

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY DIVISION**

<p><i>In re:</i></p> <p>BROOKE CORPORATION, et al.,</p> <p style="text-align: center;">Debtors</p>	<p>Case No. 08-22786-DLS (Jointly Administered) Chapter 7</p>
<p>CHRISTOPHER J. REDMOND, Chapter 7 Trustee of Brooke Corporation, Brooke Capital Corporation and Brooke Investments, Inc.,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>KUTAK ROCK, LLP,</p> <p style="text-align: center;">Defendants.</p>	<p>Adv. No. 10-06246-DLS</p>

REPORT OF PARTIES' PLANNING CONFERENCE

1. **Rule 26(f) Conference.** Pursuant to Fed. R. Civ. P. 26(f), discovery and case management conferences were held on January 12, 2012, January 26, 2012, September 5, 2012 and May 8, 2013, and were attended by:

<u>Name</u>	<u>Address</u>	<u>Party represented</u>
a. William Lynch Michael E. Norton Tyler Scott	Husch Blackwell LLP 4801 Main Street, Suite 1000 Kansas City, Missouri 64112	Chris Redmond, Trustee and plaintiff
b. James L. Moeller	Lathrop & Gage LLP 2345 Grand Blvd. Suite 2200 Kansas City, Missouri 64108	Defendants Sandler O'Neill & Partners, L.P., Macquarie Holdings (USA) Inc., and Oppenheimer & Co., Inc. (the "Underwriters")
c. John C. Aisenbrey Kristin L. Farnen Brian E. Sobczyk	Stinson Morrison Hecker LLP 1201 Walnut Street, Suite 2900 Kansas City, Missouri 64106	Defendant Kutak Rock, LLP ("Kutak")

2. **Preliminary Matters.**

- a. The following persons will appear at the upcoming Rule 16(b) scheduling conference with the court:

Michael E. Norton and John Cruciani for the Trustee.

John Aisenbrey and Brian Sobczyk for Kutak

James Moeller, Brian Fenimore, and James Moloney for Underwriters

- b. The parties provide the following information regarding themselves and their counsel:

i. Trustee/Plaintiff

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ii. Defendant Kutak Rock LLP

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- iii. Defendants Sandler O'Neill & Partners, L.P., Macquarie Holdings (USA) Inc., and Oppenheimer & Co., Inc. (the "Underwriters"):

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c.

i. Plaintiff submits the following summary (which defendants dispute):

Trustee Christopher Redmond is the Chapter 7 Trustee of Brooke Corporation, Brooke Capital Corporation, and Brooke Investments, Inc. (collectively “Brooke”). In this case, the Trustee seeks to recover from Defendant Kutak Rock LLP (“Kutak”) and Defendants Sandler O’Neill & Partners, L.P., Macquarie Holdings (USA) Inc., and Oppenheimer & Co. Inc. (collectively the “Underwriters”) for claims related to Defendants’ role in the economic collapse of Brooke. Defendant Kutak acted as outside counsel for Brooke Corporation and its principal subsidiaries and provided wide ranging legal services regarding issues such as corporate governance, compliance with applicable securities law and regulations, SEC reporting requirements, securitization issues, and other legal issues related to the overall operation of Brooke’s business. The Trustee alleges that Kutak was negligent in the performance of its duties related to these services, which caused extensive damage to Brooke. The Trustee’s Second Amended Complaint seeks recovery on the following theories against Defendant Kutak: Legal Malpractice (Count VI); Aiding and Abetting Breach of Fiduciary Duty (Count VII); Preferential Transfer (Count X); Constructive Fraudulent Conveyance (Count XI); and Recovery of Avoided Transfers (Count XII). Defendant Underwriters were retained by Brooke Corporation and its principal subsidiaries to undertake due diligence, including a review of Brooke’s franchise relationships, the background, history, and qualifications of Brooke’s auditors, as well as the overall financial condition of the Brooke entities in relation to a potential follow-on public offering of Brooke common stock. The Underwriters had a duty to exercise reasonable care in providing these services in a manner consistent with the knowledge and ability ordinarily possessed by underwriters. The Underwriters breached that duty by failing to conduct adequate due diligence and/or by failing to alert Brooke to the accounting irregularities, the misleading SEC disclosures and the true nature of Brooke’s financial condition causing extensive damage to Brooke. The Trustee’s Second Amended Complaint seeks recovery against the Defendant Underwriters on a theory of Negligence (Count XIII). Plaintiff intends to file a motion for leave to file a Third Amended Complaint on or before the deadline set by the Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sections 157 and 1334 and 11 U.S.C. Section 328. Venue lies in this Court pursuant to 28 U.S.C. Sections 1408 and 1409.

