don't.  
19 Q. Do you recall -- did you review this agreement when  
20 it was -- when it was provided to the parties prior to this  
21 court's approval of the settlement agreement? Do you recall  
22 whether you reviewed it or not?  
23 A. I don't --  
24 MR. MAGLEBY: Your Honor, may I voir dire?  
25 THE COURT: What was that?

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1 MR. MAGLEBY: May I ask a couple voir dire  
2 questions?  
3 THE COURT: Yes.  
4 MR. JONES: I'll withdraw the question.  
5 MR. MAGLEBY: All right.  
6 Q. (By Mr. Jones) Come back to the Barton Phen-Fen  
7 fees we talked about earlier, both in the settlement agreement  
8 and in the security agreement.  
9 Do you recall me asking you about that, Mr. Fidler,  
10 in your deposition?  
11 A. I believe so.  
12 Q. I asked you a couple questions about that, and I  
13 asked you whether or not the phrase "other monies" referred to  
14 monies received from client settlements or client recoveries.  
15 Do you recall that?  
16 A. Not specifically, but -- but go ahead, I guess.  
17 Q. Okay. I asked you a series of questions about that  
18 and, ultimately, your answer was: "I can't speculate on that.  
19 I don't believe it does, but I don't know." 103.  
20 So do you know whether the phrase "other monies" in  
21 the settlement agreement and in the security agreement,  
22 whether that included client monies from client recoveries or  
23 not?  
24 A. I don't know.  
25 Q. You don't know?

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1 A. I don't know.  
2 I wish my attorneys could have defined this contract  
3 a little more, but we never thought, in our wildest dreams,  
4 that we would be here with DAT&K. Just had no belief that  
5 this would happen.  
6 Q. I think you testified about that in your -- in your  
7 deposition as well. You said you had no idea that Advocate or  
8 DAT&K might come in and assert an interest in those monies  
9 being withheld and paid over -- over to MEI. Do you recall  
10 that?  
11 A. Well, I recall --  
12 Q. I think that what --  
13 A. -- thinking that, because there was so much money  
14 that Mr. Barton would receive, that this would never come up  
15 and be an issue.  
16 Q. Mr. Fidler, isn't it true that you were very much  
17 aware that Advocate may assert an interest in any monies held  
18 from client recoveries and not paid over to Advocate?  
19 A. No, I wasn't aware.  
20 Q. Okay. Then let's take a look, then, at paragraph 15  
21 of the settlement agreement again.  
22 A. I was aware that -- I just didn't think that -- that  
23 that would come into play, like I mentioned, because there was  
24 so much money expected to be recovered that this was like a  
25 moot point. It just didn't -- didn't matter.

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1 Q. I understand. I --  
2 A. Because you guys would be paid off and everyone  
3 would be happy.  
4 Q. I understand that, Mr. Fidler. I'm trying to come  
5 to a little bit different point. I'm not talking about  
6 whether you understood that Advocate had a senior security  
7 interest, I'm asking the question: Didn't you understand that  
8 Advocate might assert an interest in the client recoveries,  
9 the very money that was being withheld pursuant to this  
10 agreement and paid to you?  
11 A. No. Those -- the client -- if you're talking about  
12 the client fees for the echocardiogram costs, I had no reason  
13 to believe that you could begin to assert that. That came to  
14 me and me only, and you had claim on the -- on the attorney  
15 fees but not the client costs.  
16 Q. Let's look at paragraph 15 of the settlement  
17 agreement for just a second, Mr. Fidler, again.  
18 A. What exhibit is it?  
19 Q. It's Exhibit 10.  
20 A. And page? Or paragraph 15?  
21 MR. MAGLEBY: Page 5.  
22 THE WITNESS: 5 of 15?  
23 Q. (By Mr. Jones) Paragraph 15. Let's look on page 6.  
24 We're looking at paragraph 15. And you see the -- the  
25 reference to the withholding of monies from client recoveries

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1 to be used to, in part, pay the MEI note. You see that, don't  
2 you? It's right there in the middle of the page, \$1,420.

3 A. Yes.

4 Q. You see that, right?

5 A. Yes.

6 Q. Now, take a look at the last sentence of that  
7 paragraph. Doesn't that - doesn't that sentence expressly  
8 contemplate that someone may challenge MEI's right to those  
9 funds?

10 A. To me, it just says that the firms have the  
11 discretion to disburse them however they want.

12 Q. "In the event legal action by any third party which  
13 would take issue with the holding and/or disbursing of these  
14 funds is threatened." Do you see that?

15 A. You're - you're way up above where I thought you  
16 were.

17 Q. You see that?

18 MR. MAGLEBY: Roger, if you could direct the witness  
19 to the specific language, please.

20 THE WITNESS: Yeah, I see that. "In the event legal  
21 action by any third party which would take issue with the  
22 withholding and/or disbursing of these funds is threatened  
23 or..." (Reading.)

24 I - I don't know what that means. I'm sorry, I  
25 really don't.

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1 Q. (By Mr. Jones) Were you aware of any other - any  
2 party other than Advocate that might asserst an interest in  
3 these funds?

4 A. No.

5 Q. Finally, Mr. Fidler, in your deposition, page 112,  
6 I asked you whether or not the Barton Phen-Fen fees included  
7 monies withheld from client recoveries. Do you recall that?

8 A. Somewhat.

9 Q. And -

10 A. The Barton Phen-Fen fees, meaning attorney fees?

11 Q. Barton Phen-Fen fees as defined in these documents.  
12 I asked you a question. Now, loook at the language here. I'm  
13 confused, because it says:

14 "These monies are withheld from Barton Phen-Fen fees."  
15 Doesn't that mean, Mr. Fidler, that the monies withheld from  
16 the client recoveries are part of the Barton Phen-Fen fees?"

17 Your answer: "No. I'm talking about the defined  
18 term 'Barton Phen-Fen - you said no. Your answer:

19 MR. MAGLEBY: Well, wait a minute. Your Honor -

20 Q. (By Mr. Jones) "Not the attorneys fees."

21 My question: "No. I'm talking about -

22 THE COURT: Just a momenht. We've got an objection.

23 MR. MAGLEBY: If he's going to read from the  
24 deposition, he's got to read the witness's answer. Just  
25 because he doesn't like it doesn't mean he can skip it and go

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1 on to his next question.

2 THE COURT: Well, I think - I think that's his  
3 intent. He just got -

4 MR. JONES: That was my - I just skipped -

5 THE COURT: - he just got mixed up.

6 MR. JONES: I'll go back and read it.

7 The answer: "Not the attorneys fees."

8 "Question: No. I'm talking about the defined term  
9 'Barton Phen-Fen fees.' Says these monies will be held and  
10 set aside. We're talking about the amount here \$1,420.65."

11 And following an objection by Mr. Magleby, your  
12 answer: "I know that's what it says, but that's not what was  
13 understood between the plaintiff MEI and I."

14 Q. Do you recall that?

15 A. Well, I said that, I guess.

16 Q. So the documents that we're looking at here, the  
17 security agreement and the settlement agreement, they all use  
18 the same term "Barton Phen-Fen fees," and you recognize that  
19 the documents include client cost recoveries within the  
20 definition of Barton Phen-Fen fees.

21 A. No, I don't recognize that.

22 Q. Isn't that what I -

23 A. Client costs are separate from attorney fees.

24 Q. I didn't - again, that was the question. That's how  
25 we got lost before. I'm not asking whether it was included in

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1 attorneys fees. What I'd asked you was whether it was  
2 included within the definition of Barton Phen-Fen fees.

3 Your testimony and the definition - in the  
4 deposition was you know, that's what it says but it was not  
5 your intent. Is that correct?

6 A. I'm sorry, I - Mr. Barton's interpretation of Barton  
7 Phen-Fen fees? You're asking me what my interpretation of  
8 what he - that - he thinks that is?

9 MR. JONES: No further questions, Your Honor.

10 THE COURT: All right. Thank you.

11 Gents, how are you looking as far as getting your  
12 evidence in by - in the time that was allotted today?

13 MR. MAGLEBY: Your Honor, I would do a short  
14 redirect of Mr. Fidler and then we're done. I don't know what  
15 Mr. Jones has planned.

16 THE COURT: Okay. Do you have some evidence that  
17 you're going to be presenting, Mr. Jones, in terms of  
18 testimony?

19 MR. JONES: I'd intended to briefly call  
20 Mr. Hashmomto, the receiver.

21 THE COURT: Okay. Why don't we go ahead and proceed  
22 then. Go ahead, Mr. Magleby.

23 MR. MAGLEBY: Thank you, Your Honor.

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REDIRECT EXAMINATION

BY MR. MAGLEBY:

Q. Mr. Jones asked you some questions about how many screenings took place and how often you were at the Keith Barton law offices. Do you recall that?

A. Yes.

Q. Were you working long days?

A. And weekends.

Q. And weekends?

A. We would go till 9:00 at night.

Q. And my next question: Did you go late at night?

A. Yes.

Q. You were working week after week, month after month?

A. Year after year.

Q. Year after year? Was that a strain on your personal relationships?

A. Very much, yeah.

Q. So regardless of whether or not you know exactly how many initial screenings or full studies you attended, you know you were there for a fair amount of time?

A. I was. In fact, I even lost accounts from my regular business because I was there so much.

Q. Okay. Well, all that time that you were there, you ever aware of anybody not signing the documents we've been talking about?

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A. No.

Q. All right.

A. No.

Q. And then we go on to talk about -- Mr. Jones asked you some questions about how you were going to be paid if the cases didn't settle. Do you recall that?

A. Yes.

Q. And that was part of our dispute with Keith Barton.

A. Right.

Q. And was it your understanding that when we settled that dispute with Keith Barton, one thing we absolutely tied up was that, one way or another, we were going to get paid before the partners of the Gregory, Barton & Swapp law firm got paid?

A. That's what you explained to me --

Q. Okay.

A. -- through our contracts.

Q. And then Mr. Jones asked you questions about -- cross-examined you on your belief that you had the right to be paid by the client. Do you recall that?

A. Yes.

Q. What was the basis for your belief that you had a right to be paid by the client?

A. Because of the contracts that we signed that stated --

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MR. JONES: Objection, Your Honor.

THE COURT: Yes, sir?

MR. JONES: He's -- I believe Mr. Fidler is testifying about the contents of the lien agreement.

MR. MAGLEBY: He opened the door, Your Honor.

MR. JONES: I did not.

THE COURT: Well, let's -- he can -- he can testify what his basis was. That doesn't mean that the lien agreement's admissible or that I would consider its contents. He's merely testifying about what -- the basis for his belief.

Q. (By Mr. Magleby) The basis for your belief, Mr. Fidler, you were starting to say --

A. That all the -- all of the collective contracts signed by Mr. Barton's people that had claims would guarantee that I'd be paid from the costs for their echocardiograms.

Q. And, in fact, had there even been occasions, Mr. Fidler, when you were performing echocardiograms that you don't have any contract signed and people still paid?

A. Definitely. Well --

Q. And sometimes --

A. -- yeah. That's true.

Q. And sometimes, do the people receiving the echocardiograms pay you directly?

A. They do.

Q. Okay. And is it your understanding somebody is

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obligated to pay you for it? You don't work for free, do you?

A. That's correct.

Q. All right. And then you were asked a number of questions about the DAT&K and Advocate Capital security interest coming ahead of MEI; is that right?

A. Yes.

Q. And I want to make sure we understand what you're saying here. Are you saying their security interest comes ahead of you for the client costs or you're saying you believe it comes ahead of you for Mr. Barton's attorney fees?

A. It only comes ahead of me for Mr. Barton's attorney fees. I have claim on the client costs and no one else --

Q. Okay.

A. -- is my belief and understanding.

Q. Did you ever understand the clients owed Mr. Barton money for the work that you were doing? That they had to pay him?

A. No.

Q. Okay.

A. Those would come out of their settlement.

Q. Now, let's go to Exhibit 11, page 2.

A. Okay.

Q. I'm sorry, I must have written it down wrong. It's not Exhibit 11.

A. It is Exhibit 11.

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1 Q. It is Exhibit - well, I know I've taken you to  
2 Exhibit 11, but that's not what my question was about. Let me  
3 see here.

4 I got it. It is Exhibit - sorry, Exhibit 9, page 2.

5  
6 You were asked a number of questions by Mr. Jones  
7 about what Barton Phen-Fen fees means. Do you recall that?

8 A. Yes.

9 Q. Okay. And if we look at sub (j), it says: "All  
10 fees or other monies that shall become due to Barton." Do you  
11 see that?

12 A. I do.

13 Q. Did you ever have an understanding that the client  
14 side - the client settlement monies deducted to pay you for  
15 your MEI echocardiogram would ever be due to Mr. Barton?

16 A. No. He told me that he had no right to those, those  
17 had to be paid to the provider that provided the service.

18 Q. Okay. And then if we go on with that paragraph, the  
19 very bottom of that page 2, it says, comma, "the subject of  
20 which are the recoverable attorney fees arising out of the  
21 Texas firms' representation of certain Barton MEI clients."  
22 Do you see that?

23 A. I do.

24 Q. Okay. And I don't know if you were an English  
25 major, but do you have an understanding, looking at that, that

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1 the comma, and then when it says "the subject of which are the  
2 recoverable attorney fees" is a phrase that modifies and  
3 discusses what preceded it in the sentence?

4 A. I'm not an English major, but that, in my mind,  
5 defines what it is talking about preceding the comma.

6 Q. Okay. And setting that aside - because you're not  
7 a lawyer, right?

8 A. No.

9 Q. With regard to your understanding of these  
10 documents, did you ever have an understanding that you were  
11 giving up, by this language, "Barton Phen-Fen fees," your  
12 right to be paid directly from the clients?

13 A. No. Because it defines in here in the settlement as  
14 attorney fees not client fees - or client costs, excuse me.

15 I never gave up that right, I never have, I never  
16 will, as long as this will go.

17 Q. You were asked questions by Mr. Jones about your  
18 deposition. Do you have it up there?

19 A. No.

20 Q. Let me have you go to -

21 MR. MAGLEBY: If I could give it to him, Your Honor.

22 THE COURT: Yes.

23 Q. (By Mr. Magleby) Okay. You were asked some  
24 questions by Mr. Jones about your testimony on page 103.  
25

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1 A. Okay.

2 Q. Do you recall that generally?

3 A. Generally.

4 Q. Okay. I want to take you back to a question on page  
5 102. Mr. Jones asked you - before the question, he asked you  
6 about in the depo: "Mr. Fidler, isn't it true that that  
7 refers to money received from client settlements and client  
8 recoveries?"

9 Your answer: "I don't believe it does."

10 Mr. Jones: "You don't believe it does?"

11 Your answer: "No."

12 Were those your answers?

13 A. Uh-huh. (Affirmative.)

14 Q. Now, Mr. Jones - I'm sorry, you have to say yes or  
15 no.

16 A. Yes.

17 Q. Mr. Jones asked you - in your opinion, did Mr. Jones  
18 ask you the same question a number of times?

19 A. Yes, he did.

20 Q. Okay. When you gave that answer, did you think it  
21 was truthful?

22 A. Yes.

23 Q. All right. Did you ever find any of Mr. Jones'  
24 questions confusing?

25 A. Extremely.

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1 Q. Nonetheless, you did your best to answer them  
2 truthfully.

3 A. I tried, yes.

4 Q. Okay.

5 A. I'm not an attorney.

6 Q. Be glad. Probably asked this; I've got it in my  
7 notes. Did you ever think Advocate's security interest would  
8 apply to the client cost side?

9 A. No.

10 Q. Was the settlement agreement a means by which you  
11 obtained additional rights to be paid for Mr. Barton's  
12 contingency fees and other monies?

13 A. Yes.

14 Q. By the way, did you have an understanding that  
15 Mr. Barton was entitled to receive other monies from the Texas  
16 firms that were not Phen-Fen monies?

17 A. He could have.

18 Q. Did he ever talk to you about the hip implant cases?

19 A. The Sulser hip implants, yes.

20 Q. All right. And at the time that we did this  
21 settlement agreement, did you have an understanding he was  
22 waiting to be paid on those?

23 A. Yes, and that he could use those funds if he wanted  
24 to -

25 Q. Did you have an understanding Mr. Barton did a lot

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1 of television advertising and took a whole variety of cases?

2 A Personal injury cases in several different states

3 Q And you were - to the extent that they were covered

4 by other monies " he could use those to pay you

5 A Yes I was hoping he d get some big truck injury

6 cases

7 MR MAGLEBY That will be all Thank you

8 Mr Fidler

9 THE COURT Thank you

10 Further cross examination?

11 RECROSS-EXAMINATION

12 BY MR JONES

13 Q Just to follow up on the most recent or the last

14 question asked by your counsel Are you suggesting to me that

15 other monies " as used in the definition of Barton Phen-Fen

16 fees would include monies from cases not Phen Fen cases but

17 all kinds of other cases? Is that what you re suggesting?

18 A Yes

19 Q Okay When you look at the definition Exhibit 10 -

20 Exhibit 9 can look in Exhibit 9 or Exhibit 10 of the Barton

21 Phen-Fen fees Let s look at Exhibit 9 (j)

22 A Uh huh (Affirmative )

23 Q Okay I m going to ask you two things about that

24 Do you see anything in there that would include - or

25 can you point me to any language that would expand that

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1 definition to include monies other than those due under the

2 referral agreements related to Phen-Fen?

3 A It - it - as we said before it defines them as

4 recoverable attorney fees and that s - doesn t necessarily

5 limit it to the Phen Fen

6 Q Well let s see It says " arising out of the

7 Texas firms representation of Barton MEI clients Do you

8 see that?

9 A I do see that

10 Q And Barton MEI clients we re talking about the

11 Phen Fen clients aren t we Mr Fidler? Okay

12 A Yeah

13 Q Okay Now the other point I d like to ask you

14 about you said that you re not an English major but you

15 believe the subject of which are recoverable attorneys fees "

16 that that phrase modifies what precedes it in the sentence

17 Do you see that?

18 A It defines it as -

19 Q Yeah Right And what precedes it in the sentence

20 is the Phen-Fen referral agreement between Barton - or the

21 Texas firms or any subsequent agreement between Barton and the

22 Texas firms the subject of which

23 What it defines Mr Fidler isn t it true that what

24 it defines is the agreements - doesn t define fees or monies

25 it defines the agreements under which we are to look to see

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1 what fees and monies are due That s what it defines isn t

2 it Mr Fidler?

3 A Well you re trying to make me define that as client

4 costs And in my mind it is not client costs it is attorney

5 fees that - and so - m not - you know that s as much as I

6 know on that

7 MR JONES Thank you Mr Fidler

8

9

10 REDIRECT EXAMINATION

11 BY MR MAGLEBY

12 Q Mr Fidler real briefly Turn to Exhibit 12

13 And I ll just - since this has been stipulated

14 admissible I ll represent to the Court and to the witness

15 this is a Phen Fen referral agreement or a referral alliance

16 agreement excuse me between GBS and the Texas firms

17 And Mr Fidler if you d turn to the second page

18 paragraph 8 Are you with me?

19 A Yes

20 Q And down there in the last sentence it says - or

21 last - I ll just read it

22 As to the \$2 million loan advanced by Williams &

23 Bailey to Gregory Barton & Swapp said amount will be repaid

24 to Williams & Bailey out of the first referral fees allocated

25 to Gregory Barton & Swapp s interest from either the Phen Fen

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1 or hip/knee replacement cases "

2 Do you see that?

3 A I do

4 Q Did you have an understanding that Mr Barton was

5 working with the Texas firms on hip/knee replacement cases?

6 A I - I know that yes

7 Q All right And it s possible - did you think it was

8 possible that Keith Barton was working with Texas on other

9 cases?

10 A Oh yeah

11 Q Do you know whether or not -

12 A They do a lot of their litigation for them

13 MR MAGLEBY Okay Thank you No further

14 questions

15 THE COURT Anything further for this witness?

16 MR JONES Just one follow up on that

17 RECROSS EXAMINATION

18 BY MR JONES

19 Q Mr Fidler the - if you take a look at that

20 paragraph (j) you ll - the Phen Fen referral agreement

21 defined there isn t it true that that s not Exhibit 12?

22 MR MAGLEBY Your Honor I didn t redirect him on

23 this

24 MR JONES You asked him -

25 THE COURT I ll allow the question He could call

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1 him on as his own witness, if he wanted, so...

2 THE WITNESS: What exhibit is it again?

3 Q. (By Mr. Jones) Exhibit 12 that you were just asked

4 about was - is dated -

5 A. Yes.

6 Q. - that document is dated August 17, 2001. Do you

7 see that?

8 A. I do.

9 Q. And would you compare that to the Phen-Fen - the

10 Phen-Fen referral agreement referred to in the definition of

11 Barton Phen-Fen fees?

12 A. Yes.

13 Q. It says August 6/8, 2002.

14 A. Uh-huh. (Affirmative.)

15 Q. Isn't it true, Mr. Fidler, that the Phen-Fen

16 referral agreement referred to there is actually Exhibit 13?

17 Take a look at Exhibit 13 and tell me if you think that's the

18 agreement that's referred to rather than Exhibit 12.

19 A. Now, I don't have a legal understanding of which

20 exhibit you're - it just - in my mind, it's - Keith was able

21 to satisfy that agreement from his attorney fees.

22 Q. Could I just ask you to take a look at the date on -

23 the date that Exhibit 13 was executed?

24 MR. MAGLEBY: Your Honor, we'll stipulate that

25 that's the agreement.

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1 MR. JONES: Thank you.

2 THE COURT: All right. Anything further?

3 MR. MAGLEBY: No, Your Honor.

4 THE COURT: All right. Thank you, sir. You may

5 stand down.

6 And you're resting at this point, then?

7 MR. MAGLEBY: We are, Your Honor.

8 THE COURT: Mr. Magleby?

9 MR. MAGLEBY: Yes.

10 THE COURT: All right. Just so you know, I do have

11 an oral argument coming in at 1:00. Well, it's actually

12 another matter. I don't know how extensive it will be. But

13 are you going to be finished by then or - with the next

14 witness?

15 MR. JONES: I don't think I can do that in ten

16 minutes, Your Honor.

17 THE COURT: How long do you think you'll take? Do

18 you have an estimate?

19 MR. JONES: I can probably do it in 30.

20 THE COURT: Okay. Well, why don't we get started on

21 that and I'll have the bailiff watch for these other folks,

22 then we'll see where we go.

23 MR. JONES: And I'll - with the Court's schedule and

24 mine, I'll try to shorten it as much as possible.

25 THE COURT: Okay. Thank you.

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1 MR. JONES: And with some indulgence from counsel.

2 MR. HOFMANN: And, Your Honor, at this point, we

3 haven't participated in the other questioning, but with

4 Mr. Hashimoto on the stand, we would like to participate in

5 the questioning there.

6 THE COURT: All right. Just be - just keep in mind

7 I have another matter coming and we're over time on this

8 hearing, so, you know - and I don't want to have to make you

9 come back next week, if we can avoid it, so... Okay.

10 MR. SHORT: And, Your Honor, we can discuss this at

11 an appropriate time, but I'm not sure any pleadings have been

12 filed by Mr. Barton on this matter. I'm not sure it's

13 appropriate for him to raise any questions in this matter.

14 THE COURT: You may be right on that. We'll look at

15 that when that comes up.

16 Okay. All right. So you want to call

17 Mr. Hashimoto, then?

18 MR. JONES: I do, Your Honor.

19 THE COURT: All right. Mr. Hashimoto, do you want

20 to come forward, please, and face the clerk and raise your

21 right hand.

22 MARK HASHIMOTO,

23 called as a witness by DAT&K, being

24 first duly sworn, was examined and

25 testified on his oath as follows:

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1 THE COURT: Please have a seat.

2 DIRECT EXAMINATION

3 BY MR. JONES:

4 Q. Mr. Hashimoto, what is your relationship to Gregory,

5 Barton & Swapp?

6 A. I'm the court-appointed receiver.

7 Q. And just for the Court's information, do you recall

8 when you were appointed receiver for Gregory, Barton & Swapp?

9 A. It was May 2005.

10 Q. And, also, could you briefly give to the Court your

11 educational and professional background?

12 A. Yes. I have a bachelor's degree in both finance and

13 accounting from the University of Utah. I also have a - a

14 master's in business administration also from the University

15 of Utah. I'm a license CPA here in the state of Utah.

16 Q. And what is your - could you give me just a little

17 bit of your professional employment background?

18 A. Yes. I've been employed by several firms in the

19 area of forensic accounting. First it was with the national

20 and international accounting firm of KMG Maine Hurdman. I was

21 there for approximately two and a half years.

22 From there, I went to work for a regional firm by

23 the name of Nielsen, Elgren, Dirken & Company, was there for

24 approximately ten years. From there, I formed my own firm by

25 the name of Hunter & Hashimoto, had that firm for

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1 approximately five years. And then since that time, I've been  
2 a sole practitioner with an affiliation with a firm by the  
3 name of LECG.

4 During that time, I've practiced in the area of  
5 bankruptcy, insolvency, forensic accounting and investigative  
6 accounting, economic analysis.

7 Q. What are your duties - why don't we go back to your  
8 appointment as a receiver. What were your duties as a  
9 receiver when you were appointed?

10 A. Well, originally, it was basically to operate the  
11 ongoing firm of Gregory, Barton & Swapp. Effectively, there  
12 was a definition of receivership assets that I was to take  
13 control of and operate. And - and at that time, it was an  
14 ongoing, operation law firm.

15 Q. Did you take possession of all the books and records  
16 of Gregory, Barton & Swapp?

17 A. Physically, no. There was some agreements between  
18 the parties. Since we sold the auto practice, those documents  
19 and records to those clients were - were shuffled off to the  
20 Gregory & Swapp firm, who purchased those. With the respect  
21 to the mass tort clients, those documents were to be retained  
22 by - by Keith Barton and his associated law firm.

23 The accounting records, I have, for the most part,  
24 in my possession. And that basically, I think, is all of the  
25 documents and how they were divvied up at the time.

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1 Q. So you took possession of the financial and  
2 accounting records; is that correct?

3 A. Well, to the extent that I needed to. I mean, there  
4 were some old records that I didn't actually take physical  
5 possession of.

6 Q. When you say "old," were those several years or many  
7 years prior to -

8 A. Many - many years prior, yes. And part of the  
9 agreement was that they would remain in place where they were,  
10 which Gregory & Swapp effectively took over the old space, but  
11 we would have complete access to those documents at any time.

12 Q. Okay. Was one your duties to review those financial  
13 statements?

14 A. Yes.

15 Q. Did you do that?

16 A. Yes.

17 Q. Was one of your duties to prepare financial  
18 statements on an ongoing basis for Gregory, Barton & Swapp  
19 once you were appointed receiver?

20 A. Yes. We have a monthly requirement to provide  
21 monthly financial statements to the court.

22 Q. Was one of your responsibilities to review claims  
23 that were filed in the - in the receivership?

24 A. That is one of my duties, yes.

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1 Q. In connection with your duties as a receiver, have  
2 you reviewed - have you reviewed the proof of claim filed by  
3 MEI?

4 A. I have not, in detail, reviewed that. We are  
5 currently in the process of still trying to pay out DAT&K on  
6 their claim, and so we have left the other claims, basically,  
7 to be reviewed at a later point in time, pending whether or  
8 not there are actually assets and funds available for those  
9 subordinate claims.

10 Q. Do you recall, Mr. Hashimoto, if - the proof of  
11 claim is Exhibit 6. Do you have it up there in the exhibit -

12 A. There's no binder up here.

13 MR. FIDLER: Oh, Your Honor, I got it. I got it.  
14 Sorry.

15 MR. MAGLEBY: Got to keep an eye on these witnesses.

16 Q. (By Mr. Jones) Mr. Hashimoto, you have seen that -  
17 that note - the note and settlement agreement attached -

18 A. I have.

19 Q. - to that proof of claim before?

20 A. Yes.

21 Q. Mr. Hashimoto, may I direct your attention to  
22 Exhibit 14.

23 A. Okay.

24 Q. And do you recall this document, Mr. Hashimoto, even  
25 in its redacted version?

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1 A. Yes, I do.

2 Q. And, Mr. Hashimoto, is this the settlement agreement  
3 that resolved the disputes among the Texas law firms, the  
4 receiver, Gregory, Barton & Swapp with respect to the proceeds  
5 of the Phen-Fen cases? Is that correct?

6 A. That's correct.

7 Q. And that settlement agreement was approved by this  
8 court, correct?

9 A. Correct.

10 Q. Can I call your attention to page 2 of that  
11 document, the first Whereas. Do you see that? "Since the  
12 execution of the MEI note?"

13 A. Yes.

14 Q. Okay. In connection with this settlement process,  
15 was it necessary for you to determine what payments had been  
16 made on that MEI note?

17 A. Yes.

18 Q. And I'd ask you to take a look, then, at Exhibit 18.

19 A. Okay.

20 Q. Do you recognize this document?

21 A. I do.

22 Q. Is it a document - is this the document - does this  
23 document reflect the payments that were made on the MEI note  
24 that were - we just looked at in the settlement agreement?

25 A. Yes. This is an accounting that was actually

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1 provided by Williams Bailey which documented the payments that  
2 they made -

3 Q. Okay.

4 A. - to MEI.

5 Q. And in that accounting, did you determine what  
6 portion of those payments were withheld from the client  
7 portion of the recoveries?

8 A. Well, I do know the amount that was - that was  
9 accounted for that was withheld from client recoveries, yes.

10 Q. And is that amount that's reflected in the  
11 settlement agreement that we just looked at in that - at the  
12 top of page 2 where it says "...of which only \$87,974.16 was  
13 recovered from client settlements"?

14 A. Yes.

15 Q. And then that foots, does it not, to Exhibit 18,  
16 which has the same number recovered from prior settlements?  
17 Do you see that?

18 A. Yes, I do.

19 MR. JONES: Your Honor, I'd move for admission of  
20 Exhibit 18. It is not stipulated to.

21 THE COURT: Any objection?

22 Hearing none, it's -

23 MR. HOFMANN: No objection, Your Honor.

24 Q. (By Mr. Jones) Now, Mr. Hashimoto, in - if only  
25 \$87,974.16 came from the client portion of the settlements to

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1 make these payments under the MEI note, do you know where the  
2 other monies came from?

3 A. I - it came from Williams Bailey.

4 Q. And did you have to - in trying to figure out what  
5 Williams Bailey owed Gregory, Barton & Swapp under the  
6 referral agreement, did you have to account for those monies?

7 A. Yes.

8 Q. And what was the effect of the fact that Williams  
9 Bailey had made these payments of monies, \$284,000 and change  
10 not from client recovery, what was the effect on the  
11 receivership estate, the amount Gregory Barton received -  
12 Gregory, Barton & Swapp received from the settlement?

13 A. There was a deduction from the amount that we  
14 ultimately received from the Phen-Fen settlements.

15 Q. And if there hadn't been that deduction and that  
16 money had been paid to Gregory, Barton & Swapp, or paid to you  
17 as receiver, would you have in turn paid that money to DAT&K?

18 A. Yes, I would have.

19 Q. And that would have been because that money would  
20 have been subject to DAT&K's security agreement, correct?

21 A. Exactly.

22 Q. Mr. Hashimoto, I'm going to ask you to take a look  
23 at an exhibit that's been marked for identification but not  
24 stipulated to, and that's Exhibit 19.

25 A. Okay.

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1 Q. Did you prepare this exhibit?

2 A. I did.

3 Q. Could you explain to the Court what this exhibit  
4 tells us?

5 A. This is an exhibit that summarizes the amounts  
6 withheld from client settlements for MEI versus the amounts  
7 that were paid to MEI.

8 Q. So if I take a look at - at the first column,  
9 Amounts Withheld From Client Settlements -

10 A. Yes.

11 Q. - is that the total amount of dollars that were  
12 withheld from client settlements for the work done by MEI?

13 A. Yes.

14 Q. Okay. So that's the total amount. It's a million  
15 seventy dollars, five seventeen sixteen, correct?

16 A. Correct.

17 Q. And then I look at the settle - the second column  
18 and I look at the total dollars that had been paid to MEI. Do  
19 you see that?

20 A. Yes.

21 Q. Those match, do they not?

22 A. They do.

23 Q. And so MEI has received a sum equal to the entire  
24 amount withheld from the client portion of the recoveries.

25 A. Yes.

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1 Q. Now, if they received any other money other than the  
2 payments they've already received, that, in effect, has to  
3 come from another source, does it not, Mr. Hashimoto?

4 A. Yes, it would.

5 Q. That other source would be the monies that otherwise  
6 would have been paid Gregory, Barton & Swapp, correct?

7 A. Yes.

8 Q. And, in turn, would have been paid to DAT&K pursuant  
9 to its security agreement; is that correct?

10 A. I believe so, yeah.

11 MR. JONES: Move for admission of Exhibit 19.

12 THE COURT: Any objection?

13 MR. HOFMANN: No objection, Your Honor.

14 THE COURT: It will be admitted.

15 Q. (By Mr. Jones) Try to finish then.

16 I have one final question, Mr. Hashimoto.

17 In connection with your review of the books and  
18 records, the financial statements of - of Gregory, Barton &  
19 Swapp, do you know how Gregory, Barton & Swapp accounted for  
20 their obligations to MEI? We've heard some earlier testimony  
21 that - we heard some earlier testimony that invoices were  
22 delivered by MEI to Gregory, Barton & Swapp on a monthly basis  
23 but those were not paid.

24 How were they accounted for on the books and records  
25 of Gregory, Barton & Swapp?

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1 A. They were booked as an expense, contract labor and  
2 included as part of their accounts payable.

3 Q. So that was an obligation that they had, they booked  
4 it in the accounts payable money they owed to MEI; is that  
5 correct?

6 A. That's the way it was accounted on their general  
7 ledger.

8 Q. And if money came in from a client recovery, money  
9 came in, how was that accounted for?

10 A. It was accounted for as part of the gross revenue of  
11 Gregory, Barton & Swapp.

12 Q. So the monies that came in, whether they were  
13 attorneys fees or whether they're client recovery costs, they  
14 were all accounted for as income to Gregory, Barton & Swapp;  
15 is that correct?

16 A. That's correct.

17 MR. JONES: I have no further questions, Your Honor.

18

19 THE COURT: Thank you.

20 Mr. Hofmann?

21 CROSS-EXAMINATION

22 BY Mr. Hofmann:

23 Q. Good afternoon, Mark. I'm sorry, we've done this  
24 dance on a number of occasions, haven't we, before over the  
25 years?

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1 A. Yes, we have.

2 Q. If I refer to you as Mark, is that okay?

3 A. That's fine with me.

4 Q. I'll slip if I don't.

5 A. Okay.

6 Q. All right, Mark.

7 You're familiar with - you're an accountant?

8 A. Yes.

9 Q. And you're familiar with generally accepted  
10 accounting principles?

11 A. Yes.

12 Q. And terms used in accounting?

13 A. Yes.

14 Q. If I use the term "payment," do you know what that  
15 means in an accounting sense?

16 A. Yes.

17 Q. What does it mean?

18 A. Generally, a - a payment of funds, an actual payment  
19 of funds.

20 Q. If I use the term "incurred," do you have an  
21 understanding what that means?

22 A. It's a cost that has been - you've been obligated  
23 to.

24 Q. Is the terms "payment" and "incur" synonymous?

25 A. No. Not exactly.

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1 Q. In fact, you can incur a debt and never pay it,  
2 correct?

3 A. That's correct.

4 Q. Do you have an understanding of the definition of  
5 the term "disbursement"?

6 A. Yes.

7 Q. What is that?

8 A. In my view, it would be the actual payment of funds.

9 Q. Would the terms "disbursement" and "payment" be  
10 synonymous?

11 A. Yes, I think so.

12 Q. Would you have a definition of reimbursement?

13 A. Yes. I mean, it's not necessarily an accounting  
14 term, but a general definition, I would say that somebody's  
15 being repaid for - for a cost.

16 Q. Would you agree with me that someone's being repaid  
17 for something paid or disbursed?

18 A. Sure. Could be.

19 Q. In fact, you - it's a condition precedent to a  
20 reimbursement to make a disbursement, correct?

21 A. Yes, I - I think so.

22 Q. And if I look at the term "advanced," as advanced  
23 costs under generally accepted accounting principles, how  
24 would you define that term?

25 A. A cost that's been advanced to another party.

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1 Q. I just briefly pulled out my dictionary here on my  
2 little Blackberry, and I get, to quote, "pay an expectation of  
3 reimbursement as an advance." Would you agree with that  
4 definition?

5 A. Yes. I think so. I think there's some obligation  
6 to reimburse, yes.

7 Q. Now, as a receiver for a law firm, you understand  
8 there are rules that apply to keep client funds separate from  
9 law firm funds?

10 A. Yes.

11 Q. Have you tried to do that in this case?

12 A. Yes.

13 Q. Are there trust accounts available for GB&S?

14 A. Yes.

15 Q. And you've never used client funds to pay for  
16 incurred expenses, have you?

17 A. No.

18 Q. You've been careful about that?

19 A. Yes.

20 Q. And that includes client portion of settlements,  
21 correct? Client gets this portion in, you don't use that  
22 portion to pay a law firm bill, do you?

23 A. Correct.

24 Q. Now, you understand that GB&S has incurred costs on  
25 behalf of its various clients, in whatever category those

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1 clients fall.  
2 A. Yes.  
3 Q. In fact, there's a large -- a large business for  
4 automobile accidents, is there not?  
5 A. There was, yes.  
6 Q. And there were costs incurred for those clients too.  
7 A. Yes.  
8 Q. Accident reconstruction experts.  
9 A. Absolutely, yes.  
10 Q. Medical experts.  
11 A. Yes.  
12 Q. And isn't it true that, in the history of GB&S, when  
13 you reviewed it, such fees were deducted from the clients'  
14 portion for automobile accidents of their settlements?  
15 A. That's my understanding.  
16 Q. Now, if the law firm had actually paid those costs  
17 first, it got reimbursed for those costs out of the client  
18 portion of settlement.  
19 A. I think that's generally the case.  
20 Q. But if the cost had not been paid by the firm, then  
21 the costs incurred were paid from the clients directly and  
22 didn't go -- were not paid to the firm.  
23 A. It was paid out of the trust account generally  
24 towards those costs.  
25 Q. The client portion.

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1 A. Yes.  
2 Q. All right. In fact, the automobile business was  
3 sold, was it not?  
4 A. It was.  
5 Q. Who was it sold to?  
6 A. The firm of Gregory & Swapp.  
7 Q. And does GB&S, as a receiver, receive payments out  
8 of that sale?  
9 A. I did. At one time.  
10 Q. Have you ever required the purchaser of that  
11 automobile business to pay GB&S for costs that it never  
12 advanced, it never paid itself?  
13 A. Repeat the question. I'm not sure I understand.  
14 Q. The purchaser of the automobile business --  
15 A. Okay.  
16 Q. -- needs to make certain -- needed to make certain  
17 payments to GB&S, correct?  
18 A. Correct.  
19 Q. And did some of those payments reimburse for costs  
20 already put out by GB&S for those cases?  
21 A. That's not how the deal was structured.  
22 Q. Did GB&S ever get paid back for costs it actually  
23 expended on behalf of those clients?  
24 A. Well, I think it was an overall total purchase  
25 price. We didn't really delineate --

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1 Q. It didn't break it out?  
2 A. -- exactly -- it didn't break it out, no.  
3 Q. All right. Let's look at Exhibit 19.  
4 A. Okay.  
5 Q. Did you prepare this, I understand?  
6 A. I did.  
7 Q. Now, the column Amounts Withheld From Clients'  
8 Settlement, that's simply the amounts that the Texas firm  
9 has -- has said "These are the portion for these clients of  
10 their echo costs," correct?  
11 A. That's correct.  
12 Q. You didn't make that determination, did you?  
13 A. It was audited by me, but it was accounted for by  
14 the Texas firms.  
15 Q. And so that million dollars and seventy thousand  
16 dollars and change represents the cost for each of these  
17 individual clients in the aggregate for echo costs?  
18 A. Yes.  
19 Q. All right. Let's go to the -- the right column,  
20 Amounts Paid to MEI. There's \$601,000. That was the initial  
21 payment made before the promissory note, correct?  
22 A. That's my understanding, yes.  
23 Q. You weren't part of that settlement agreement with  
24 MEI, were you?  
25 A. No.

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1 Q. You have no personal knowledge of what that \$601,000  
2 was for?  
3 A. No.  
4 Q. Were you aware that MEI did what are called  
5 screenings as well as studies for clients?  
6 A. Yes.  
7 Q. You sat in today's testimony. Were you sitting  
8 there the whole time?  
9 A. I have been, yes.  
10 Q. Did you hear the testimony that the \$601,000 was for  
11 payment not for full studies but for screenings?  
12 A. Yes.  
13 Q. Is it your understanding, though, that the amounts  
14 withheld from client settlements on your left side of the  
15 column is for full study work?  
16 A. I'm not sure exactly what it's for.  
17 Q. Because Texas made a determination?  
18 A. That's correct.  
19 Q. But when you audited it, did you not audit it for  
20 what the full cost study expense was for each of these  
21 clients?  
22 A. I don't recall. I mean, there were basically costs  
23 related to specific clients, and I couldn't tell you  
24 specifically if it was for full studies or original  
25 screenings.

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1 Q. Did you audit all the costs that came out of these  
2 client settlements, whether or not for echoes? For any other  
3 purpose.

4 A. Not every single one.

5 Q. Were costs deducted for TV advertisements?

6 A. No.

7 Q. If, in fact, GB&S had expended monies for - for TV  
8 advertisement, so that have come - should that have been  
9 deducted from the client portion of the settlement?

10 A. No. It was an unreimbursed cost.

11 Q. If GB&S paid for a screening for a client that never  
12 really - I'm sorry, potential client that never became a  
13 client because it didn't qualify - he or she didn't qualify -  
14 should that be deducted from these particular clients' monies?

15 A. No. It was also an unreimbursed cost.

16 Q. If some of that \$601,000 were for screenings for  
17 potential clients that never became clients, should that be  
18 deducted from the hundred - that million dollars that was  
19 deducted from client settlements?

20 A. For purposes of this exhibit, I think, yes.

21 Q. The \$601,000, if it's paid for a non-client expense,  
22 your testimony is it should be properly deducted from actual  
23 clients' settlement monies.

24 A. Well, this schedule is merely meant to show what was  
25 withheld from clients that was reimbursable to MEI versus

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1 payments that were made in total to MEI.

2 Q. But in your - in doing so, you have made no  
3 distinction as far as payments made to MEI as to what those  
4 payments were for.

5 A. I think that's, in part, why we're here.

6 Q. But in your analysis -

7 A. There was a - there was a priority dispute as to the  
8 remaining dollars that were left over here and that's why we  
9 chose to interplead it with the court and let the court make  
10 a ruling on whose funds those were.

11 Q. I understand, Mark. But my question was: In your -  
12 your putting this exhibit together, you didn't make a  
13 distinction as to what these monies paid to MEI were for.

14 A. No.

15 Q. And if they were paid for screening and not full  
16 studies, would that change your - your opinion as to whether  
17 they should be taken out of actual client funds?

18 A. And, again, I - that's not the purpose of this  
19 particular exhibit.

20 Q. And the three seventy-two, if those were paid for  
21 other than for full studies, would your answer be the same?

22 A. Yes. It would be.

23 Q. Now, the \$97,000 figure on the right-hand column,  
24 that was a calculated amount, was it not?

25 A. It was. Absolutely.

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1 Q. And that was an amount calculated in order to make  
2 those two columns match.

3 A. Yes.

4 Q. Isn't a coincidence they just matched.

5 A. Absolutely. We determined what that amount was and  
6 we paid that. That was undisputedly money that needed to go  
7 to MEI. Beyond that, there was a priority dispute as to who  
8 had a claim to it.

9 Q. But do you have any personal knowledge as to whether  
10 the non-plugged numbers, the six oh one or the three seventy-  
11 two, were client costs that should come out of the left-hand  
12 column or for some other purpose?

13 A. No. That's - well, that's - in my opinion, that's  
14 exactly why we're here before the Court.

15 Q. But you personally have no knowledge and have done  
16 no investigation of what those payments were for, correct?

17 A. Well, I know they were for note payments and an  
18 initial payment related to the MEI obligation.

19 Q. Well, there's a number of obligations that GB&S was  
20 obligated for resulting from Phen-Fen litigation, right? A  
21 Yes.

22 Q. There was the TV advertisement.

23 A. There was certainly some that remained outstanding.

24 How much of that related to the Phen-Fen litigation and how  
25 much of it related to the auto practice, I - I don't think I

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1 could break that out.

2 Q. And did you look at paragraph 25 in doing this audit  
3 of the breakout between the two firms? This is the Supplement  
4 to Referral Agreement. It should be in your binder in front  
5 of you.

6 MR. MAGLEBY: Exhibit. You said paragraph.

7 MR. JONES: I'm sorry. Exhibit 25. Or tab 25,  
8 Mark.

9 THE WITNESS: Could you ask the question again? I'm  
10 sorry.

11 MR. JONES: Sure.

12 Q. You had indicated that you kind of did this audit  
13 with respect to MEI's costs on the client cost portion that  
14 Texas was withholding.

15 A. I did a general audit, yes.

16 Q. Did you consider tab - or Exhibit 25 in doing that  
17 analysis?

18 A. I remember there was a - I remember going through  
19 all of this stuff on quite extensive detail. Whether or not  
20 I specifically referred back to this while I was looking at  
21 costs related to MEI, I don't recall.

22 Q. All right. Well, let's go through it real briefly  
23 then.

24 Now, so I have your testimony, you had no indication  
25 that GBS paid any of that \$601,000 down payment.

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1 Not a dime of it.

2 A. Well, they didn't initially. We did ultimately.

3 Q. When that payment was made, that -

4 A. By - by a deduction of the amounts that Williams

5 Bailey ultimately paid paid us.

6 Q. We'll get to that in a minute.

7 A. Okay.

8 Q. The payment that came, the \$601,000, did not come

9 from GB&S.

10 A. No.

11 Q. And the -

12 A. Not directly.

13 Q. - \$372,000 in payments none of that came from GB&S.

14 A. It - well, again, it ultimately did in the end. It

15 initially came from Williams Bailey, then it came out as a

16 deduction from the amounts that we received from Williams

17 Bailey at the end of the day. So -

18 Q. I'm asking who made the payment, not how you

19 allocated it at the end.

20 A. Okay. If you're saying who made the payment?

21 Q. Yes.

22 A. The physical payment, Williams Bailey did.

23 Q. And Williams Bailey made the \$601,000 as well?

24 A. They actually were the ones that cut the check, yes.

25 Q. But you went through a process of determining how it

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1 should be allocated, right?

2 A. Yes, we did.

3 Q. Did you follow the procedures set forth in Exhibit

4 25?

5 A. I - I think we did. I think we went through this and

6 attempted to negotiate this out with Williams Bailey based on

7 the terms of these agreements.

8 Q. Let's look at paragraph 4 on page 3.

9 A. Okay. I'm there.

10 Q. Okay. The first paragraph, 4(a), talks about this

11 \$730,000. That's not just the \$601,000, that's other case-

12 related expenses, is it not?

13 A. I don't know. I don't - it's been a very long time

14 since I reviewed this document.

15 Q. All right. But that's - from the fee portion, Texas

16 has the right to recoup, right? That's the first thing that

17 comes out.

18 A. For unreimbursed costs.

19 Q. Right. And let's start out at the beginning. This

20 has nothing to do with client portion of settlement. This is

21 only the attorney fee portion, right?

22 A. Yes. I believe so.

23 Q. Paragraph 4 has nothing to do with what comes out of

24 the clients' portion of settlement, correct?

25 A. Could I review paragraph 4?

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1 Q. Please.

2 A. Okay.

3 Q. All right. My question is: Paragraph 4 deals

4 nothing with the client portion of this - of - these

5 recoveries.

6 A. I don't see any specific reference to that, no.

7 Q. All right. And we've used the term "client

8 recoveries" before. And let me have a definition between you

9 and I so at least we are on the same sheet of music.

10 A. Okay.

11 Q. When a case is settled and the defendant pays an

12 amount for a client's (inaudible), that whole thing I'm going

13 to refer to as the client's settlement - or the case

14 settlement.

15 A. Okay. Okay.

16 Q. The client portion will be this portion that goes to

17 the client, the attorney fee portion will be the portion that

18 goes to the attorney.

19 A. Okay.

20 Q. Would you agree with that?

21 A. Yes. That's fine.

22 Q. So let's look at the attorney fee provision and how

23 that - the portion - how that gets broken out. Paragraph 4.

24 So Texas, to the extent it's paid up to seven thirty

25 for case expense, gets to deduct that off the top.

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1 A. Yes. Off the gross settlement.

2 Q. And out of attorneys fees only.

3 A. No. Well, let me think about that. Yes. Yes,

4 that's correct.

5 Q. Now, 4(b), to the extent GB&S has advanced any

6 funds, it gets to be recouped those, right?

7 A. Yes.

8 Q. But it's in advancing funds, so that paragraph never

9 came into play.

10 A. It did some.

11 Q. How much?

12 A. I don't remember the exact amount, but there were

13 some that we - that GB&S paid for and what we were reimbursed

14 for.

15 Q. Nothing relating to echoes or this type of - nothing

16 relating to our case here today, right?

17 A. Boy, I - I can't say for 100 percent sure. There

18 were some amounts -

19 Q. You can't recall any?

20 A. Yeah. I don't recall.

21 Q. All right.

22 A. The amount wasn't huge, but I don't recall exactly

23 what it was for. It's been several years since I've been into

24 that agreement.

25 Q. Okay. First Texas, then GB&S, and then there comes

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1 a point where there's a reconciliation, right? A true-up, if  
2 you will.

3 A. True-up meaning? Meaning what exactly?

4 Q. A reconciliation of these attorney fee costs,  
5 attorney fee division between Texas and GB&S.

6 A. Yes.

7 Q. Now, you indicated that, eventually, it's worked out  
8 so GB&S paid a share of this. Is that through the  
9 reconciliation process you were - that's talked about in this  
10 agreement?

11 A. Yes.

12 Q. All right. And that's paragraph 6, is it not?

13 A. Could you repeat the question?

14 Q. You've indicated that there is this reconciliation  
15 process and that's kind of what you went through to determine  
16 that GB&S had a share of this - these funds.

17 A. Yes.

18 Q. Was that the reconciliation process we see outlined  
19 in paragraph 6 of this supplemental referral agreement?

20 A. Yes. All of the payments that were made to MEI,  
21 one-half of it was deducted from the portion that was  
22 ultimately paid to us.

23 Q. Did the actuals -

24 A. As Gregory, Barton & Swapp.

25 Q. The actuals here are fees, one-third to - or, one-

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1 third to GBS, two-thirds to the Texas firms, correct?

2 A. Correct.

3 Q. But this process allowed for 50-50 for certain  
4 expenses, right?

5 A. Yes.

6 Q. But isn't it true that that only gets into effect at  
7 the very end, after the MEI note is paid in full? Correct?

8 A. Well, that's how it worked in the ultimate  
9 settlement agreement.

10 Q. Isn't it true that paragraph 6 says: "Once the MEI  
11 note is paid off in its entirety, this reconciliation will  
12 then occur"?

13 A. There was a lot of negotiation over this paragraph,  
14 and what was ultimately deducted out was 50-50 from - from -  
15 50 percent of it was charged to us.

16 Q. And -

17 A. Of those payments to MEI.

18 Q. You've never given MEI that portion of the agreement  
19 so we can see how that was handled, have you? That was  
20 redacted?

21 A. I don't know.

22 Q. Will you look at Exhibit 14. Is that the - the  
23 settlement you're talking about?

24 A. Yes, it is.

25 Q. Is there any portion of this exhibit that deals with

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1 why paragraph 6 was not honored?

2 A. I think it was honored.

3 Q. My question is: Where do I see in paragraph 14  
4 that's being dealt with?

5 I'm sorry, I keep saying paragraph, Mark. Exhibit  
6 14.

7 A. Let me take a minute and look through it.

8 Q. Sure.

9 (Pause.)

10 THE WITNESS: I don't see the specific division of  
11 the - the payments - related to MEI divided 50-50 in this  
12 document. However, there was an attachment to this document  
13 which had the complete reconciliation of how the cash was  
14 ultimately divided between Williams Bailey and Gregory, Barton  
15 & Swapp.

16 Q. (By Mr. Jones) That was not provided to MEI,  
17 though, was it? It was redacted as part of the redactions on  
18 this document?

19 A. Appears to be, yes.

20 Q. And in this record, we have nothing to indicate how  
21 that was done.

22 A. It doesn't appear so.

23 Q. And that was done - those redactions were done at  
24 the choice of you and DAT&K, right?

25 A. I - I don't recall the exact process of why we

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1 redacted what.

2 Q. But isn't it true that the way the Exhibit 25  
3 reimbursement works, GB&S is only entitled to reimbursement if  
4 it pays over 50 percent of these costs to MEI? Correct? This  
5 true-up only occurs if it pays more than 50 percent.

6 A. Well, the true-up's going to occur regardless. I  
7 mean, ultimately, there's going to be an accounting for all  
8 the MEI costs and it's going to - and it got divvied up 50-50  
9 between us and Williams Bailey, as agreed to in that agreement  
10 we were just referring to.

11 Q. In the true-up, is there a - is there any kind of an  
12 event that would result in GBS having a right to payment from  
13 the Texas firms under this true-up? Some contractual right.

14 A. Yeah. I mean, ultimately, it was - it was deducted  
15 from the amounts that were ultimately due us.

16 Q. Under the way Exhibit 25 reads, could there  
17 potentially have come a time that GBS was entitled to a  
18 contractual right to payment from the Texas firms for the  
19 reimbursement portion?

20 A. Maybe I'm not quite understanding the question.  
21 Sorry.

22 Q. I'm probably trying to speed through this too fast,  
23 Mark. Let me have you take a look at Exhibit - or - Exhibit  
24 25.

25 A. Okay.

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1 Q. Paragraph 6.  
2 A. Okay.  
3 Q. I'm sorry, 7 now. Talking about the payment.  
4 A. 7?  
5 Q. Middle of the paragraph. "This reconciliation will  
6 be made by a payment of a sum from GBS and/or Barton on the  
7 one hand to the Texas firms on the other, or vice versa,  
8 depending on the application of the above-referenced factors."  
9 A. Okay.  
10 Q. So as a result of this true-up or reconciliation,  
11 one of the firms may owe the other firm some money.  
12 A. Yes.  
13 Q. And isn't it true the only way GB&S was going to be  
14 owed any money is if it paid over 50 percent of these defined  
15 costs?  
16 A. Yes.  
17 Q. Which it never did.  
18 A. No.  
19 Q. And would you agree with me the MBI note was never  
20 paid, the - well, kick in that reconciliation provision of 25?  
21 A. Well - repeat the question again.  
22 Q. The MBI note was never fully paid -  
23 A. It was not fully paid.  
24 Q. - kicking in the condition of that reconciliation.  
25 In fact, if you look at paragraph 7, I stopped

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1 reading, "this reconciliation will only occur, however, after  
2 such time that the MEI is paid off."  
3 Did I read that correctly?  
4 A. Where are we at again? I'm sorry.  
5 Q. Paragraph 7 on -  
6 A. Yes.  
7 Q. - Exhibit -  
8 A. I'm just trying to find the exact location where you  
9 were reading.  
10 Q. Okay. It's actually the second to last sentence in  
11 paragraph 7.  
12 (Pause.)  
13 THE WITNESS: Okay. And the question was?  
14 Q. (By Mr. Jones) Did I read that correctly? "...only  
15 to occur if the MBI note's paid off"?  
16 A. It just says "after such time," not "if such time."  
17 Q. "This reconciliation will only occur, however, after  
18 such time that the MBI note is paid off."  
19 A. I think it was anticipated that it would be paid  
20 off, and it obviously wasn't.  
21 Q. As we're right here today, it's not been paid off.  
22 A. That's right.  
23 Q. Do you see Exhibit 24 in front of you? Do you  
24 recognize what that is?  
25 A. I do recognize what it is. I don't think it was

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1 produced to me in this exact form.  
2 Q. Was this information produced to you in a different  
3 form?  
4 A. It was more in a - in an overall spreadsheet that  
5 showed all of the client settlements, all of the costs  
6 deducted - yeah, it was more in a global sense. I don't  
7 remember it produced in this specific manner to me.  
8 Q. Do you understand what this document represents?  
9 A. I think so, yes.  
10 Q. Do you see over where it says Echo Cost to MEI?  
11 A. Yes.  
12 Q. Is this not the cost that was - this amount of the  
13 cost, was that factored into - the amount withheld by the  
14 Texas firms are the funds we're dealing with today?  
15 A. I think so, yes.  
16 Q. So if I take any one of these, last to the bottom,  
17 Anderson, Sandra, \$953.  
18 A. Yes.  
19 Q. And that differs from the hold-back portions that we  
20 spent a lot of time talking about now. On the other agreement  
21 with MEI and the Texas firms and GBS, correct?  
22 A. I'm not sure I understand the question.  
23 THE COURT: Let me interrupt. How much longer are  
24 you going to be with this witness?  
25 MR. JONES: Five minutes.

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1 THE COURT: All right. Let's go ahead and see if  
2 you can finish up and then I'm going to take that other  
3 argument.  
4 MR. JONES: Sorry.  
5 THE COURT: Okay.  
6 Q. (By Mr. Jones) Mark, let me have you turn to  
7 Exhibit 10. We spent some time this morning on paragraph 15.  
8 Do you see where the sum of echocardiogram expense hold-back,  
9 the amount of \$1,420.65 is discussed?  
10 A. Okay.  
11 Q. That's not the amount that was calculated out of the  
12 client portion of the settlement for the funds we're dealing  
13 with here today, was it?  
14 A. No.  
15 Q. In your work as an accountant, have you ever seen a  
16 situation where one - or more than one party owes a debt?  
17 A. Yes.  
18 Q. Ever see a situation where one party has one or more  
19 ways of recourse to get the debt paid?  
20 A. Sure. Yes.  
21 Q. And if the debt's paid from source A, that reduces  
22 the liability in source B.  
23 A. Yes.  
24 Q. And if these two parties, A and B, owe the debt, is  
25 it appropriate in the books and records for B to show it as a

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1 debt?

2 A. It depends on who the primary obligor is on it.

3 Q. If it's joint and several. If both owe it.

4 A. It depends on the agreement itself. I mean, it may  
5 be shown as a contingent liability on the books, it may be  
6 shown as an actual obligation. It depends on the - the  
7 obligation itself.

8 Q. Would you be surprised to see that obligation on the  
9 books and records of B as an account payable?

10 A. Would it surprise me to see that?

11 Q. Right.

12 A. No.

13 Q. And were you surprised to see the client costs on  
14 the accounting records of GB&S?

15 A. No. I assumed it probably would be.

16 MR. JONES: Let me just have a moment to see if I  
17 can just shorten this up, Your Honor.

18 Q. Mark, let's do one more exhibit. 18. This is the  
19 spreadsheet given to you by the Texas firm?

20 A. This is one of them, yes.

21 Q. So I understand, your contention here today is that  
22 by this true-up that you've done in the manner we don't see  
23 because Exhibit 14 was redacted, you believe GB&S has, as an  
24 end result, paid some portion of these costs.

25 A. One-half of this \$284,000 figure was deducted out of

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1 the GB&S side of the ledger.

2 Q. Isn't it true, however, that if we're looking from  
3 an attorneys fees section, GBS's share would have been one-  
4 third of that amount?

5 A. There was quite a discussion about that and an  
6 argument about that.

7 Q. And we don't have anything -

8 A. As to - as to where it should be placed, whether it  
9 should be a one-third cost or a one-half cost. And that was  
10 part of the negotiation that ultimately took place in reaching  
11 the settlement agreement.

12 Q. MEI wasn't part of that negotiation, was it?

13 A. No.

14 Q. And you have chosen to keep that information from  
15 MEI so it can look at it.

16 A. Well, again, I don't know exactly how we decided on  
17 what to redact and what not to redact on the agreement. I  
18 don't recall the process, to be honest with you.

19 Q. But this information you're - you're concluded that,  
20 for some process you followed, GB&S is incurring this  
21 obligation. The process you went through, would you agree  
22 with me, does not comply with Exhibit 25? On the  
23 reconciliation.

24 A. I think it does comply with 25. There was  
25 ultimately an - an allocation of 50 percent of the cost to GBS

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1 and 50 percent to Williams Bailey. That's what 25 agreed to.

2 Q. And the process you followed was never disclosed to  
3 MEI and was redacted from all the agreements given to us,  
4 correct?

5 A. The spreadsheet did not - was not produced,  
6 apparently.

7 MR. JONES: Thank you, Your Honor.

8 THE COURT: Thank you.

9 We're going to take about a five-minute recess while  
10 I take this other argument. Well, they'll be arguing for  
11 probably at least 20, 25 minutes. We'll see. It's - then  
12 we'll start back up on this matter, so let's go ahead and call  
13 them in, Cat, and we'll give them five minutes to try and get  
14 set up then.

15 (Pause in proceedings.)

16 THE COURT: Okay. Mr. Hashimoto, if you'd like to  
17 retake the witness stand. Let me note that those present when  
18 the court recessed are again present. And Mr. Hashimoto is  
19 still under oath on the witness stand. And did you have some  
20 questions Mr. Hofmann, or were you turning the witness back  
21 over -

22 MR. MILLER: I turned the witness. I think  
23 Mr. Short does have some.

24 MR. MAGLEBY: It's Mr. Miller, Your Honor.

25 THE COURT: All right. Did I say Hoffman? I'm

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1 sorry.

2 MR. MILLER: It's okay. I've been -

3 THE COURT: Oh, I'm sorry. I had the wrong name  
4 down. Sorry.

5 MR. JONES: Your Honor, we would object to Mr. Short  
6 cross-examining Mr. Hashimoto. We had this discussion before.  
7 Mr. Short represents Mr. Barton.

8 THE COURT: Is Mr. Barton a party?

9 MR. JONES: He's a party in the receivership but  
10 he's not a party to the dispute over these funds.

11 MR. SHORT: Yes, he is.

12 MR. JONES: He has no interest in these funds.

13 THE COURT: Was he inter - has he interpleaded an  
14 interest in the funds?

15 MR. SHORT: There's no interest to interplead, Your  
16 Honor. His interest is in the fact that he's the attorney who  
17 has some responsibility for the very funds that are at issue  
18 here and he's got some ethical obligations that need to be  
19 addressed that are different, quite frankly, from MEI's  
20 interest. And the last time we were here -

21 THE COURT: Does that need to be addressed here or  
22 can it be addressed in other -

23 MR. SHORT: No. It needs be addressed here because  
24 what's being proposed is to divert client funds to pay GBS  
25 debts.

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1 THE COURT: But that won't be -- and the Court's well  
2 aware that he has an ethical obligation to protect his  
3 clients. Is that what you're trying to show here or what?  
4 MR. SHORT: No. We're trying to show that,  
5 actually, what is going on and what Mr. Hashimoto is proposing  
6 is to divert client funds.  
7 THE COURT: Well, I think that -- I think that will  
8 be self-evident, if that's the case, if these are indeed  
9 client funds. But, so far, no decision's been made on that.  
10 MR. SHORT: Well, I understand that there's no  
11 decision that's been made on it, but that's the decision this  
12 Court's going to make. And by the time the Court makes the  
13 decision, we don't get to have a say if the Court doesn't let  
14 us speak today.  
15 And when I was here last time, you did indicate, as  
16 I recall, that we would be allowed to participate today.  
17 THE COURT: Okay. That may be true. I don't  
18 recall.  
19 MR. JONES: Your Honor --  
20 MR. SHORT: I relied on that understanding.  
21 MR. JONES: Actually, I have a different  
22 recollection of that, Your Honor. What happened last time  
23 was, Your Honor, if you'll recall, these motions were both  
24 filed and noticed to all parties, including Mr. Barton.  
25 Mr. Magleby noticed his motion, I noticed mine, and there was

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1 an objection period for people to file objections to these  
2 motions in the case. There were no objections filed. All we  
3 have are the -- my motion, DAT&K's motion, MEI's motion, his  
4 response, my response. Nobody else filed a pleading.  
5 And I believe what Your Honor said last time to Mr.  
6 Short is, "I'm not going to let you participate in the  
7 argument of this because you haven't filed any pleadings and  
8 you haven't intervened in this matter and you didn't object to  
9 it." And you suggested to Mr. Short that, if he wished to  
10 participate, he needed to file something.  
11 Now, Your Honor, nothing has been filed. We've  
12 received no pleadings from Mr. Short at all regarding this  
13 matter.  
14 THE COURT: Let me hear also from Mr. Hofmann.  
15 MR. HOFMANN: Thank you, Your Honor.  
16 This is controversy over disputed funds, obviously.  
17 There are two parties that have made claims to those funds;  
18 that's MEI and DAT&K. Mr. Barton has not made a claim to  
19 those funds, he's not a party to this dispute; he's a witness.  
20 I'm not aware of any rule that would allow counsel  
21 to one witness to cross-examine some unrelated witness, and  
22 that's what Mr. Short is purporting to do here. And I think  
23 that's improper.  
24 THE COURT: How do we make sure that the clients of  
25 Mr. Barton are protected, I guess would be the question, if he

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1 doesn't participate? Would you like to address that?  
2 MR. HOFMANN: Well, I think that that's the -- the  
3 outcome of the Court's decision will determine that very  
4 issue. Either the funds belong to the clients or they don't.  
5 If they belong to the clients, then the clients will be  
6 protected. If the funds do not belong to the clients, then  
7 that would be the Court's adjudication of that issue.  
8 MR. JONES: Your Honor, there's really no issue  
9 regarding the clients. If I may address that there's no  
10 issue --  
11 THE COURT: Well, there may be. If the funds belong  
12 to the clients, if we decide that, I mean, I know they haven't  
13 interpleaded all the clients in this case, but if -- if the  
14 funds -- if the funds are the clients' then that would affect  
15 how the Court -- you know, probably how the Court does this.  
16 Because if they're the clients' funds, unless Mr. Barton --  
17 unless there's some proof that Mr. Barton was acting as their  
18 agent in assigning all of their interests over to DAT&K, then  
19 they probably aren't going to, you know -- unless that came up,  
20 then, sure, they wouldn't be prejudiced. But if there was  
21 evidence to that effect that came out --  
22 MR. JONES: May I try to address that, Your Honor,  
23 because --  
24 THE COURT: Yes. Uh-huh.  
25 MR. JONES: Because it's not the -- it's not DAT&K's

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1 position. There's no issue here with respect to the clients.  
2  
3 Our argument is that the clients owed that money.  
4 It was originally client funds, they owed it to GB&S who, in  
5 turn, owed it to MEI. That obligation owing to GBS was part  
6 of our collateral. That's our argument.  
7 If the Court concludes that that is indeed correct,  
8 there's no issue for the clients, because the Court is  
9 concluding that the money was owed to Gregory, Barton & Swapp  
10 and properly would be paid to Gregory, Barton & Swapp and, in  
11 turn, to DAT&K.  
12 If the Court concludes that that money was client  
13 money and never -- that GBS never had an interest in it, then  
14 that money would properly be payable, under their theory, to  
15 MEI because that was for the services incurred or provided by  
16 MEI to the client.  
17 There's no issue here regarding the client or client  
18 funds or ethical obligations. This is not an issue with  
19 respect to the clients, it's only an issue among the parties  
20 here. There will be prejudice however the Court rules to the  
21 interest of any client or any issue regarding ethical  
22 obligations.  
23 THE COURT: Well, now, but Mr. -- the owner of MEI  
24 that testified. I'm sorry. Name slipped my mind for a moment  
25 here.

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1 MR. JONES: Fidler.  
2 MR. MAGLEBY: Mr. Fidler.  
3 THE COURT: Mr. Fidler said that he believes that  
4 these clients owe him money for some type of an agreement  
5 there. Although maybe the statute of limitation on that has  
6 run; I don't know. But if he intended to go after them  
7 personally and the money went to DAT&K, that could affect  
8 them, couldn't it? They could have a - somebody could be  
9 going after them personally.  
10 MR. HOFMANN: And their right to even go after that  
11 money hasn't happened yet because the money's still sitting  
12 right here in the court.  
13 MR. JONES: Your Honor, actually, there's been no  
14 evidence offered of any agreement between MEI and any of the  
15 clients regarding payment. And if we look at the testimony,  
16 including the testimony I read from Mr. Fidler's deposition,  
17 he had - he testified he had no right of recovery against the  
18 client.  
19 THE COURT: Well, he's saying here today he does, he  
20 thinks he does. At least he's - I don't know if he's saying  
21 he has a right of recovery; he's saying, "I don't know if I  
22 can go out and sue them" or whatever in a court. But he  
23 thinks that they owe him this money personally, not just  
24 through GB&S, I think is what he's saying.  
25 MR. BARTON: Your Honor, could I just chime in for

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1 a minute here to just being the attorney -  
2 THE COURT: Well, let's let the attorneys talk, if  
3 we could, please.  
4 MR. JONES: And the other thing is, Your Honor -  
5 THE COURT: I know you're an attorney, but you're  
6 represented, so... Okay.  
7 MR. JONES: I understand Mr. Fidler's testimony not  
8 to provide a basis for them to go after the client, but also,  
9 to the extent that Mr. Barton thought that there was an issue  
10 regarding the distribution of these funds either to MEI or to  
11 DAT&K, he had every opportunity, he had notice, opportunity to  
12 object and to participate in this proceeding, and he has not  
13 done so.  
14 THE COURT: Okay. Mr. Hofmann - and I don't have  
15 the transcript of that prior -  
16 MR. BARTON: Your Honor, may -  
17 THE COURT: Don't interrupt me, please.  
18 I don't have the transcript of that prior  
19 proceeding. But is it also your understanding that the Court  
20 indicated that, if they wanted to participate, they were  
21 supposed to file something and -  
22 MR. HOFMANN: That was my memory, Your Honor, as  
23 well.  
24 THE COURT: Okay. Mr. Hofmann or Mr. Magleby, do  
25 you - that probably wasn't a big - as big of a deal to you,

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1 but do you have any memory on that?  
2 MR. MAGLEBY: I don't, Your Honor.  
3 THE COURT: Okay.  
4 MR. HOFMANN: I don't. But it's my understanding  
5 that Mr. Barton, whose counsel participated in discovery was  
6 in the deposition.  
7 THE COURT: Well, that's fine. But, evidently, the  
8 Court said something about they wanted them to file some kind  
9 of a claim or notice or something.  
10 MR. BARTON: I wasn't here at that hearing, Your  
11 Honor.  
12 THE COURT: All right. Thank you.  
13 MR. HOFMANN: And, Your Honor, if I may, there needs  
14 to be some legal basis -  
15 THE COURT: Do you remember me saying that, that you  
16 were supposed to file something?  
17 MR. SHORT: That is my recollection and I  
18 (inaudible) did not.  
19 THE COURT: Okay.  
20 MR. SHORT: I've been operating on the understanding  
21 that we would be allowed to participate -  
22 THE COURT: If you filed something.  
23 MR. SHORT: No, not if. And that we would also be  
24 allowed to file something if we want. But the problem is  
25 we're putting a great burden on Mr. Barton to rebrief what's

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1 already been briefed. That doesn't make sense.  
2 There's no legal precedent at all, and they haven't  
3 cited any, to say that when there is a hearing in a case where  
4 Mr. Barton is already a party that he can't participate in it.  
5 Just like any other case. If you have multiple parties, you  
6 don't need to file something to participate in the hearing.  
7 THE COURT: Well, I realize that, but this is not -  
8 this is an interpleader action that's just been put down in  
9 this case. So -  
10 MR. SHORT: Actually, Your Honor, there's never been  
11 an interpleader in this case on these - on these funds.  
12 THE COURT: Well, it's what the receiver's doing.  
13 It's the receiver's - it's the receiver's interpleader action.  
14 All right. How long you going to take with this  
15 witness?  
16 MR. MILLER: It's going to be very quick.  
17 THE COURT: All right.  
18 MR. MILLER: We could have been done by now.  
19 THE COURT: All right. That's - I'm going to allow  
20 you to ask your questions.  
21 MR. MILLER: Your Honor, I do have the -  
22 THE COURT: - just because he is a party.  
23 All right.  
24 MR. MILLER: We have the transcript here, Your  
25 Honor.

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1 THE COURT: All right. What did we say?  
2 MR. MILLER: I'm going to as quickly as I can, Your  
3 Honor.  
4 THE COURT: Because I want to do what I promised I'd  
5 do. But let's -  
6 MR. SHORT: And whatever may be there, we do assert  
7 that we've got a right to be here, regardless of -  
8 THE COURT: But the Court also has the right to  
9 control the proceeding, so -  
10 MR. SHORT: And I understand.  
11 THE COURT: - so go ahead and read that. If we -  
12 did I tell him he could just file something if he wanted to  
13 or - realize we're all working on about a half-year-old memory  
14 here, so...  
15 MR. MAGLEBY: I think the short answer is we can  
16 spend time reading the transcript and agonizing over it. By  
17 the time we do that -  
18 THE COURT: Well, but evidently, it's a significant  
19 point for the other side, so let's -  
20 MR. SHORT: But there's no prejudice to the other  
21 side.  
22 THE COURT: Well, they think there might be. So  
23 let's take a look here.  
24 MR. SHORT: I would just assert that they need -  
25 THE COURT: Let - let's - let's let them look.

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1 MR. SHORT: Okay. I was just going to say, while  
2 they're looking -  
3 THE COURT: Let's let them look and then we'll see.  
4 MR. MILLER: Your Honor, I believe I found the  
5 section, if that helps.  
6 THE COURT: Great. That would be great.  
7 MR. MILLER: Starting at page 52 - I'll just read  
8 it, if that's okay.  
9 THE COURT: Sure.  
10 MR. MILLER: "Mr. Short: Your Honor, may I be heard  
11 on this as well? I realize I'm not -  
12 "THE COURT: You're not a party here and I'm not going to  
13 let you be heard until I've heard from the parties, okay?  
14 "Okay.  
15 "THE COURT: You are well - well, you - you are a party.  
16 "That's what I was saying, Your Honor, that I'm not a  
17 party.  
18 "THE COURT: But you are. You haven't filed any - you  
19 haven't filed any appearance or motions or anything like that  
20 or papers, so I'll hear from you later. Let me hear from  
21 these gents first, okay?"  
22 THE COURT: Okay.  
23 MR. MILLER: So it would appear to me as you're  
24 saying "Let me hear from these guys first, then you."  
25 THE COURT: But did we say anything after that about

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1 today's hearing?  
2 MR. MILLER: I don't see it.  
3 It appeared to be a - just a timing issue. You  
4 wanted to hear from these gentlemen first, then Mr. Short.  
5 THE COURT: All right. Okay.  
6 MR. MILLER: But, again, I -  
7 THE COURT: All right. Well, I'm going to go ahead  
8 and let Mr. Short proceed. If you come across something  
9 there, let me know. But let's try and keep it brief.  
10 MR. SHORT: Okay.  
11 CROSS-EXAMINATION  
12 BY MR. SHORT:  
13 Q. Mr. Hashimoto, prior to being appointed as the  
14 receiver in this case, have you ever been a receiver for a law  
15 firm?  
16 A. No, I have not.  
17 Q. Did you have any prior experience with the duties of  
18 a law firm to their clients as to safeguarding their client  
19 funds?  
20 A. Only to the extent that I have been - that I've had  
21 counsel help me through that.  
22 Q. So but you personally have no prior experience?  
23 A. No.  
24 Q. So you're relying totally on what your counsel has  
25 told you?

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1 A. Yes.  
2 Q. Okay. Now, do you have a duty under your  
3 receivership order to the clients of Gregory, Barton & Swapp?  
4 A. Yeah. There is mention to that, yes.  
5 Q. What is your understanding of that duty?  
6 A. That there is a duty to protect the clients.  
7 Q. So the decision as to whether or not to take money  
8 out of their settlements was made by you?  
9 A. There was a disputed action here. I've interpled  
10 the money to the Court for the Court to decide, ultimately,  
11 where that money needs to go.  
12 Q. And that's -  
13 A. I - I wasn't going to make that legal determination.  
14 Q. And that's not the question I'm asking you. I'm  
15 asking about the decision when Williams Bailey and the other  
16 Texas law firms did their settlements with the clients, there  
17 was approximately \$1 million withheld from those clients,  
18 correct?  
19 A. Approximately, yes.  
20 Q. And did you give the authorization to withhold that  
21 money on behalf of GBS?  
22 A. No. That was operative through agreements that were  
23 previously made.  
24 Q. So you did not independently review whether or not  
25 it was appropriate to take that money out of the GBS clients'

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1 accounts?

2 A. I just said I didn't authorize that specifically.  
3 There's - the operative language is in the agreements that  
4 were previously entered into between Gregory, Barton & Swapp  
5 and the Texas firms.

6 Q. And what I'm asking is, before that money was  
7 withdrawn from - or withheld from those clients in the  
8 distribution to the clients, did you review whether those  
9 monies could be withheld?

10 A. I only got review of that after the fact. Williams  
11 Bailey made that determination. They sent me an accounting of  
12 how that was to be - how that was accounted for and how it was  
13 handled.

14 Q. And did you object to taking that money away from  
15 the clients?

16 A. No.

17 Q. Why not?

18 A. Because I thought it was appropriately taken out.

19 Q. It was appropriately taken out to pay MEI?

20 A. It was appropriately deducted from the clients'  
21 settlement.

22 Q. What - for what purpose was it deducted from the  
23 clients' settlement?

24 A. Well, originally, it was for MEI, but then there  
25 became a dispute over whose funds ultimately the \$442,000 went

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1 to. And so that's why we're here.

2 Q. I understand that. But my question is just to the  
3 question of why was it withheld from the clients? Was it  
4 withheld from the clients to pay MEI?

5 A. It was related to the MEI costs.

6 Q. Okay. I'll ask my question again. You can answer  
7 it yes or no.

8 THE COURT: Okay. I think we're - another law firm  
9 did this. He didn't do it, okay? So -

10 MR. SHORT: Well, actually -

11 THE COURT: - let's - let's move on, okay? We're  
12 not getting anywhere with this. Let's move on.

13 MR. SHORT: Okay.

14 Q. As far as those funds, then, where were they at the  
15 time that you learned about them? Where were they located?

16 A. They were located in the bank accounts of Williams  
17 Bailey.

18 Q. Was it located in their operating accounts or in  
19 their trust accounts, their client trust account?

20 A. I'm not 100 percent sure.

21 Q. You didn't verify where these monies were?

22 A. I had no reason to.

23 Q. Are you not the trustee that was supposed to be  
24 watching over these - the receiver watching over these  
25 clients' interests?

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1 A. It's Williams Bailey's responsibility to deal with  
2 that. Ultimately, we got an accounting of how the monies were  
3 accounted for, what was owed us, and we got the proper amount  
4 paid to us.

5 Q. Okay. So - well, you say the proper amount "paid to  
6 us." Has any money out of that \$1 million actually been paid  
7 to GBS?

8 A. Of the million dollars withheld?

9 Q. Yes.

10 A. No.

11 Q. Okay. So that money -

12 A. No. What I was talking about "paid to us," I meant  
13 the overall settlement proceeds.

14 Q. Okay. The attorney fee portion.

15 A. Well, the attorney fee portion and whatever  
16 reimbursement of costs that we were to receive.

17 Q. Okay. But - and so that's separate from this \$1  
18 million, correct?

19 A. Yes.

20 Q. Okay. So from this \$1 million, what then happened  
21 with that money while it's in the trust account of Williams  
22 Bailey and the others?

23 A. \$97,000 of it was paid to MEI, \$442,000 of it was  
24 paid from Williams Bailey to MEI, and \$442,000 of it was sent  
25 here to the court.

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1 Q. So that \$97,000 was actually from a previous round  
2 or a previous batch, correct?

3 A. No. It was the overall difference between what had  
4 been withheld from client funds for MEI-related costs and what  
5 had already been paid to MEI through previous payments made by  
6 Williams Bailey.

7 Q. And that's how you did this reconciling from before.

8 A. And that's why we put the additional \$97,000 to get  
9 them to exactly the amount - MEI was then exactly at the  
10 amount that was withheld from client settlements on Phen-Fen  
11 cases that was earmarked for MEI-related costs.

12 Q. But you're saying there's still \$400,000-plus  
13 sitting in the trust account at that time of that \$1 million.

14 A. Well, it's now sitting here with the court.

15 Q. Okay. So that very same money that was withheld  
16 from the clients has been sent and is being held by the court  
17 right now?

18 A. Yes.

19 Q. So it was client trust money at Williams Bailey;  
20 it's still client trust money today, correct?

21 A. I think we're sitting here trying to figure that  
22 out. I mean, that's what this dispute is all about.

23 Q. Well -

24 A. I wasn't about to try and make a legal conclusion on  
25 that, and that's why I interpled it to the Court so this could

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1 be decided in - decided in a judicial manner.

2 Q. You understand -

3 A. I wasn't going to make that legal conclusion.

4 Q. You understand the concept of tracing money,  
5 correct?

6 A. Yes.

7 Q. Those were trust account monies. Tell me how they  
8 changed from being trust account monies at Williams Bailey to  
9 the point when it comes into this court into its trust  
10 account.

11 A. Well, I think it's an accounting issue, because  
12 what's being argued here is that some of these MEI costs were  
13 previously paid. And so it's merely being a reimbursement of  
14 costs to potentially DAT&K, which would have passed through  
15 Gregory, Barton & Swapp and then gone on to DAT&K.

16 So it's - it's an accounting issue and that's what  
17 we're debating over today.

18 Q. When that dispute arose, you then went back and did  
19 the accounting for each of the accounts to find out exactly  
20 what happened on each account and whether or not that money  
21 had been properly withheld from the clients?

22 A. Well, there was an accounting that was performed by  
23 Williams Bailey that was sent to me, in terms of what was  
24 withheld from client settlements related to MEI costs.

25 Q. Was the \$1 million - one million seventy, et cetera,

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1 on your Exhibit No. 19, is that the total amount that's owed  
2 to MEI?

3 A. No. That's the total amount that was withheld from  
4 client settlements related to MEI costs.

5 Q. Okay. Well, let's clarify. In the first column,  
6 that's the total amount that was withheld from clients,  
7 correct?

8 A. Yes. Related to MEI.

9 Q. But is the amount, then, in the second column the  
10 amount that was paid from client accounts?

11 A. That is - not - not necessarily. It's the amount in  
12 total that was paid to MEI -

13 Q. And, in fact -

14 A. - from Williams Bailey related to MEI costs.

15 Q. In fact, is not MEI owed more than \$1 million?

16 A. Yes, I believe they are.

17 Q. So you have taken or are proposing that it's  
18 appropriate to take these trust accounts and use it to pay  
19 another obligation of GBS rather than pay MEI for which  
20 purpose those amounts were withheld.

21 A. What I'm saying is there's a priority dispute as to  
22 those funds. And that's what we're now adjudicating.

23 Q. Let's talk about the priority dispute. What  
24 priority or what claim does DAT&K have in the trust account  
25 money?

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1 A. Well -

2 THE COURT: All right, Counsel, I think you're  
3 getting into things that the Court's supposed to be deciding  
4 here.

5 MR. SHORT: That's the purpose of the exam.

6 THE COURT: Well, he's decided - he's decided that  
7 he doesn't know. He can't make that determination. So he's  
8 paid the money into court and we're trying to trace the funds  
9 to see whom they belong to. That's what we're trying to do  
10 here.

11 So I don't - Mr. Hashimoto, it's probably not really  
12 productive to have him - to argue with him over why he has the  
13 funds here, because he said it's because "I don't know what to  
14 do with them," basically. Okay?

15 MR. SHORT: Okay. Well -

16 THE COURT: All right. So let's - let's move on.

17 MR. SHORT: Okay. Let me see if there's anything -

18 THE COURT: And we're - no. We need to get this  
19 done, so...

20 MR. SHORT: Okay. Just one last point.

21 Q. Did you give any notice to any of the clients that  
22 you were interpleading their trust account funds into this  
23 court?

24 A. I don't believe so.

25 THE COURT: Thank you.

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1 All right. Let's see -

2 MR. JONES: Just - I will be brief, Your Honor.

3 THE COURT: Certainly.

4 REDIRECT EXAMINATION

5 BY MR. JONES:

6 Q. Mr. Hashimoto, could I draw your attention to  
7 Exhibit 19? We looked at it earlier. And while you're  
8 looking for that, do you recall hearing the testimony from  
9 other parties this morning that, at the time the security  
10 agreement and settlement agreement among MEI and GBS, do you  
11 recall hearing the testimony that Advocate's security interest  
12 was already in place, was senior and was in default? Do you  
13 recall that?

14 A. Yes, I do.

15 Q. Okay. So that was what the landscape looked like  
16 prior to that settlement agreement, correct?

17 A. Correct.

18 Q. Okay. Then let's take a look at - at 19.

19 A. Okay.

20 Q. If - I think you testified earlier that Williams  
21 Bailey made the payments of the \$501,000 and \$372,000, those  
22 payments, correct?

23 A. Correct.

24 Q. And those payments - all those payments were made  
25 pursuant to that settlement agreement, correct?

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1 A. That's my understanding, yes.

2 Q. Okay. What would have been the position of GBS had  
3 those payments, the payments that were made pursuant to the  
4 settlement agreement after DAT&K's security interest was a  
5 default, what would the result have been for GB&S and for  
6 DAT&K in terms of monies that it would have recovered?

7 MR. MILLER: Objection. Calls for legal  
8 conclusions, part of what we're here for.

9 THE COURT: I agree. I'm going to sustain that  
10 objection.

11 Q. (By Mr. Jones) Let me try to rephrase it. In your  
12 calculations of how much was due GB&S and, in turn, DAT&K,  
13 what was the impact on that calculation of the fact that these  
14 payments were made?

15 A. Well, ultimately, that amount was - at the end - the  
16 end result was the amount would have been higher.

17 Q. And how much higher would that amount have been?

18 A. It would have been - well, had we not paid the  
19 \$97,000, it would be -

20 Q. Let's just assume that we paid that, because -

21 A. Okay.

22 Q. Let's assume we paid that. I'm only talking about  
23 the \$601,000 and the \$372,000.

24 A. It would be the \$442,000 that we're currently with -  
25 with the court now.

229

1 Q. And what would have MEI received, total, in terms of  
2 payment, including all the monies withheld from client costs  
3 and any other - what would MEI have received?

4 A. Well, they would have received the million seventy  
5 thousand dollars.

6 Q. Okay. And so - and they've been paid the exact  
7 amount they would have received had those documents not been  
8 entered into subsequent to DAT&K's security interest, correct?

9 A. Yes.

10 MR. MILLER: Objection. Calls for a legal  
11 conclusion.

12 THE COURT: Sustained.

13 Q. (By Mr. Jones) Let me - you were asked some  
14 accounting questions earlier, at the beginning of your  
15 testimony. I just want to focus on one of them.

16 A. Okay.

17 Q. You were asked about definitions for GAAP purposes  
18 of items like "advanced" and "reimbursement" and those - those  
19 kinds of things. Correct? Do you recall that?

20 A. Yes.

21 Q. And do you recall also testifying that, whenever  
22 GB&S received an invoice from MEI, they booked it as an  
23 account payable. Do you recall that?

24 A. Yes.

25 Q. Okay. And those hadn't been paid, they were just on

230

1 the books as an account payable, right?

2 A. That's correct.

3 Q. From an accounting standpoint, could a party have a  
4 right to reimbursement when they've incurred the obligation,  
5 put it on their books as a payable but have not yet paid it,  
6 if there's another party obligated to reimburse them for that?

7 A. Yes. Yes.

8 Q. Doesn't have to be paid in order for a right of  
9 reimbursement to arise, at least under accounting principles,  
10 correct?

11 A. As long as there's the obligation, I think that  
12 would be the same.

13 MR. JONES: I have no further questions, Your Honor.

14 THE COURT: Thank you.

15 Recross?

16 MR. HOFMANN: Try to be brief, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. MILLER:

19 Q. Mark, let me have you take a look at Exhibit 19.  
20 That's where we left off.

21 A. Okay.

22 Q. I just want to make this clear. The first column,  
23 then, represent monies deducted from the clients' portion of  
24 these recoveries, correct?

231

1 A. That's correct.

2 Q. These are monies that would never have gone to - for  
3 attorneys fees in any event.

4 A. Correct.

5 Q. The amounts set forth in that column are a summary  
6 of a whole bunch of individual costs for individual clients,  
7 correct?

8 A. Yes.

9 Q. We saw in Exhibit 24, a Sandra Anderson, for \$953.

10 A. Correct.

11 Q. Can you show me where the offsetting account for Ms.  
12 Anderson appears in either the \$601,000 or the \$372,000?

13 A. It's looked at on a more global basis. This is the  
14 amount that was due MEI from withholding from client  
15 settlements and this is the amount that was ultimately paid to  
16 them.

17 Q. It's not viewed out of the client-by-client basis,  
18 is it?

19 A. No. It's on an overall basis.

20 Q. It's withheld on a client-by-client basis, but  
21 you're offsetting general business expenses that are not  
22 client based, correct?

23 A. It's not on an individual-by-individual basis.

24 Q. And if I'm Ms. Anderson, you've taken \$953 from me  
25 in the one column but I'm not getting credit for it in the

232

1 other.

2 A. Well, that's, again, I think partly what we're here  
3 for.

4 Q. But that's the effect of what this schedule does,  
5 does it not?

6 A. It shows that MEI basically got paid an amount equal  
7 to the amount that was withheld from clients.

8 Q. But the monies that - well, no. These are never  
9 monies that went to fees. The monies that came from these  
10 clients, though, are not being reimbursed on the other side of  
11 this column to any individual client. They're not getting  
12 credit for it all.

13 A. Well, it's looked at - in this schedule, it's looked  
14 at as a whole. And that's the way we looked at it as well.

15 Q. You're looking at it only in MEI but not in the  
16 client's perspective, correct?

17 A. I'm not sure there's a difference. The money was  
18 paid, ultimately. Whether it's looked at on a client-by-  
19 client basis, the money was paid.

20 THE COURT: Counsel, this raises a question. I  
21 don't know whether you want to go into this. But you raised  
22 a question and, certainly, you could go into this as well,  
23 where we say "amount withheld from current client  
24 settlements," and then you ask "That wouldn't include any  
25 attorneys fees," how does the 40-60 calculation come in here?

233

1 We've got 40 - 60 percent going to clients, 40 percent going  
2 to attorneys fees. I'm just wondering if that - if he's  
3 taking that into account when he says that these are client  
4 settlements.

5 See -

6 MR. MILLER: Let me ask. I -

7 THE COURT: - see what I'm asking you?

8 MR. MILLER: Sure.

9 THE COURT: You don't have to ask it if you don't  
10 want to, but I'm just -

11 MR. MILLER: No. That's fine.

12 THE COURT: I'm just wondering.

13 MR. JONES: Your Honor, all that money is taken out  
14 of the client portion of the recovery. So 40 percent -

15 THE COURT: Okay.

16 MR. JONES: - legal fees, you put it over here; all  
17 that money's taken out of the 60 percent remaining.

18 THE COURT: All right. Okay. Thank you. I  
19 appreciate that. Sounds like there's agreement there.

20 MR. MILLER: So as I understand - right. These are  
21 all funds that otherwise would be paid to clients if not for  
22 this.

23 THE COURT: All right. Thank you.

24 Q. (By Mr. Miller) Talked briefly about  
25 reimbursements. I thought your definition of reimbursement is

234

1 to be paid back for something already paid, correct?

2 A. Well, I - I think it can be an obligation that's  
3 ultimately owed that hasn't necessarily been paid yet.

4 Q. Did you not agree that incurrence is different than  
5 payment?

6 A. Yes.

7 Q. Now, if you've incurred a debt on my behalf, Mark,  
8 I can prepay that reimbursement by paying you now, right?  
9 Even though you haven't paid it.

10 A. I guess you could.

11 Q. And I've satisfied your incurrence of debt.

12 A. Yes.

13 Q. But I haven't reimbursed you anything because you  
14 never paid it.

15 A. But if I still have the legal obligation, I can  
16 still be reimbursed for it.

17 Q. And then, once I pay you for it, should you then not  
18 pay the obligation for which you're being reimbursed?

19 A. Could. That's one way of dealing with it.

20 Q. Is there any other way it could work?

21 A. It could go in my general account and I could pay it  
22 with some other funds from some other source.

23 Q. Can you imagine any way from an accounting  
24 perspective that you should be reimbursed for something you  
25 never paid, ever?

235

1 A. If I still have the obligation for it.

2 Q. But you'll never pay it.

3 A. Well, if I still had the obligation for it.

4 Q. And you consider that -

5 A. Potentially.

6 Q. - a reimbursement of the definition you gave to me.

7 A. Yeah. I believe it would be.

8 Q. A payment back for something you've already paid but  
9 not incurred.

10 A. I thought we were talking about just the opposite,  
11 something that had been incurred but not necessarily paid. I  
12 thought that's what we were talking about.

13 Q. All right. Well, maybe - let's make sure that we  
14 have the same definition.

15 A. Okay.

16 Q. A disbursement's the same as a payment.

17 A. Yes. I believe so.

18 Q. And a payment's something you actually make.

19 A. Yes.

20 Q. An incurrence is something - an obligation that you  
21 have obligated yourself to make but haven't yet paid.

22 A. Yes.

23 Q. And a reimbursement is payment to you for something  
24 you already paid in the past.

25 A. Or incurred. I think it could be incurred as well.

236

1 Q. Are you familiar with GAAP standards for advance  
2 payment of goods and services?  
3 A. I - I honestly couldn't recite that off the top of  
4 my head, no.  
5 Q. GAAP is not tax accounting, is it not?  
6 A. No. Not necessarily.  
7 Q. Different?  
8 A. It can be different.  
9 Q. And in tax accounting, you're able to accrue  
10 expenses and take them the year you accrued the expense?  
11 A. Depends on the type of tax accounting. There's  
12 different ways of accounting for things.  
13 Q. Assuming you're an accrual basis taxpayer; is that  
14 right?  
15 A. Yes.  
16 Q. But if you're a cash basis, you can't do that.  
17 A. That's correct.  
18 Q. Under GAAP, isn't it true that if I am going to take  
19 a reimbursement expense for goods and services, it's only at  
20 the time I actually pay - make payment for the goods and  
21 services; I can't take it in advance? Under GAAP.  
22 A. Repeat that again?  
23 Q. If I'm going to take a GAAP charge in my financial  
24 statement, because I'm a reporting entity -  
25 A. Okay.

237

1 Q. - I can only take that charge when paid. Not  
2 incurred, when paid, under GAAP.  
3 A. I don't believe that's right. I mean, if you're an  
4 accrual basis taxpayer, you can - you can expense the item -  
5 Q. For taxes.  
6 A. - when it's - when it's incurred.  
7 Q. No, I'm not talking about expenses. You can expense  
8 it off your financial - your balance sheet or your income  
9 statement, right?  
10 A. Okay.  
11 Q. But can you take the reimbursement until paid?  
12 Until you've actually paid the expense?  
13 A. I believe so. I think as long as it's been  
14 incurred, I think that's - I think - I don't know why. If  
15 you've booked the obligation, I don't know why you couldn't  
16 take the - the repayment.  
17 Q. And the basis upon which you take the payment is the  
18 fact you would make the payment to the third party.  
19 A. Ultimately, yes. But you'd have that obligation to  
20 do that.  
21 Q. And if you never made the payment to a third party -  
22 what's the nature of the payment you received? Is it a  
23 reimbursement or something else?  
24 A. What are - I'm not sure what we're referring to  
25 right now.

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1 Q. You owe Mr. Magleby \$1,000.  
2 A. Okay.  
3 Q. I owe him \$1,000 too.  
4 A. Okay.  
5 Q. I pay you the money because you - because you've  
6 incurred the debt.  
7 A. Okay.  
8 Q. You never pay Mr. Magleby, you pay Mr. Jones. You  
9 never pay Mr. Magleby at all. Have I reimbursed you or done  
10 something else?  
11 A. Are we talking about you and I owe the same debt to  
12 Mr. Magleby? Is that what we're talking about?  
13 Q. Yes. You've incurred a debt to Mr. Magleby but  
14 never paid it.  
15 A. Uh-huh. Okay.  
16 Q. I'm going to pay you that \$1,000.  
17 A. Okay.  
18 Q. But you never ever pay it to Mr. Magleby. Are you  
19 saying that, under your definition of reimbursement you went  
20 through with me and under your understanding of accounting  
21 principles, not an expense, that that's a reimbursement?  
22 A. Well, what we're talking about here, Blake, is - is  
23 not the same scenario we were talking about before.  
24 Q. Stay with my scenario, please.  
25 A. Okay.

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1 Q. Is my payment to you a reimbursement if you never  
2 paid Mr. Magleby?  
3 A. Well, maybe not in that specific situation.  
4 Q. And if these funds that we're dealing with now are  
5 paid to DAT&K, they won't be paid to MEI, will they?  
6 A. That's correct. It's a priority issue.  
7 Q. It's a reimbursement issue, is it not?  
8 A. I -  
9 MR. MILLER: Thank you, Mark.  
10 THE WITNESS: Okay.  
11 THE COURT: All right. Mr. Short?  
12 MR. SHORT: I won't even bother to bring the book  
13 this time, Your Honor.  
14 RECROSS-EXAMINATION  
15 BY MR. SHORT:  
16 Q. As far as the priority goes, what priority does  
17 DAT&K have in the trust account funds? What claim?  
18 A. I don't believe they do.  
19 MR. SHORT: Thank you.  
20 THE COURT: Anything further, Mr. Jones, for this  
21 witness?  
22 All right. Thank you, sir. You may step down.  
23 THE WITNESS: Are we done?  
24 THE COURT: Did you have any other evidence you were  
25 going to present today?

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1 MR JONES I do not Your Honor  
2 THE COURT Okay  
3 MR MAGLEBY Your Honor?  
4 THE COURT Yes sir  
5 MR MAGLEBY We have two additional things Let me  
6 just tell you what they are and you can tell me if you want to  
7 hear them or not  
8 I would like to recall Mr Barton put him up there  
9 and ask him if paragraph 15 in the security agreement ever  
10 happened I believe he s previously testified that it did  
11 not But if we can get a stipulation for that then I don t  
12 have to call him  
13 THE COURT You re asking Mr Jones to stipulate?  
14 MR MAGLEBY Or if the Court can take judicial  
15 notice  
16 THE COURT Do you understand what this - do you  
17 understand what he s asking?  
18 MR JONES I do And I do not believe that s  
19 Mr Barton s testimony and I would not stipulate to it  
20 MR MAGLEBY Well I ll put him up then  
21 THE COURT So you re going to call him to say  
22 something different than what he said on -  
23 MR MAGLEBY I think he s - I think he s already  
24 said it but I m not clear if I asked him the question as  
25 plainly as that so I d like to put him up there and make my

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1 record  
2 THE COURT Okay Now is this proper rebuttal?  
3 MR MAGLEBY Yes  
4 THE COURT How is it proper rebuttal if he said -  
5 MR MAGLEBY In response to Mr Hashimoto s veiled  
6 although not direct testimony that attempts to support that  
7 somehow the money in the one column is money for another  
8 column relating to paragraph 15 of the security agreement As  
9 he says it s a priority issue I want to ask Mr Barton  
10 questions about the security agreement the priority issue  
11 and whether or not those events ever happened It would - the  
12 events that -  
13 MR JONES Your Honor all of those questions have  
14 been asked and answered  
15 THE COURT I believe that s - I don t believe  
16 that s proper rebuttal at this point  
17 What else did you want to present?  
18 MR MAGLEBY Your Honor couple more questions for  
19 Mr Fidler about the lien agreement I ll make a proffer and  
20 you can tell me if it will make a difference  
21 Mr Fidler is prepared to testify that the  
22 contingency fee agreement and the lien agreement he knows  
23 that those were documents that were executed in conjunction  
24 with MEI echocardiograms because they were given to him by one  
25 of his clients one of the people who received the

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1 echocardiogram That s why they have the MEI control number  
2 on it And the names were redacted because of HIPA and other  
3 privacy concerns But that he is a hundred percent sure that  
4 those were the actual documents that were signed in  
5 Mr Barton s office for his echocardiogram because he knows  
6 this client and he did her echocardiogram  
7 THE COURT Well he s already - he s already  
8 testified that people would have signed those when they came  
9 in for their echocardiograms right?  
10 MR MAGLEBY That s true but I think it gives  
11 enough foundation for that document to then come into  
12 evidence  
13 THE COURT And how is those - what is this  
14 rebutting in their case?  
15 MR MAGLEBY This is rebutting the argument that  
16 MEI did not have its own independent right to be paid which  
17 Mr Jones asked Mr Hashimoto about  
18 THE COURT Mr Jones?  
19 MR JONES I did not ask Mr Hashimoto that  
20 question  
21 THE COURT I don t recall that -  
22 MR JONES I have - I did ask Mr Fidler that  
23 question Your Honor  
24 THE COURT Yeah I don t recall that coming up  
25 with Mr Hashimoto

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1 MR MAGLEBY I believe the whole line of  
2 questioning is whether or not in this column versus that  
3 column  
4 THE COURT Well yeah I don t believe that s  
5 proper rebuttal either That s just bolstering what the -  
6 bolstering what you were trying to do on your original case  
7 All right Anything else you want to discuss  
8 before - before we decide how you re going to argue this?  
9 MR MAGLEBY Nothing from me Your Honor  
10 MR JONES Nothing from me Your Honor  
11 THE COURT It s quarter to 3 00 The Court was  
12 planning on having this concluded at noon The Court has  
13 another matter to take care of What I would propose is that  
14 counsel provide a written closing argument to the Court by  
15 next week something like that if you can while these things  
16 are still fresh in everybody s mind And then I can - I can  
17 issue findings and conclusions on this case Any  
18 problem with doing that that you can see? That could - you  
19 could even email your arguments into Catherine s email if you  
20 want You know whatever you want to do In case there s a  
21 logistics problem with you being out of - both of you being  
22 from kind of out of town So - and Mr Short if you want to  
23 chime in on something too then you can  
24 But -  
25 MR JONES That s perfectly fine Your Honor

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1 THE COURT: Okay When do you think you could do  
2 that by, keeping in mind that the - I'd like to rule on this  
3 next week, if possible.  
4 MR. MAGLEBY: Your Honor, I would like to - like to  
5 get it to you by Wednesday, but I'm afraid I'm going to ask  
6 until Friday, because I have other hearings Monday and  
7 Tuesday.  
8 THE COURT: Okay. Mr. Jones, is there any problem  
9 with Friday as far as you're concerned?  
10 MR. JONES: There's no problem. There's no problem  
11 with Friday, Your Honor.  
12 THE COURT: Why don't we do that? And like I say,  
13 if you want to facilitate expeditious delivery, you could  
14 email those in to Catherine and she can print them off  
15 MR. MAGLEBY: We will do that, Your Honor.  
16 THE COURT: Okay. Very good.  
17 All right.  
18 MR. JONES: Thank you, Your Honor  
19 THE COURT: Thank you, counsel. Thank you all for  
20 being well prepared today, and -  
21 MR. MAGLEBY: Your Honor, I'm sure I speak for all  
22 of us Thank you for working through lunch  
23 THE COURT: Well, I take it you have an accounting  
24 background?  
25 MR. MILLER: No. Actually, I don't.

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1 THE COURT. Oh, you don't? Okay I was going to  
2 say it's pretty agonizing to listen to two accountants talk to  
3 each other. But, anyway. Okay.  
4 MR. MAGLEBY. He's just -  
5 MR. HASHIMOTO. I'll take that (inaudible)  
6 THE COURT But it was very clear. The testimony  
7 was very clear and I thank you for that. Okay. Thank you.  
8 (Whereupon, the hearing was  
9 concluded at 2:40 p.m.)  
10 -ooo0ooo-  
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#### CERTIFICATE

STATE OF UTAH ]  
] ss  
COUNTY OF SALT LAKE ]

I, JERI KEARBEY, Certified Court Transcriber in and for  
the State of Utah, do hereby certify that the foregoing electronically-  
recorded proceedings were transcribed by me from an audio/video CD  
furnished by the Fourth Judicial District Court in and for Utah County,  
State of Utah,

That pages 1 through 247, both inclusive, represent a  
full, true and correct transcript of the proceedings held on February 6,  
2009 and that said transcript contains all of the evidence objections of  
counsel and rulings of the Court and all matters to which the same relate

DATED this 27th day of February 2009

  
JERI KEARBEY, CCI

I hereby affirm that the foregoing transcript was  
prepared under my supervision and direction

  
Carolyn Erickson, CSR

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 1 1 83 5 110\*  
 243 20 244 6  
 83 12 178  
 25  
 3 163 11  
 29 25 230 9  
 1 173 24  
 5 18 1 2 10  
 3 4 171 13

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