UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376
	Chapter 11
Debtors	Substantively Consolidated

RICHARD C. BREEDEN, TRUSTEE FOR
THE BENNETT FUNDING GROUP, INC., et al.

Plaintiff

ADV. PROC. NO. 96-70280A

v.

L.I. BRIDGE FUND, L.L.C., and
EUROPEAN AMERICAN BANK

Defendants

APPEARANCES:

SIMPSON, THACHER & BARTLETT Attorneys for § 1104 Trustee 425 Lexington Avenue New York, NY 10017	KENNETH CROWLEY, ESQ. Of Counsel
BERKMAN, HENOCH, PETERSON & PEDDY, P.C. Attorneys for Defendant 777 Zeckendorf Boulevard Garden City, New York 11530	BRUCE D. MAEL, ESQ. Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court herein considers the Motion of the Plaintiff Richard Breeden, Trustee for The Bennett Funding Group, Inc. ("Trustee") for an order pursuant to Rule 37(c)(1) of the Federal

Rules of Civil Procedure ("Fed.R.Civ.P.") precluding the Defendant L.I. Bridge Fund, L.L.C. (L.I. Bridge) from introducing any testimentary or documentary evidence from an expert on the issue of the value of a certain stock warrant.

The Motion was argued before this Court on February 12, 1998.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(a) and (b)(1) and (2)(H).

FACTS

On October 8, 1997, Trustee's counsel served L.I. Bridge with a Demand for Discovery of Expert Witness ("Discovery Demand") pursuant to Fed.R.Civ.P. 26(a)(2) made applicable to the adversary proceeding by Federal Rule of Bankruptcy Procedure ("Fed.R.Bankr.P.") 7026. The Discovery Demand required L.I. Bridge to disclose the names of any expert witnesses that L.I. Bridge intended to call at the trial of the adversary proceeding. The Discovery Demand also required production of the substance of the expert's opinion, the grounds therefore, copies of documents reviewed and relied upon by the expert, the expert's curriculum vitae, list of other cases in which the expert had testified, etc. The Discovery Demand requested a compliance

within 30 days of service.[1]

On November 28, 1997, Trustee's counsel not having received compliance with the Discovery Demand, sent a letter to L.I. Bridge's counsel in which he advised, *inter alia,* that because of the Court's recently imposed discovery deadline, L.I. Bridge must comply with the discovery deadline by December 5, 1997. As an alternative, Trustee's counsel advised L.I. Bridge's counsel that failure to comply would necessitate a motion to preclude. (*See* Exhibit C attached to Affidavit of Christopher Nelson, sworn to February 4, 1998). The November 28, 1997 letter also referenced a subpoena that had been served upon Sucsy, Fischer & Co. ("Sucsy Fischer")[2] for the production of documents upon which Sucsy had apparently relied in preparing its valuation report regarding the AmeriData Warrant. *Id.*[3]

On December 16, 1997, this Court issued an Amended Scheduling Order directing that all discovery be completed by February 10, 1998. The trial date was not changed. On January 16, 1998, Trustee's counsel again wrote to L.I. Bridge's counsel reminding it of the extended discovery cut-off date and reiterating its need to have compliance with its expert discovery not later than January 23, 1998. Again, Trustee's counsel threatened to file the instant motion. Trustee's counsel received no formal compliance with the Discovery Demand and, on February

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[1]The Court issued a Scheduling Order on November 18, 1997 requiring all discovery to be complete by December 19, 1997 with a trial scheduled to commence on March 18, 1998.

[2]Sucsy Fischer is a valuation expert that apparently had been consulted by L.I. Bridge's attorneys and who had in fact prepared some type of valuation report regarding the stock warrant in question.

[3]At oral argument the Trustee's counsel conceded that it had served Sucsy Fischer with a non-party subpoena seeking documents upon which Sucsy's relied in preparing it valuation report and that those documents were produced by L.I. Bridge's counsel on or about February 6, 1998.

5, 1998, it filed this motion.

ARGUMENTS AND DISCUSSIONS

L.I. Bridge's counsel contends that it has responded to the Discovery Demand by asserting that Plaintiff had been advised and was fully aware that Defendant was going to be using Sucsy Fischer as its valuation expert, noting that the Trustee's counsel had served Sucsy Fischer with a subpoena and had obtained the documents requested on or about January 6, 1998. They also assert that Trustee's counsel had actually received Sucsy Fischer's valuation report as far back as March 1997 when it was attached as an exhibit in opposition to an earlier motion filed by the Trustee's counsel in this adversary proceeding. While acknowledging that it has never actually designated Sucsy Fischer as its expert, L.I. Bridge's counsel makes an interesting assertion that it was hindered in that designation by the Trustee's motion to retain new experts without notifying L.I. Bridge's counsel.[4]

At oral argument Trustee's counsel, while conceding that it received certain documents in compliance with the subpoena served upon Sucsy Fischer asserts that it has yet to be advised that Sucsy Fischer is in fact L.I. Bridge's expert and it has now been deprived of the opportunity to depose Sucsy Fischer, or any expert to be called by L.I. Bridge, by virtue of the passage of the extended discovery deadline.

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[4]L.I. Bridge's counsel argues in this regard that the Trustee has not complied with the mandatory discovery imposed upon him by Fed.R.Civ.P. 26(a)(1). That rule has, however, been abrogated in the Northern District of New York by Administrative Order #40 of the U.S. District Court dated December 14, 1993.