- ii. The Second Amended Complaint places at issue every major transaction in which Brooke engaged between 2002 and its collapse in 2008, and seeks up to \$80 million in damages. The case is in its early stages; preliminary disclosures have not occurred, no depositions have been taken, and document discovery is in its early stages. The defendants submit the following summaries (which plaintiff disputes):

Defendant Kutak submits the following summary of the case and Kutak's defenses (which plaintiff disputes):

The Trustee's state law claims against Kutak are premised on the flawed and unsupported allegation that Kutak had a duty independently to verify the accuracy of statements in Brooke's audited financial statements regarding Brooke's solvency and income recognition practices, that Kutak knew or should have known (1) that the financial statements were incorrect and not in accordance with generally accepted accounting principles, (2) that Brooke's independent auditors erred when they certified Brooke's financial statements each year from 2003-2007, and (3) that Brooke, therefore, was insolvent when it issued securities and paid dividends.

Kutak was Brooke's securities counsel. It was engaged for specific purposes and did not undertake the duties the trustee alleges, and had no duty to go beyond the scope of its legal knowledge and expertise to investigate Brooke's financial health or independently to verify Brooke's certified financial statements. To the contrary, lawyers are entitled to rely upon the opinions of other professionals, especially include financial statements audited by certified public accountants engaged by the lawyer's client.

The damage theory alleged by the Trustee is deepening insolvency, i.e., that Kutak's alleged negligence wrongfully prolonged Brooke's corporate life to Brooke's detriment. Even if this were a valid theory of damages, which it is not, the Trustee stands in the shoes of the insolvent corporation, not its creditors, and an insolvent business is not harmed by deepened insolvency. Therefore, the Trustee has no damages.

Any damages that may have been suffered by Brooke were caused by its own negligence or fault or by the negligence or fault of others, and not by any alleged negligence or fault of Kutak. Kutak specifically denies that it was at fault in any manner for the alleged injuries to Brooke. Pursuant to K.S.A. 60-258a, any negligence or fault attributed to Kutak

must be compared with the negligence or fault of all other parties and non-parties that contributed to Brooke's alleged damages. Moreover, pursuant to K.S.A. 60-258a, the aggregate negligence or fault of all such parties and non-parties, if any, must be compared with Brooke's own negligence or fault. Other parties or non-parties who may have contributed to Brooke's alleged damages include, without limitation, Brooke Corporation, Brooke Capital Corporation, Brooke Holdings, Inc., Aleritas Capital Corp. and the officers and directors of each such entity; the accounting firm of Summer, Spencer & Callison, CPA's Chartered; and underwriters and other professional advisors, and (assuming the Trustee's theory of liability is correct) other lawyers for the Brooke entities .

- iii. The Underwriters submit the following summary of the case and the Underwriters' defenses (which plaintiff disputes):

The Trustee has manufactured from thin air supposed duties that the Underwriters allegedly owed to Brooke, claiming among other things that the Underwriters "were retained to perform due diligence." Actually, the Underwriters' duties were defined and described in a written engagement letter which squarely and unequivocally placed on Brooke the responsibilities that Brooke's trustee now creatively seeks to cast back upon the Underwriters. Underwriters are not auditors. Underwriters are not lawyers. Underwriters are not officers, directors, or management. Underwriters are simply that, underwriters who agreed to purchase shares of Brooke's stock under certain conditions, and who did just that – raising \$28 million in debt-free equity in 2005 to support Brooke's business. The Underwriters owed no duties to Brooke apart from the limited obligation contained in the engagement letter, and with no duty owed, there can be no breach of duty to support the Trustee's claims.

To the extent Brooke suffered any damage, such damage was caused by the careless and negligent conduct of Brooke's officers, Brooke's directors, Brooke's auditors, and the scores of other professionals who actually owed various duties to Brooke as more fully described in the Underwriters' answer. Brooke's only articulated damage theory to date is one of deepening insolvency: that the Underwriters, by assisting Brooke in obtaining an infusion of \$28 million in debt-free capital, enabled Brooke in later years to run itself deeply into insolvency. The Underwriters deny that theory is a valid damage theory or that it applies to a party who assists in providing debt-free capital, but if the Court permits Brooke to pursue such a theory, then the jury must compare the

Underwriters' "fault" in assisting Brooke with the fault of numerous other parties who subsequently assisted Brooke with obtaining additional capital and debt, and who had superior opportunities to identify the issues and alleged problems for which the Trustee now attempts to hold the Underwriters responsible (all as the Underwriters allege in their answer).

3. **Plan for Alternative Dispute Resolution (ADR).**

a. The Trustee shall submit to defendants a written, good faith settlement proposal by August 15, 2013. By September 6, 2013, defendants shall make a written, good faith response to such proposal, either accepting it or submitting a good faith counterproposal to settle the case. By September 16, 2013, the parties shall send confidential reports to the magistrate judge, stating the efforts to settle the case, current evaluations of the case, views concerning future settlement negotiations, prospects for settlement, a specific recommendation regarding mediation and/or any other ADR method, and an indication (preferably jointly) concerning who has been selected by the parties to serve as a mediator or other neutral in an ADR process.

b. To date, the parties have engaged in the following good faith efforts to resolve this matter:

The Trustee and the Underwriters have agreed to participate in voluntary mediation. The Trustee and the Underwriters are currently working on selecting a mediator and setting a date for the mediation. The Trustee anticipates that the mediation will occur in the 30-60 days.

In early 2011, the Trustee submitted a settlement demand to defendant Kutak. This settlement demand was later withdrawn when Kutak's attorney reported that Kutak could not respond at that time. More recently, the Trustee has suggested mediation to defendant Kutak. Kutak is willing to mediate but asserts that it needs more information about the basis of the Trustee's claims before a mediation could be fruitful.

c. The parties have agreed on the following ADR procedure, which will be accomplished by:

See 3(b) above.

4. **Plan for Pre-Discovery Disclosures.** The parties have participated in informal and formal discovery whereby a large amount of information has been produced.
 - a. The Trustee proposes that the Trustee and Kutak exchange any additional information required by Fed. R. Civ. P. 26(a)(1) by May 31, 2013. The Trustee further proposes that because of the planned mediation between the Trustee and the Underwriters, the Underwriters provide such disclosures by July 31, 2013.
 - b. Defendants propose that such disclosures by all parties should be exchanged by July 31, 2013.
 - c. Kutak does not believe it should be required to make its initial disclosures before the Underwriters.

5. **Plan for Discovery.** The parties jointly propose to the court the following discovery plan:
 - a. Fact Discovery deadline.

The Trustee contends all fact discovery shall be commenced or served in time to be completed by January 31, 2014.

In light of the Trustee's request that each side (plaintiff and defense) may take as many as 40 depositions, a substantial number of which would be of witnesses who are not under the control of a party, the defendants believe that completing fact discovery – even if there are only 40-50 such depositions in total, cannot be accomplished in 6 months. The defendants submit the deadline for fact discovery should be June 30, 2014.
 - b. Expert discovery

The Trustee submits the expert discovery shall be completed by July 1, 2014.

The defendants submit that it should be completed by November 30, 2014.
 - c. The parties intend to serve disclosures and discovery electronically, as permitted by D. Kan. Rules 5.4.2 and 26.3.
 - d. One or more of the parties anticipate the following problem(s) in discovery, which should be discussed with the court and, if possible, resolved at the scheduling conference:

The defendants believe that parties have encountered substantial issues involving e-discovery relating to the Trustee's email and documents and expect those issues will remain a central focus of the case. Plaintiff does not agree. Plaintiff asserts that it has produced large amounts of ESI already and has given defendants substantial access to all of Brooke's data systems. See item e. below.

Plaintiff has indicated its intention to take up to 40 depositions, and defendants anticipate that the majority of the depositions occurring in this case will be of non-parties. All of Brooke's former employees, officers and directors are non-parties. Brooke's former auditors are non-parties. All of Brooke's former lenders, banks, investment advisors, and other financial professionals are all non-parties. Deposing non-parties is significantly more difficult and time-consuming than if the majority of the witnesses were employees of parties. Plaintiff believes that many of the depositions he seeks will be witnesses controlled and/or produced by defendants. Plaintiff believes that the parties can complete the needed depositions within the discovery period Plaintiff proposes.

e. Disclosure or discovery of electronically stored information (ESI) should be handled as follows:

i. Trustee's ESI Statement (to which Kutak and the Underwriters respectfully disagree as being insufficient and inaccurate):

The Trustee has provided the defendants a large amount of ESI in response to informal and formal discovery requests. With the approval of the Court, the Trustee has hired XACT, a third party vendor, to maintain and preserve the Brooke data systems.

The parties have participated in detailed discussions regarding ESI protocols and cost sharing, but have been unable to reach agreement. During the course of these discussions, the Trustee has provided defendants with specific information about the location, sources, format, and scope of Brooke's ESI. More specifically, the Trustee has given Kutak and the Underwriters a file level listing of all files on the Brooke data systems, a summary of the content of all of the Brooke data servers, a list of all .pst (e-mail) files on the Brooke data systems, a copy of large portions of the raw (unprocessed) data from the Brooke systems, and the entire .pst files for the Directors and Officers of Brooke. The Brooke systems contain a vast amount of data (over 1 billion documents), most of which the Trustee believes

is irrelevant to any claims or defenses of the Parties. The Trustee has proposed two plans that would more efficiently identify the relevant ESI without causing the Brooke Estate or defendants to be overwhelmed and overburdened with the expense of processing large amounts of irrelevant data. In providing this information to defendants, the plaintiff Trustee invited defendants' input regarding the identification of relevant custodians and the identification of relevant ESI subject to discovery. The Trustee is still hopeful that the parties can come to an agreement regarding the identification of relevant Brooke ESI. If no agreement can be reached, then the Trustee will independently identify the ESI that it believes is most likely to contain relevant information and will respond to specific discovery requests in the manner the Trustee believes will comply with the discovery obligations imposed by the Federal Rules of Civil Procedure. The Trustee reserves the right to seek cost sharing as appropriate given the scope of the defendants' request for production.

With respect to Kutak's request for production, on May 9, 2013, the parties met again to discuss ESI issues. During that meeting, Kutak agreed to narrow its discovery requests based upon the Trustee's concerns regarding the breadth of these requests. Moreover, Kutak agreed to more fully consider and respond to the Trustee's proposal regarding the specific Brooke data to be ingested, searched, and produced. The parties agreed that further discussions would occur after Kutak narrowed its requests and more fully considered the Trustee's ESI proposal. The Trustee has produced other non-Brooke ESI information responsive to Kutak's request, such as third party documents in possession of the Trustee and documents produced by other parties in related litigation among other items.

The Underwriters requested, and were given access to, large amounts of raw data including the .pst (e-mail) files of all of the Officers and Directors of Brooke and a large portion of the user created files maintained by Brooke. This data was also produced to Kutak. All of this was given to the Underwriters (and Kutak) at the expense of the Trustee and through an informal request process. Later, the Underwriters formalized these same informal requests through a Rule 34 document request. The Underwriters have had several questions regarding the format, content, and scope of the data produced, which the Trustee has answered completely. The

Trustee is unaware of any remaining issues with respect to the Underwriters' request for production.

Contrary to Kutak's statement below, the Trustee asserts that it has produced substantial information responsive to Kutak's request, such as third party documents, .pst files, communications with other litigants and other Brooke information.

Contrary to Kutak's statement below, the Trustee asserts that Kutak's "Document Collection and Production Protocol," was over broad and that the Trustee could not agree to Kutak's proposal.

The Trustee disagrees with the Underwriters' statement below that data has been lost and the Trustee is unaware of any remaining issues with the production to the Underwriters.

ii. Kutak's and the Underwriters' ESI Statement (which the Trustee respectfully believes does not fairly describe the ESI efforts and issues to date. The Trustee also disagrees with the defendants' statement on proportionality):

(a) **Introductory Statement.** Defendants agree that they have participated in a number of meetings and discussions in which the scope, format, and costs of the parties' respective Electronically Stored Information ("ESI") production obligations have been discussed. Both the Underwriters and Kutak have provided to the Trustee specific information regarding the location and sources of their respective ESI, the manner and methodologies used by each to collect their ESI including whether and to the extent archived or deleted ESI was included, and the identification of specific custodians from whom documents were collected. Each has obtained input from the Trustee regarding search terms to be used by them to collect ESI for review and determination of responsiveness, although no specific agreement was reached with respect to the use of these terms. Each Defendant has completed their review of their document collections for responsiveness and privilege, has produced documents responsive to the Trustee's discovery requests, and has produced privilege logs as required to the Trustee. Each has undertaken to comply with its discovery obligations at its own expense. Subject to any supplementation that may be necessary pursuant to the Fed. R. Civ. P., each Defendant believes that they have substantially, if not fully completed their productions to the Trustee. As of the date of this report the Defendants are not aware of pending disputes regarding their respective productions, although Trustee has made inquiry regarding certain issues in certain productions and the Defendants have responded to those inquiries.

(b) **Defendants’ Productions and Format.** Early in these discussions, Kutak circulated to the parties a “Document Collection and Production Protocol,” to document the scope of its production obligations as well as define the production formats to be used by the parties. The parties did not reach agreement on the terms of Kutak’s Production Protocol, although the format of production generally, with limited exceptions, was not disputed. However, a stipulated production protocol was not executed by the parties.

(i) Kutak has made its paper documents available to the Trustee for review, and the Trustee has received all paper documents identified by him from Kutak. Each of the Underwriters was separately the subject of a Rule 2004 document production process in the main bankruptcy case involving Brooke, a process with which the Underwriters fully complied, producing both their paper records and their ESI. The Trustee undertook further discovery in this Adversary, with an enlarged scope both substantively and temporally.

(ii) In addition to making its paper documents available to the Trustee, Kutak has culled and processed, at its own expense, its collected ESI. It has produced approximately 192,529 pages of documents as well responsive native Excel spreadsheets. The production format used by Kutak (and as generally requested by Trustee) was:

Standard Group IV Tiff images of these documents as well as accompanying load files for use with Summation, including an “.LFP” image file, a “.TXT” file, and a standard “.LST” file for extracted text. Inclusion of metadata fields as contained in the .TXT files in the productions were also provided as follows: BEGPROD | ENDPDOD | PGCOUNT | SUBJECT | DOCUMENT TITLE | AUTHOR | FROM | TO| CC | BCC | DATESENT | DATERECEIVED | DATECREATED | DATEMODIFIED | MD5HASH | BEGPRODATTACH | ENDPDODATTACH | CUSTODIAN | CONFIDENTIALITY | REDACTION PRESENT.

Kutak produced its Excel spreadsheets in native Excel format. Kutak also included Tiff image “cover sheet” placeholders for the corresponding native files, which contained a Bates number and confidentiality designation for each native file.

(iii) Embedded documents were extracted prior to production and to the extent responsive to the Trustee’s Requests, produced as attachments to the parent documents.

(iv) The Trustee asked that the Underwriters' ESI production in this Adversary be produced in single page group IV Tiff, with a summation load file, standard metadata fields in a .txt with standard delimiters, maintaining parent child relationships, text extract (to the extent it's available) with an .lst load file and native Excel, PowerPoint, etc. with placeholder tiffs for the native files. Even though this request was received on the eve of the Underwriters' actual document production, the Underwriters complied with the Trustee's request. The Underwriters collectively search for, collected, and produced over 130,000 pages of documents in the form and formats that the Trustee requested. At no time in this process did the Trustee offer or suggest that the Trustee should share in any of the expense of the Underwriters' efforts to locate, collect, process, search, and output (in the Trustee's specified electronic format) responsive documents as part of the Underwriters' discovery responses.

(c) **Trustee's ESI.** Kutak has served formal Requests for Production of Documents ("Kutak Requests") on the Trustee. At the urging of the Bankruptcy Court, the Underwriters have engaged in both informal discovery and formal discovery (under Rule 34) with the Trustee. The Kutak Requests specified the format of the Trustee's production, which format was generally consistent with that produced by the Defendants.¹ Trustee has served its Objections and Response on Kutak, but the Trustee has not produced documents specific to Kutak's Requests. Rather, subject to his objections, Trustee stated that he would either produce the documents "at a mutually agreeable time" or that he would "perform a reasonable search to identify and collect non-objectionable information that is responsive to this request, as limited by and construed in accordance with the Trustee's General and Specific Objections, and produce such information at a mutually agreeable time."

The Trustee's responses to the Underwriters' formal and informal discovery requests have consisted primarily in the production of a series of hard drives containing raw, unsearched, unformatted ESI in what the Underwriters understand is the same form in which the Trustee received the data from Brooke's IT personnel at, about, or shortly after the time of Brooke's bankruptcy. This ESI originally consisted of four hard drives of raw Brooke data, and in recent months a series of issues have arisen concerning the completeness, integrity, and potential loss of some of this data by the Trustee. The Trustee and the Underwriters' counsel have exchanged reports, data, listings, and other information in an effort to come to an acceptable understanding as to these issues. The data gaps and issues have been narrowed, but not yet finally resolved. The parties

¹ Kutak requested load files that could be utilized in the litigation support review tool used by it, rather than Summation load files Kutak produced to the Trustee.

continue to work together to try to resolve these issues. All of the parties reserve all of their rights regarding these matters while these discussions continue.

(d) Independent of the Kutak Requests, the Defendants have received from the Trustee a total of approximately 600 GB of raw data, described in the preceding paragraph, which the Trustee has not searched, de-nisted, culled or processed or reviewed for responsiveness. This data includes a variety of information and file types, including software executable files, user created files, and archived e-mail (PSTs). Using certain metadata date fields, the Trustee did search for and exclude all documents from this data that post-dated a specific date and deemed those “presumptively privileged” subject to further review by the Trustee.

(e) The Parties have had numerous discussions regarding this and other ESI in the possession of the Trustee. The Trustee has submitted various cost sharing proposals to the Defendants. Defendants have advised the Trustee that they have engaged in the ESI discovery process at their own expense, the Trustee has not shared in those costs, and each Defendant had as much if not more ESI as a whole, to search through, cull, and process as the Trustee has. Nonetheless, in an effort to find some limited common ground, Defendants have submitted to Trustee various proposals to share in certain limited costs associated with the Trustee’s ESI. To date, the parties have not reached agreement on any parties’ proposal.

(f) Consequently, Kutak, at its own expense, has started the process of de-nisting, culling, searching, and processing the Trustee’s approximately 600 GB of raw data, and it has incorporated its own work product into this set of data. The Defendants have submitted to the Trustee that in doing so, Defendants did not agree that this production satisfied the Trustee’s discovery obligations, nor that they would agree that future productions could be in the raw format of this ESI. The Trustee has advised the Defendants that additional ESI exists, which may contain responsive information.

(g) The Parties have continued their discussions to narrow the scope of their disputes. Defendants propose that a final attempt be made to narrow the scope of the ESI disputes, and reach any agreements they deem appropriate. However, if agreement cannot be reached by 7/31/2013, the Defendants propose that the parties engage in an ESI specific conference with the Magistrate to resolve any outstanding ESI issues relating to the Trustee’s data.

(h) **Proportionality.** In its status reports to the Bankruptcy Court, the Trustee has stated that he seeks damages in the amount of \$80 million. As

such, Defendants assert that the principles of proportionality (Fed. R. Civ. P. 26(b)(2)(c)) as to the production of Trustee's ESI do not apply.

- f. The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows:

The Bankruptcy Court has entered an agreed upon order regarding these issues. See Doc#375.

- g. Trustee plans to conduct discovery regarding the following specific subjects (and the defendants dispute the relevance of the majority of such subjects):

- i. The relationship of each defendant with the Brooke entities;
- ii. Communications among and between Brooke, Kutak, each Underwriter and Brooke's auditors;
- iii. Communications between Kutak, the Underwriters and Brooke's directors and audit committee;
- iv. Advice and recommendations provided by Kutak and the Underwriters to Brooke;
- v. Brooke and the Underwriter's participation in drafting Brooke SEC filings;
- vi. Consideration given and advice provided by the defendants regarding the following subject matters:
 - a. The recognition of initial franchise fees as income;
 - b. The setting of Brooke's loan loss reserves;
 - c. Brooke's cash flow or liquidity;
 - d. Brooke's method of dealing with financially troubled franchisees;
 - e. Whether Brooke's payment of dividends was lawful;
 - f. Whether Brooke was solvent;
 - g. The number of successful operating franchisees;
 - h. The double-pledging of loans by Brooke;
 - i. Brooke's litigation with its franchisees;
 - j. Brooke's internal controls;
 - k. Drafting Brooke's 2005 S-1;
 - l. Responding to SEC inquiries;
 - m. Whether Brooke's outside auditors were qualified to be handling audits of a public company;
 - n. Whether Brooke's prospectus contained all information necessary to enable investors to make an informed assessment of its financial position and prospects;
 - o. The turnover of franchisees;

- p. The increase in Brooke's operational expenses;
- q. The number of franchisees unable to make their monthly loan payments;
- r. Brooke's advances to its franchisees to pay monthly expenses;
- s. The status of Section 44 compliance;
- t. The lack of an expert on Brooke's audit committee;
- u. The lack of documentation reflecting the services performed for Brooke by the defendants;
- v. Compensation received by the defendants for services performed for Brooke;
- w. The ongoing services Brooke provided to its franchisees and the cost of providing those services;
- x. Whether Brooke's financial statements accurately reflected its financial position and complied with relevant legal and regulatory requirements, including GAAP;
- y. Brooke's offering circulars and franchise agreements;
- z. Brooke's compliance with the Sarbane Oxley Act;
- aa. Advice or assistance provided to Brooke's directors with respect to their oversight responsibility to shareholders relating to the integrity of Brooke's financial statements;
- bb. Investigation into the total number of franchise locations or the financial health of any franchisee;
- cc. Whether payments received from borrowers were being used to cover the operating expenses of any Brooke entity;
- dd. Writing off or expensing uncollected amounts owed to Brooke by its franchisees;
- ee. The suitability of any potential franchise candidate;
- ff. Participation in the preparation for investor and analyst conference calls involving Brooke;
- gg. Drafting press releases issued by Brooke.

While the Underwriters and Kutak dispute the relevance and materiality of a majority of the above inquiries to the purported claims asserted against each of them, to the extent such discovery is permitted and occurs the Underwriters and Kutak will defend themselves on such issues and would intend in discovery to explore fully the duties that the Underwriters and Kutak were required to and actually undertook and performed as well as the role that other individuals and entities played in causing or contributing to cause the conduct and damages of which the Trustee complains in each of these areas.

Kutak will also pursue discovery on the scope of Kutak's representation of the Brooke represented entities, the knowledge of Brooke's former directors, executives, employees, lawyers, and former accountants (auditors as well as those within Brooke) regarding Brooke's financial condition and appropriateness of issuing securities and paying dividends, their knowledge of and contribution to Brooke's submissions and responses to the SEC, and the participation and fault other parties and non-parties in the conduct alleged to have caused damage to the Brooke entities.

The Underwriters will also pursue discovery on the limited scope of the Underwriters' engagement by Brooke Corp. , as well as the duties and activities of Brooke's former executives, directors, former accountants (auditors as well as those within Brooke) , investment advisors, banks, and other professionals and their respective knowledge of Brooke's financial condition, appropriateness of paying dividends, submissions and responses to the SEC, and the participation and fault other parties and non-parties in the conduct alleged to have caused damage to the Brooke entities.

The Underwriters also will conduct discovery on the myriad ways in which the Trustee's allegations about Brooke's financial condition and business practices which (if true) prove that Brooke breached the representations and warranties and other terms of the Underwriters' engagement letter with Brooke, giving rise to the Underwriters' counterclaims.

- h. The Parties have agreed to a maximum of 25 interrogatories, including all discrete subparts, each by the Trustee, and Kutak, and collectively by the Underwriter defendants.
- i. The Parties have agreed to a maximum of 40 depositions (exclusive of records custodians where necessary) by the Trustee and 40 by the defendants.
- j. Each deposition shall be limited to 8 hours, except that the parties anticipate that, owing to the time frame at issue of over seven years, the number of parties, and the broad scope of issues identified in subsection g. above, that some depositions may exceed 8 hours. The parties agree to work in good faith to identify such depositions in advance.
- k. The parties agree that the provisions of Rule 26 effective on and after December 1, 2010, shall apply to and govern this case.

The Trustee proposes that disclosures required by Fed. R. Civ. P. 26(a)(2), including reports from retained experts, shall be served by plaintiff by

March 17, 2014, and by defendants by April 21, 2014. Disclosures and reports by any rebuttal experts shall be served by May 19, 2014.

The defendants propose that disclosures required by Fed. R. Civ. P. 26(a)(2), including reports from retained experts, shall be served by plaintiff by July 1, 2014, and by defendants by September 1, 2014. Disclosures and reports by any rebuttal experts shall be served by October 1, 2014.

- l. The parties agree that physical or mental examinations pursuant Fed. R. Civ. P. 35 are not appropriate in this case.
- m. The Trustee suggests that supplementations of disclosures under Fed. R. Civ. P. 26(e) shall be served at such times and under such circumstances as required by that rule.

Defendants suggest that in addition, such supplemental disclosures shall be served 40 days before the deadline for completion of fact discovery.

Defendants suggest that the parties serve preliminary witness and exhibit disclosures pursuant to Fed. R. Civ. P. 26(a)(3)(A)(i) & (iii) at least 40 days before the completion of fact discovery.

The Trustee disagrees and suggests that disclosures pursuant to Fed. R. Civ. P. 26(a)(3)(A)(i) & (iii) be made according to the Rule.

- n. The Court has entered the parties' agreed upon protective order. See Doc#375.

6. Deadlines for Amendments and Potentially Dispositive Motions.

- a. Any motion for leave to join additional parties or to otherwise amend the pleadings shall be filed by August 15, 2013. The Trustee anticipates filing a motion for leave to file a third amended complaint. If the Trustee amends the complaint, the defendants will have 21 days after August 15, 2013 to move to join additional parties.
- b. Provided that such defenses have been timely preserved, any motions to dismiss for lack of personal jurisdiction, venue, propriety of the parties, or failure to state a claim upon which relief can be granted shall be filed by August 30, 2013.

c. Dispositive Motions.

The Trustee proposes all other potentially dispositive motions shall be filed by June 1, 2014.

The defendants propose all other potentially dispositive motions shall be filed by December 31, 2014.

d. Plaintiff proposes that all motions to exclude testimony of expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law, shall be filed no later June 1, 2014 .

Defendants propose that such motions be filed no later than December 31, 2014.

7. Other Items.

a. The Trustee proposes that by July 15, 2013, any party asserting comparative fault shall identify all persons or entities whose fault is to be compared.

The defendants propose that September 6, 2013, any party asserting comparative fault shall identify all persons or entities whose fault is to be compared.

b. The parties request a status conference prior to the final pretrial conference, in order to discuss the following subjects: The status of discovery. The parties request a status conference in January 2014.

c. Final Pretrial Conference.

The Trustee requests that the Court hold the final pretrial conference in June 2014.

The defendants request that the Court hold the final pretrial conference after December 31, 2014.

d. Trial. At the present time, the Parties agree the trial is expected to take approximately 14 trial days, or approximately 3 weeks.

The Trustee submits the case should be ready for trial by October 2014.

The defendants submit the case should be ready for trial after December 31, 2014.

- e. The parties are not prepared to consent to trial by a U.S. Magistrate Judge at this time.

Date: 5/14/13

Respectfully submitted,

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