Fed.R.Civ.P. 37(c)(1) appears to leave a court little discretion where it finds that a failure to disclose is without substantial justification, and is harmful to the party seeking disclosure. The Rule requires the court to prohibit the use of any witness or information not so disclosed. Fed. R.Civ.P. 37(c)(1).

Here there is no dispute that L.I. Bridge's counsel did not formally respond to the Trustee's Discovery Demand for reasons known only to counsel. In its defense, L.I. Bridge's counsel complains that the Trustee is elevating form over substance since it received all the expert discovery that it needed in response to the subpoena previously served on Sucsy Fischer.

The Trustee relies on the decision of the District Court for the Southern District of New York in *Furlong v. Circle Line Statute of Liberty Ferry. Inc.,* 902 F. Supp. 65, 67 (S.D.N.Y. 1995). In that case, the defendant failed to comply with several scheduling orders entered by the court in a litigation that had been pending for four years and was finally ready for trial.

Despite the holding in *Furlong*, other federal courts have concluded that the preclusionary effect of Fed.R.Civ.P. 37(c)(1) is a "Drastic remedy and should only be applied in cases where the party's conduct represents flagrant bad faith and callous disregard of the federal rules." *McNerney v. Archer Daniels Midland Co.,* 164 F.R.D. 584, 587 (W.D.N.Y 1995), relying upon *Hinton v. Patnaude*, 162 F.R.D. 435, 439 (N.D.N.Y. 1995). *See also Bonin v. Chadron Community Hosp.*, 163 F.R.D. 565 (D. Neb. 1995)

It has been observed that Fed.R.Civ.P.. 37 was amended in 1993 to impose an "automatic" preclusion order where a party failed to disclose unless the failure was substantially justified or the failure to disclose was found to be harmless. Nevertheless, as the District Court observed in *Bonin, supra,* 163 F.R.D at 568. "The facts demonstrate that as is often true in discovery disputes,

there's blame enough for everyone. Neither side can be called exemplary in its handling of the disagreements among counsel." Here Trustee's counsel asserts that L.I. Bridge's counsel's "unjustified and repeated failure timely to provide such information has severely prejudiced the Trustee's trial preparation by rendering the Trustee unable to complete critically important discovery in advance of the current February 10, 1998 discovery cutoff and the February 25, 1998 motion deadline." (*See* Trustee's Motion to preclude at ¶ 12). Conversely, L.I. Bridge's counsel argues that "Plaintiff had been advised and was fully aware that defendant was going to be using Sucsy Fischer & Co. (Sucsy Fischer) as its valuation expert. Indeed, Plaintiff even served Sucsy Fischer with a document and deposition subpoena in or about October 1997." *See* objection of L.I. Bridge Fund at #2.

At oral argument neither counsel were personally aware of the documents produced by L.I. Bridge Fund in conjunction with the January 6, 1998 letter from L.I. Bridge's counsel to Trustee's counsel. The Court notes, however, that Trustee's counsel's primary objection is to 1) the failure of its adversary to specifically designate Sucsy Fischer as its valuation expert, and 2) its apparent inability to depose anyone on behalf of Sucsy Fischer prior to the February 10, 1998 discovery cutoff.

It thus appears that sanctions can be fashioned which will stop short of outright preclusion, since this Court cannot conclude that L.I. Bridge's counsel can be said to be guilty of "flagrant bad faith and callous disregard of the federal rules." *Mc Nerney, supra,* 164 F.R.D. at 587.

Accordingly, it is

ORDERED that the Trustee's motion for a preclusionary order pursuant to Fed.R.Civ.P.

37(c) is denied, except that the following sanctions are imposed:

a) L.I. Bridge's counsel shall within fifteen (15) days of the date of this Order disclose to the Trustee's counsel the identity of any person who may be used at trial to present evidence of the valuation of the Ameridata Stock Warrant on the date of its transfer to L.I. Bridge.

b) L.I. Bridge's counsel shall within fifteen (15) days of this date of this Order provide Trustee's Counsel with a report which shall comply with Fed.R.Civ.P. 26 (a)(2)(B).

c) Following the identification of its expert and the service of the report, L.I. Bridge shall produce at its expense said expert, at the offices of the Trustee's counsel on not less than ten (10) days written notice for an examination pursuant to Fed.R.Civ.P. 26(a)(4). In the event that said expert cannot be produced at the offices of Trustee's counsel, L.I. Bridge shall pay reasonable transportation, lodging and attorney's fees of Trustee's counsel associated with the taking the deposition at another location.

d) L.I. Bridge and its counsel shall pay monetary sanctions to the Trustee and the Counsel STB in the sum of $1,000 in order to compensate the Trustee and its counsel for necessity of having to make the within Motion.

e) That in the event the Trustee obtains a money judgment versus L.I. Bridge, interest shall accrue on that judgment from March 18, 1998, the date on which the trial was scheduled to commence.

f) The Court's Amended Scheduling Order dated December 16, 1997, shall be further amended by rescheduling the trial of this adversary proceeding to begin on June 4, 1998 at 9:00 A.M. at the U.S. Court House, 10 Broad St., Utica, New York. All other control dates in said Amending Scheduling Order dealing with the filing of pretrial memoranda, stipulations and

witness lists shall be adjusted so as to occur on a date not later than five (5) days prior to the actual date of trial. Motions shall be made returnable not later than May 14, 1998.

Dated at Utica, New York

this 5th day of March 1998

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge