IN THE UNITED STATES BANKRUPTCY COURT
FOR DISTRICT OF DELAWARE

In re: WASHINGTON MUTUAL, INC., et al.,[1] Debtors.	Chapter 11 Case No. 08-12229 (MFW) (Jointly Administered) **Hearing Date: August 24, 2009 at 11:30 a.m. (ET)** **Ref. Nos. 1444 and 1515**

JPMORGAN CHASE BANK, N.A.'S RESPONSE TO THE WASHINGTON MUTUAL NOTEHOLDERS GROUP'S OBJECTION TO THE MOTION TO COMPLY WITH FEDERAL RULE OF BANKRUPTCY PROCEDURE 2019

JPMorgan Chase Bank, N.A. ("JPMC"), hereby responds to the Washington Mutual Noteholders Group's Objection to JPMC's Motion to Comply With Federal Rule of Bankruptcy Procedure 2019 (the "2019 Motion"). In support of this Response, JPMC respectfully states as follows:

PRELIMINARY STATEMENT

1. Rule 2019 of the Federal Rules of Bankruptcy Procedure ("Rule 2019") is clear in its requirements — "*every entity or committee representing more than one creditor*" must file a verified statements setting forth:

> (1) the name and address of the creditor . . .; (2) the nature and amount of the claim . . . and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petitions; (3) a recital of the pertinent facts and circumstances with the employment of the entity . . . and, in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and (4) . . . the amount of claims . . . owned by

[1] The Debtors in these chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395). The Debtors continue to share their principal offices with the employees of JPMorgan Chase located at 1301 Second Avenue, Seattle, Washington 98101.

> the entity, the members of the committee . . . the times when acquired, the amounts paid thereof, and any sales or disposition thereof."

Fed. R. Bankr. P. 2019(a). Rule 2019, by its terms, applies to the Washington Mutual Noteholders Group. Regardless of what it calls itself, the Washington Mutual Noteholders Group is an *ad hoc* committee that represents the interests of its members.

2. Where, as here, the rule's language is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Plain and simply, the Washington Mutual Noteholders Group represents "more than one creditor." This is not simply JPMC's contention, but the very way in which that group has acted before the parties and the Court since the onset of this bankruptcy action. By its pleadings and appearances in this bankruptcy case, the Washington Mutual Noteholders Group time and again has spoken with a single voice, presented a united front to the Court, the debtor and other stakeholders and sought to enjoy the increased bargaining power that comes from collective action.

3. The Washington Mutual Noteholders Group must now adhere to the clear directives that accompany the obvious benefits they secure by speaking and acting as a collective voice. *See* Mark Berman & Jo Ann J. Brighton, *Will the Sunlight of Disclosure Chill Hedge Funds? The Tale of Northwest Airlines*, Am. Bankr. Inst. J., May 2007, at 64 ("It appears that the ad hoc committee wanted the best of both worlds — namely, to form a committee to advance their collective goals . . . while at the same time retaining the right to act to advance their individual interests. . . . The benefit/burden concept is nothing new to those players that have been actively participating in the bankruptcy process for a long time.").

4. The plain language of Rule 2019 demands the Washington Mutual Noteholders Group's compliance, and legislative history and public policy bolster this application. Rule 2019 fulfills the purpose it was intended to address by assuring that all participants in the reorganization process are aware of the actual economic stake of creditors who, formally or informally, act in concert and profess to have control over one or more classes of creditors. This awareness fosters the necessary transparent negotiation process, mitigates the potential and actual harms that have long been the cornerstone of disclosure in securities and in bankruptcy laws (particularly when the issue is trading in claims against a bankruptcy entity) and allows parties to obtain information that is not necessarily available absent discovery.

5. The "parade of horribles" the Washington Mutual Noteholders Group suggests as the outcome of this clear application of Rule 2019 is unsupported by the record, the evidence or the law. The concerns trumpeted by the Washington Mutual Noteholders Group would simply allow them to continue to operate in the shadows, in derogation of the Rule 2019's clear directive and the important interests it serves to protect.

6. The significance of the Rule 2019 disclosure requirement is highlighted here by the fact that the Washington Mutual Noteholders Group is apparently buying and selling large quantities of WMI notes, and may be changing their positions in those securities based upon events in this case. Disclosure of what securities these Noteholders own, when and at what price they acquired them, what they have sold or additionally purchased and when, and at what price, is critically important to the Court and parties in interest in assessing: (i) the level and nature of their interest in this proceeding; (ii) the bias and motivation behind the positions they are urging on the Court; and (iii) their credibility. As the *Northwest Airlines* court clearly explained, one of Rule 2019's purposes is to give "all parties a better ability to gauge the credibility of an

important group that has chosen to appear in bankruptcy and play a major role." *In re Northwest Airlines*, 363 B.R. 704, 709 (S.D.N.Y. 2007). Here, it appears that during the course of this proceeding the Washington Mutual Noteholders Group has increased their collective ownership from the $1.1 billion claimed when they first appeared to approximately $3.3 billion, without any substantiation and despite the group's knowledge that it was subject to a 60 day trading restriction. *See* Objection to Motion of Debtor's Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019(a) for Approval of Settlement with JPMorgan Chase Bank, N.A. [Docket No. 1324] (Exhibit A). Disclosing, as Rule 2019 requires, the specifics of the changing interest held by the members of this Group, who have joined together to give collective heft to their position before the Court, is essential so all parties can transparently assess the credibility of their litigation position and understand who they are and what interests they are advancing in negotiations among the various constituencies interested in this matter.

ARGUMENT

A. BY ITS PLAIN LANGUAGE, RULE 2019 APPLIES TO THE WASHINGTON MUTUAL NOTEHOLDERS GROUP.

7. Rule 2019 is clear in its application to the Washington Mutual Noteholders Group. The bankruptcy court in *In re Northwest Airlines Corporation* ("*Northwest I*") decided this very issue that the Washington Mutual Noteholders Group spends over ten pages fervently arguing against. 363 B.R. 701 (Bankr. S.D.N.Y. 2007); *see also Wilson v. Valley Electric Membership Corp.*, 141 B.R. 309, 315 (E.D. La 1992) (Rule 2019 "seems to apply to the formal organization of a group of creditors holding similar claims who have elected to consolidate their collection efforts."). The *Northwest I* Court held that members of an *ad hoc* committee of equity security holders must disclose the amount of their interests, price paid, dates purchased and any subsequent sales thereof, pursuant to Rule 2019. 363 B.R. at 704. The *Northwest I* Court noted

that "[a]d hoc or unofficial committees play an important role in reorganization cases. By appearing as a committee of shareholders, the members purport to speak for a group and implicitly ask the court and other parties to give their position a degree of credibility appropriate to a unified group with large holdings." *Id.* at 703.

8. In *Northwest I*, the bankruptcy court applied the following factors in support of its holding that the ad hoc committee of equity security holders in that case was required to file Rule 2019 disclosures: (1) the *ad hoc* committee filed a single notice of appearance; (2) the members appeared as a "committee"; (3) the *ad hoc* committee moved for appointment of an official committee of equity security holders; (4) the *ad hoc* committee actively litigated discovery issues and other matters; (5) the *ad hoc* committee's counsel was paid for its action on behalf of the committee and not individual members; and, (6) the *ad hoc* committee's counsel took instructions from the *ad hoc* committee as a whole and did not represent the interests of any individual member. *Id.*

9. Using these factors shows that the Washington Mutual Noteholders Group is no different than the *ad hoc* committee in *Northwest I* and should be compelled to comply with the requirements of Rule 2019.[2] On October 20, 2008 and November 6, 2008, counsel for the Washington Mutual Noteholders Group filed Notices of Appearance and Requests for Service of

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[2] With regard to the last two factors identified by the *Northwest I* Court — (5) the ad hoc committee's counsel was paid for its action on behalf of the committee and not individual members and (6) the ad hoc committee's counsel took instructions from the ad hoc committee as a whole and did not represent the interests of any individual member — there has not been sufficient disclosures by the law firms representing the Washington Mutual Noteholders Group for JPMC to provide information regarding these considerations. *See Fed. R. Bank. P.* 2019(a)(3) and (4) (requiring "a recital of the pertinent facts and circumstances in connection with the employment of the [law firm]" and "a copy of the instrument whereby the [law firm is empowered to act])." However, based upon its collective pleadings and court appearances, and the absence of any argument on behalf of an individual, JPMC believes that counsel for the Washington Mutual Noteholders Group is compensated for its actions on behalf of the group and takes instructions from the group.

Papers stating that it served as counsel for the group. In each of those notices, the Washington Mutual Noteholders Group identified itself as representing a collective of creditors — "the Washington Mutual, Inc. Noteholders Group [], the participants of which are 23 entities . . . collectively [] the beneficial owner of, or the holder or manager of, various accounts with investment authority, contractual authority or voting authority for more than $1.1 billion face amount of notes issued by Washington Mutual, Inc." *See* Notice of Appearance and Request for Service of Papers dated October 20, 2008 [Docket No. 101] (Exhibit A to 2019 Motion) (the "First NoA") and Notice of Appearance and Request for Service of Papers dated November 6, 2008 [Docket No. 247] (Exhibit C to 2019 Motion) (the "Second NoA") (emphasis added).

10. In each of its subsequent pleadings and its appearances before this Court, the Washington Mutual Noteholders Group continued to seek to leverage its position as representing the collective of creditors. According to statements made by its counsel before this Court:

- "[A]s creditors here, *the group we're representing is today over $1.1 billion.*" (October 20, 2008 Hearing Trans. 37:17-19) (emphasis added) (Exhibit B);
- "We just wanted to note, with respect to the relief sought in this motion, that *the noteholders' group* has been engaged with Weil Gotshal in the very open discussions with respect to the material issues in this case, and respect to the motion, and I expect to continue that dialog. I just wanted to note that *they do support the relief sought in the motion but do expect to continue to play a very active and constructive role* in reviewing any additional funding that's required or requested by Weil Gotshal with respect to the trusts" (November 25, 2008 Hearing Trans. 67:10-19) (emphasis added) (Exhibit C);
- "I represent *Washington Mutual note holder's group*, which collectively holds at least 3.3 billion dollars of value of outstanding debt securities of the debtor Washington Mutual.... as *the holder of 3.3 billion dollars in the face amount of WMI debt, we are obviously the principal stakeholder in this* — these Chapter 11 cases. *We have a real interest in the outcome of this estate and ensuring a maximum value for creditors.*" (June 24, 2009 Hearing Trans. 78:8-24) (emphasis added) (Exhibit D);
- "[T]he prejudice to *creditors* from the delay that's likely to come if we are all sent to D.C. is significant" (*Id.* at 79:11-12) (emphasis added) (Exhibit D).

11. The Washington Mutual Noteholders Group has been actively involved in the bankruptcy proceedings on behalf of its members. The Washington Mutual Noteholders Group has filed responsive pleadings to all or nearly all briefing in this bankruptcy to date.

- On December 29, 2008, the Washington Mutual Noteholders Group filed a collective joinder to the Debtors' Objection to the Motion Pursuant to 11 U.S.C. § 554(b) for an Order to the Debtor in Possession to Abandon Certain Multidistrict Prepetition Derivative Claims Pending in the U.S. District Court for the Western District of Washington [Docket No. 506].

- On January 22, 2009, the Washington Mutual Noteholders Group filed a collective joinder to Debtor's Objection to Proof of Claim Number 8 Filed by the Internal Revenue Service [Docket No. 590].

- On June 15, 2009, the Washington Mutual Noteholders Group filed a collective opposition to (a) the Motion of Intervenor-Defendant Federal Deposit Insurance Corporation, as Receiver for Washington Mutual Bank, to Stay or Dismiss the Adversary Complaint, and (b) the Motion of Defendant JPMorgan Chase Bank, National Association for Stay of Debtor's Adversary Proceeding [Docket No, 1132; Adv. Docket No. 38].

- On July 15, 2009, the Washington Mutual Noteholders Group filed a collective objection to Debtor's Motion Pursuant to § 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019(a) for Approval of Settlement with JPMorgan Chase Bank, N.A. [Docket No. 1324].

12. In addition to speaking in a single voice and advancing a unified position through briefing, the Washington Mutual Noteholders Group has appeared at each hearing and argued on behalf of the group at these hearings.

- On October 20, 2008, the Washington Mutual Noteholders Group argued before this Court in opposition to the Washington Mutual Bank Noteholders' standing in the Chapter 11 case. (October 20, 2008 Hearing Trans. 24:10-25:20) (Exhibit B).

- On November 25, 2008, the Washington Mutual Noteholders Group argued before this Court in support of Debtor's motion to provide financial support to WM Mortgage Reinsurance Company, Inc. (November 25, 2009 Hearing Trans. 67:7-21) (Exhibit C).

- On January 29, 2009, the Washington Mutual Noteholders Group argued before this Court in opposition to extending the bar date for filing proofs of claims. (January 29, 2009 Hearing Trans. 57:11-61:22) (Exhibit E).

- On June 24, 2009, the Washington Mutual Noteholders Group argued before this Court in opposition to the FDIC's motion to stay the adversary proceeding. (June 24, 2009 Hearing Trans. 78:6-80:5) (Exhibit D).

13. In none of the filings or at none of the hearings did the Washington Mutual Noteholders Group represent anyone's interest but that of a collective group of creditors. In fact, never has the Washington Mutual Noteholders Group or its counsel voiced a single concern of one of its members to this Court or to JPMC.[3] The disclosure required by the members of such a group is clearly the province of Bankruptcy Rule 2019 and its requirements for full disclosure are unequivocal and salutary.

14. Through each of these actions and statements, the Washington Mutual Noteholders Group has affirmatively participated in this proceeding as a unified group (even referring to the group in the singular as the "*holder* of $3.3 billion dollars in the face amount of WMI debt" and "*the principal stakeholder*"), acting in concert and for the benefit of the creditors generally.

15. Given this, the Washington Mutual Noteholders Group cannot evade Rule 2019 by declaring that no member of the group represents any party other than itself in contravention of its actions to date. The group of equity security holders in *Northwest I* made this very same argument in their objection to the application of Rule 2019 and the court summarily rejected it, stating, "the Rule cannot be so blithely avoided."[4] *Northwest I*, 363 B.R. at 703. According to

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3 It is in the transfer of individual claims that Congress preserved the liquidity of the public markets that the Washington Mutual Noteholders Group professes to defend. *See, e.g.,* Bankruptcy Rule 3001(e)(2) (requiring disclosure of the transfer of any claim other than "one based on a publicly traded note, bond or debenture"). No similar exception exists when the claims transferred are those held by creditors engaging in collective action.

4 Nor does the argument that the members of the group should be permitted to evade Rule 2019 because they do not owe fiduciary duties to one another have any merit or basis in law. As held by the *Northwest II* Court held that, "Assuming, *arguendo*, for purposes of this motion that the Committee does not act as a fiduciary, Rule 2019 is based on the premise that the other shareholders have a right to

the *Northwest I* Court, "[t]he Rule is long-standing, and there is no basis for failure to apply it as written."

16. Rather than address these issues substantively, the Washington Mutual Noteholders Group relies solely on an unpublished opinion from the Southern District of Texas Bankruptcy Court, *In re Scotia Development, LLC*, that contains no reasoning or analysis. With due respect to that Court, it is clear why Rule 2019 is needed. "Rule 2019 is based on the premise that the other shareholders have a right to information as to Committee member purchases and sales so that they make an informed decision whether this Committee will represent their interests or whether they should consider forming a more broadly-based committee of their own. *It also gives all parties a better ability to gauge the credibility of an important group that has chosen to appear in bankruptcy and play a major role.*" *Northwest II*, 363 B.R. 704, 709 (Bankr. S.D.N.Y. 2007) (emphasis added). Here, where the Washington Mutual Noteholders Group actively purport to speak for a single group and implicitly asks this Court and the other parties to give their positions a degree of credibility asserted to be appropriate to a large economic constituent, the mandated Rule 2019 disclosures are imperative so that the parties and the Court can assess the arguments which they are advocating. This has

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information as to Committee member purchases and sales so that they make an informed decision whether this Committee will represent their interests or whether they should consider forming a more broadly-based committee of their own. *It also gives all parties a better ability to gauge the credibility of an important group that has chosen to appear in bankruptcy and play a major role.*" *Northwest II*, 363 B.R. 704, 709 (Bankr. S.D.N.Y. 2007) (emphasis added).

And, without citing specifically to Rules 3001(e)(2), the *Northwest II* Court made the distinction between the differing harm addressed by the two rules: "I'm not saying that these individual funds can't take action in their own interests; I'm just saying that Rule 2019 says that, if they're a group that wants to affect this case — and they certainly do — that they've got to file certain basic information that I didn't make up. I didn't create that requirement. It's on the books, it should be filed. Transcript of Record at 45, *In re Northwest Airlines*, No. 05-17930 (Bankr. S.D.N.Y. March 15, 2007) (Exhibit F).

been the practice of bankruptcy courts. *See, e.g.*, Transcript of Record at 25-28, *In re Chrysler LLC*, No. 09-50002 (Bankr. S.D.N.Y. May 4, 2009) (Exhibit G).

B. THE LEGISLATIVE HISTORY OF RULE 2019 CONTEMPLATED ITS APPLICATION TO AN *AD HOC* COMMITTEE SUCH AS THE WASHINGTON MUTUAL NOTEHOLDERS GROUP.

17. Given the plain meaning of Rule 2019 and its clear application to the Washington Mutual Noteholders Group, "[r]eference to legislative history and to pre-code practice is hardly necessary." *Ron Pair Enterprises*, 489 U.S. at 241 (holding that where a statute or rule is clear on its face, it is the court's duty to apply the statute as written). Yet, when considering legislative history, compelling the Washington Mutual Noteholders Group to comply with Rule 2019 disclosures fits squarely within the concerns that Rule 2019 was designed to address.

18. Rule 2019 is derived from Rule 10-211 of chapter X of the old Bankruptcy Act, which was adopted largely as a result of a Securities and Exchange Commission ("SEC") report on the "Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees" (1937) (the "SEC Report"), and "is part of the disclosure scheme of the Bankruptcy Code and is designed to foster the goal of reorganization and plans which deal fairly with creditors and which are arrived at openly." Alan N. Resnick and Henry J. Sommer, 9 *Collier on Bankruptcy*, ¶2019.01 at 2019-3 (15th ed. rev. 2008).

19. The SEC Report examined perceived abuses by unofficial committees in corporate reorganizations, and focused on the practice of formation of "protective committees." These unofficial committees were formed ostensibly to protect the interests of security holders, but in practice were often dominated by insiders, financial advisors or other parties with potential or actual conflicts. Contrary to the Washington Mutual Noteholders Group's contention, the SEC Report was not only concerned with the abuses of insiders. According to the SEC Report, dominant members of the protective committees often acquired their claims or interests at

"default prices" and sought either to "capitalize on their nuisance value or endeavor to effectuate settlements or plans favorable to those who bought at depressed prices but disadvantageous to those who purchased at predefault prices." SEC Report at 897 (Exhibit H). The report noted that other security holders may be misled by such groups' participation in a reorganization by the mistaken belief "that in the hands of these self-styled independents their cause will be honestly and rigorously served." *Id.* at 880 (Exhibit H).

20. The SEC report recommended that persons who represent more than twelve creditors or equity security holders be required to file with the court a sworn statement setting forth the amount of securities or claims he owned, the date he acquired them, the amount he paid, and any sale or disposition he made — the information now required by Rule 2019 — in order to "provide a routine method of advising the court and all interested parties in interest of the actual economic interest of all persons participating in the proceedings." *Id.* at 702.

21. There were no other requirements to the SEC's recommended trigger for disclosures other than the number of creditors represented. The Washington Mutual Noteholders Group is misinformed when stating that they "bear none of the characteristics of the protective committees whose abuses Rule 2019 was meant to address." (Objection at 8.) Why else would the Washington Mutual Noteholders Group have been subject to trading restrictions albeit briefly? The concerns addressed by the rules governing disclosure of claims acquired by those who engage in collective action in a bankruptcy case are not limited to "the ad hoc committee of equity securities holders [that] had divided loyalties as a consequence of having material holdings in other parts of the [debtor] capital structure." (Objection at 12). Implicit potential or actual conflicts may exist based upon when a stakeholder purchased a claim (*In re Allegheny International, Inc.*, 118 B.R. 282, 289-90 (Bankr. W.D. Pa. 1990) (finding that hedge fund had

purchased claims in the debtor near the end of the case with the purpose of establishing a blocking position within a class)) or because it was purchased at a discount. SEC Report at 897 (Exhibit H) or even because the creditor, by purporting to exert collective leverage, in fact traded claims based upon the information acquired during confidential communications or discussions. John J. Rapisardi, *Information Disclosure by Distressed Claims Purchasers*, N.Y.L.J, Mar. 15, 2007, at 3 ("Because of the limited oversight over ad hoc committees, bankruptcy courts have used Rule 2019 to verify an ad hoc committee actually represent the claims and interests which such committee purports to represent.") (Exhibit I).

C. APPLYING RULE 2019 TO AD HOC COMMITTEES SUCH AS THE WASHINGTON MUTUAL NOTEHOLDERS GROUP SERVES IMPORTANT PUBLIC POLICY INTERESTS.

22. Transparency is one of the hallmarks of the bankruptcy process generally. *In re CF Holding Corp.*, 145 B.R. 124, 126 (Bankr. D. Conn. 1992) ("further the Bankruptcy Code's goal of complete disclosure during the business reorganization process."); *In re Food Mgmt. Group LLC*, 2007 WL 458022, at *6 (Bankr. S.D.N.Y. Feb. 13, 2007) (the public policy interest in favor of public disclosure "is at its zenith where issues concerning the integrity and transparency of bankruptcy proceedings are involved"); *Ferm v. United States Trustee (In re Crawford),* 194 F.3d 1, 7 (9th Cir. 1999) (access to bankruptcy case information "fosters confidence among creditors regarding fairness of the bankruptcy system."); *Express News v. Blackwell*, 263 B.R. 505, 508-09 (W.D. Tex. 2000) (the framework regarding protecting information that should be disclosed in a bankruptcy case "begins with the presumption that the parties will not proceed in public litigation anonymously."). This premium on transparency is illustrated by a number of provisions of the Bankruptcy Code, including Rule 2019. *Northwest II*, 363 B.R. at 707 ("Rule 2019 is a disclosure rule.").

23. As the Business Bankruptcy Committee Special Task Force on Bankruptcy Rule 2019 published, "several modifications should be considered *to clarify* the language contained in Bankruptcy Rule 2019 and to help achieve the main purpose of Bankruptcy Rule 2019, namely transparency: 1. Bankruptcy Rule 2019 should be amended to apply uniformly to *ad hoc* committee, official committees, and all other groups of claims or equity holders who bank together through shared professionals to advance common positions and strategies." *Report of the Business Bankruptcy Committee Special Task Force On Bankruptcy Rule 2019*, ABA Section of Business Law, December 12, 2008 (Exhibit J).

24. As intended by its adoption, Rule 2019 serves the important public policy interest of enabling the debtor and other parties involved in a bankruptcy case to understand with whom they are negotiating and who will be voting on the reorganization plan.

> Rule 2019 levels the playing field because it assures that parties will not mistakenly rely on ad hoc committees appearing to represent their interests and all stakeholders know with whom they are negotiating or litigating. This helps resolve cases because it prevents the gamesmanship attendant to any process in which certain stakeholders are not aware of the type and scope of the actual economic interest of negotiating counterparties. In other words, limiting the scope of disclosures would in effect cause aspects of the chapter 11 process to resemble a poker game where other players have to guess which cards the ad hoc committee members actually hold. That will not further the goal of a successful reorganization; instead, it will lead to increased guesswork and in turn delay as parties try to figure out with whom they are negotiating.

Pachulski Stang Ziehl & Jones LLP, *Show and Tell: Ad Hoc Committees' Rule 2019 Disclosures Under Examination*, American Bankruptcy Institute Journal 58, 82, March 2009 (Exhibit K).

25. Moreover, as the Washington Mutual Noteholders Group identifies, the Bankruptcy rules "shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." (Objection at 22 (quoting Fed. R. Bankr. P. 1001).) By requiring

disclosures from the outset, Rule 2019 accomplished this very objective by preventing drawn-out discovery and unnecessary delay.

26. JPMC is not seeking to deny any party full participation in this case. Just the opposite, insisting upon the disclosures required by Rule 2019 fosters participation because it assures that parties will not mistakenly rely on *ad hoc* committees appearing to represent their interests when in fact those interests might go unrepresented or marginalized.

D. RULE 2019 IS NOT DISCRETIONARY IN ITS APPLICATION, AND EVEN IF IT WERE, DOES NOT ADVISE AGAINST REQUIRING DISCLOSURES BY THE WASHINGTON MUTUAL NOTEHOLDERS GROUP.

27. Rule 2019 does not provide the Court with discretion to excuse the Washington Mutual Noteholders Group's compliance with its disclosures requirements. Similarly to the statutes the Washington Mutual Noteholders Group cites in an unsuccessful attempt to distinguish Rule 2019 (Objection at 16), 2019(a) reads as a mandate as well with the keyword "shall" that the Washington Mutual Noteholders Group places utmost important (*id.*). Bank. R. Fed. P. 2019(a) ("[E]very entity or committee representing more than one creditor or equity security holder . . . *shall* file a verified statement setting forth [(1) through (4)]".)

28. Rule 2019(b) merely states that, upon a motion of a party in interest or on its own initiative, a court may determine (1) "whether there has been a failure to comply with the provisions of subdivision (a)" and (2) whether to "refuse to permit that entity, committee or indenture trustee to be heard further or to intervene in the case." This provision simply provides the bankruptcy court with the authority to determine upon motion or *sue sponte* if there is a violation of Rule 2019(a) and fashion an appropriate remedy or sanction. *See In re Mandalay Shores Cooperative Housing Associating, Inc.*, 63 B.R. 842, 853 (N.D. Ill. 1986) (identifying the "allowable discretion" under 2019(b) as the ability to determine that the appearance of a single creditor did not invoke the requirements of 2019(a).) Rule 2019(b) does not suggest, as the

Washington Mutual Noteholders Group would have it, that where Rule 2019(a) clearly applies, as in this instant case, the Court may simply decline to determine its application.

29. Moreover, even if the Court were able simply to decline to determine Rule 2019(a)'s application to the Washington Mutual Noteholders Group, failing to impose a remedy would ignore the Washington Mutual Noteholders Group's obligations in this case. The Washington Mutual Noteholders Group relies upon two faulty arguments for why the Court should "not apply" Rule 2019 — the result would "not advance its purpose" (Objection at 16) and "the balance of equities . . . favors nondisclosure." (Objection at 19.) As already well-established *supra*, both of these arguments necessarily fail. The Rule 2019 disclosures fits squarely within the concerns that Rule 2019 was designed to address and is necessary to unmask those conflicts endemic in *ad hoc* committees such as the Washington Mutual Noteholders Group.

30. Nor are the cases upon which the Washington Mutual Noteholders Group relies to support its argument as to this Court's exercise of discretion persuasive in the present context. Those courts did not decline to determine Rule 2019's application, as the Washington Mutual Noteholders Group suggests of this Court. Instead, those courts had specific rulings regarding the specific facts before it hardly duplicated here; those courts held that Rule 2019 does not require law firms that represent thousands of personal injury claimants to file every document by which they became official representatives of the individual claimants (*In re Kaiser Aluminum Corp.*, 327 B.R. 554, 559 (D. Del. 2005); *Wilson v. Valley Electric Membership Corp.*, 141 B.R. 309, 315 (E.D. La. 1992)), that outside parties such as the press cannot challenge the nondisclosure of creditor names that faced the threat of personal injury (*In re I.G. Services Ltd.*, 244 B.R. 377, 389 (W.D. Tex. 2000)), and that disclosure statements may be excluded from

electronic filings but available upon request and Court authorization. (*In re Owens Corning, et al.,* Case No. 00-3837-3854 (JFK) (Bankr. D. Del. Oct. 22, 2004).

E. NOTHING IN BANKRUPTCY CODE SECTION 107(B) ALTERS THE WASHINGTON MUTUAL NOTEHOLDERS GROUP DISCLOSURE OBLIGATIONS UNDER RULE 2019.

31. The Washington Mutual Noteholders Group's argument that it should not be compelled to comply with Rule 2019(a)(4) because such disclosures would violate section 107(b) of the Bankruptcy Code fail on three independent grounds. The argument has been made and rejected by other courts. *See, e.g.,* Transcript of Record at 23-46, *In re Chrysler LLC*, No. 09-50002 (Bankr. S.D.N.Y. May 5, 2009) (Exhibit L).

32. *First*, Bankruptcy Code section 107(b) creates an exception to the requirement that filings are "public records" and "open to examination by an entity at reasonable times without charge" — *i.e.*, it delineates the narrow circumstances in which pleadings should be filed under seal. 11 U.S.C. § 107(a); *see also Northwest II*, 363 B.R. at 706 ("§ 107(b) creates an exception to the general principal that '[i]n most cases, a judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need.' . . . as provided in section 107(a) of the Bankruptcy Code, it is a basic tenet of our jurisprudence that court records are public.") (quoting *In re Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994)). Even if the Washington Mutual Noteholders Group were able to satisfy the requirements of Bankruptcy Code section 107(b), which it is not, it would still have to make the required Rule 2019 disclosures as they are statutorily mandated.

33. *Second*, the Washington Mutual Noteholders Group has not met its evidentiary burden of establishing that the required disclosures violate section 107(b) of the Bankruptcy Code. *In re Orion Pictures Corp.*, 21 F.3d at 27 (holding that Bankruptcy Code section 107(b) protection is available if an interested party can show that the information sought to seal was

confidential and commercial in nature). Curiously, the Washington Mutual Noteholders Group states in its objection that, "there has been no showing of harm from non-disclosure." (Objection at 24.) Rather than "non-disclosure," JPMC is seeking disclosure, and should the Washington Mutual Noteholders Group seek to seal this information, which it cannot, it has the burden of establishing that the "information [] would cause 'an unfair advantage to competitors by providing them information as to the commercial operations of the debtor.'" *Id.* at 27, quoting *Ad Hoc Protective Comm. For 10 ½ % Debenture Holders* v. *Intel Corp.*, 17 B.R. 942, 944 (9th Cir. BAP 1982). To be sure, the Washington Mutual Noteholders Group does not provide even a single declaration in support of its indefensible representations that the information sought falls within the confines of Bankruptcy Code section 107(b). *See, e.g., Northwest II*, 363 B.R. at 707 ("This improbable contention was unsupported by the affidavits. . . . There is thus no basis for the contention that § 107(b), as construed in *Orion*, mandates that the information required by Rule 2019 be sealed on request.")

34. *Finally,* the information that the Washington Mutual Noteholders Group contends is entitled to Bankruptcy Code section 107(b) protections does not fall within the scope of Bankruptcy Code section 107(b). *See, e.g., Northwest II*, 363 B.R. at 707-09. Rule 2019 requires the disclosure of factual, historical trading data, including the prices and dates on which the claims were purchased and subsequently traded. The Rule does not require the disclosure of any policies, models, investment strategies or practices. In fact, the information requested is usually available publicly for companies that are subject to SEC regulations. *See, e.g.,* Section 13(d) of the Securities and Exchange Act of 1934.

CONCLUSION

WHEREFORE, JPMC respectfully requests that the court enter an order, substantially in the form attached to the Rule 2019 Motion, compelling Washington Mutual Noteholders Group to: (i) comply with Bankruptcy Rule 2019 and otherwise bar its participation in these cases until its disclosure deficiencies are fully remedied; and (ii) grant such other and further relief as is just and proper.

Dated: August 21, 2009
Wilmington, Delaware

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Counsel for JPMorgan Chase Bank, National Association

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

	:	**Chapter 11**
In re:	:	
	:	**Case No. 08-12229 (MFW)**
WASHINGTON MUTUAL, INC., et al.,	:	**(Jointly Administered)**
	:	
Debtors.	:	**RE: Docket No. 1183**
	:	**Hearing Date: July 27, 2009 at 2:00 p.m. ET**

OBJECTION BY THE WASHINGTON MUTUAL, INC. NOTEHOLDERS GROUP TO DEBTORS' MOTION PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 9019(a) FOR APPROVAL OF SETTLEMENT WITH JPMORGAN CHASE BANK, N.A.

TO THE HONORABLE MARY F. WALRATH,
UNITED STATES BANKRUPTCY JUDGE

The Washington Mutual, Inc. Noteholders Group (the "Noteholders") hereby objects (the "Noteholders' Objection") to the motion (the "9019 Motion") [Docket[1] No. 1183] by Washington Mutual, Inc. ("WMI") and WMI Investment Corporation ("WMI Investment," together with WMI, the "Debtors") pursuant to section 105(a) of title 11 of the United States Code (the "Bankruptcy Code") and rule 9019(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for approval of a compromise and settlement with JPMorgan Chase Bank N.A. ("JPM") regarding the treatment of the WaMu Savings Plan (the "Savings Plan") pursuant to the terms of the Agreement

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[1] *Unless otherwise noted, all docket numbers herein refer to the docket in the Chapter 11 Cases (as* defined below) before this Court.

Regarding WaMu Savings Plan (the "Settlement Agreement"), dated June 16, 2009, and respectfully represents as follows:

I. PRELIMINARY STATEMENT

1. Through the settlement proposed in the 9019 Motion, the Debtors have reversed their previous position that if JPM wanted to assume the Savings Plan, it must also assume the pending litigation associated therewith. The Noteholders object to, and ask this Court to deny, the proposed Settlement Agreement because the Debtors have failed to offer an explanation for why they have decided to retain the Pending Litigation, have not provided evidence of the potential exposure related to that litigation, and have apparently entered into a one-sided agreement that benefits JPM at the expense of the estates. The Noteholders submit that the Debtors should be required to provide this basic information as a matter of law and also because the Debtors' counsel has admitted to a conflict in matters concerning JPM. Thus, based on the information and representations in the 9019 Motion, the Court does not have a sufficient factual basis before it to approve the Settlement Agreement.

II. PROCEDURAL HISTORY

2. On September 25, 2008, the Director of the Office of Thrift Supervision ("OTS"), by order number 2008-36, appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver for Washington Mutual Bank ("WMB"), which also owned Washington Mutual Bank fsb ("WMBfsb"), and the FDIC sold substantially all assets of WMB to JPM pursuant to the Purchase and Assumption Agreement: Whole Bank (the "Purchase Agreement") dated September 25, 2008.

3. On September 26, 2008 (the "Petition Date"), each of the Debtors commenced with this Court a voluntary case (together, the "Chapter 11 Cases") pursuant to chapter 11 of the Bankruptcy Code. As of the date hereof, the Debtors continue to operate their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. On October 3, 2008, this Court entered an Order [Docket No. 25] pursuant to Bankruptcy Rule 1015(b) authorizing joint administration of the Chapter 11 Cases.

5. On October 15, 2008, the United States Trustee for the District of Delaware (the "US Trustee") appointed an official committee of unsecured creditors (the "Committee").

6. The Noteholders filed both a Notice of Appearance and Request for Papers [Docket No. 101] and a Verified Statement of White & Case LLP Pursuant to Bankruptcy Rule 2019 [Docket No. 102] with this Court on October 20, 2008.

7. On March 20, 2009, the Debtors commenced a civil action against the FDIC in the U.S. District Court for the District of Columbia, Washington Mutual, Inc. v. Fed. Deposit Ins. Corp., Case No. 09-00533 (RMC) (the "DC Action") by the filing of a complaint that identified the Savings Plan as an asset of the Debtors' estates. (Compl. ¶¶ 52-55.) JPM intervened as defendant and asserted counterclaims on March 30, 2009 [D.C. Docket No. 4], which included seeking a declaratory judgment that the Savings Plan should be turned over to JPM. (Counterclaim ¶ 5, pp. 19-20.)

8. On March 24, 2009, JPM instituted an adversary proceeding

JPMorgan Chase Bank, N.A. v. Washington Mutual, Inc., Adv. Case No. 09-50551 (Bankr. D. Del.) by filing a complaint (the "JPM Complaint") [Docket No. 807] seeking, inter alia, a determination that JPM be permitted to immediately assume sponsorship of the Savings Plan without making payments to the Debtors and without acquiring the pending litigation associated with the Savings Plan. (JPM Compl. ¶¶ 144, 146, 224-229; 9019 Motion ¶ 10.) JPM contended that it had purchased the Savings Plan pursuant to the Purchase Agreement (JPM Compl. ¶ 148) and had no obligation to assume any of the liabilities associated with such pending litigation (JPM Compl. ¶ 227.)

9. On April 8, 2009, Debtors filed an application (the "Quinn Application") [Docket No. 888] seeking to retain Quinn Emanuel Urquhart Oliver & Hedges LLP ("Quinn") as special litigation and conflicts counsel. Debtors represented that their general bankruptcy counsel, Weil, Gotshal & Manges LLP ("Weil Gotshal") had previously advised the Court and parties in interest "of the need for the Debtors to utilize conflicts counsel in certain circumstances involving [JPM]" and that Quinn's retention was therefore necessary. (Quinn App. ¶¶ 16-17.)

10. Through Quinn, Debtors answered (the "Answer") [Adv. Case Docket No. 23] the JPM Complaint on May 29, 2009. In the Answer, Debtors denied that JPM had purchased the Debtors' interest in the Savings Plan, and the Debtors counterclaimed seeking a declaratory judgment that the Savings Plan was property of the Debtors' estates. (Ans. ¶¶ 168-71.) Debtors also argued that if JPM did purchase the Savings Plan in the Purchase Agreement, it must be held responsible for the claims and litigation related thereto. (9019 Motion ¶11.)

III. BACKGROUND[2]

11. Prior to the Petition Date, WMI sponsored the Savings Plan for the employees of WMI and WMB (and its subsidiaries). The Savings Plan was maintained as a tax qualified plan under section 401(a) of the Internal Revenue Code.

12. While the Debtors have not disclosed the full extent of litigation that may be pending related to the Savings Plan, substantial and significant claims against the Debtors' estates are alleged in just the class action case of Washington Mutual, Inc. ERISA Litigation, Lead Case No. C07-1874 (MJP) (W.D. Wash.) (together with any other litigation related to the Savings Plan, the "Pending Litigation") regarding breaches of fiduciary duties by WMI and the individually named defendants (i.e., former WMI directors) in managing the Savings Plan. In the single instance cited above, the plaintiffs claim that through mismanagement the defendants lost over $250 million of their retirement savings and seek compensation in excess of that amount. (ERISA Litig. Compl. ¶¶ 7, 181, 191, 215, 220.)

13. Contrary to the previously consistent position of the Debtors with regard to the Savings Plan, the 9019 Motion now seeks approval of a settlement whereby JPM assumes the Savings Plan but not the liabilities associated with the pending litigation related to that plan. (9019 Motion ¶ 12.)

14. Despite Quinn's handling of the litigation involving JPM, Weil

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[2] Certain of the facts in this section are recounted herein from the Debtors' 9019 Motion and are not an admission of the truth, accuracy, or completeness of such facts and the Noteholders reserve all of their rights with respect thereto should such representations of the facts prove untrue, inaccurate, or incomplete.

appears as counsel of record on the 9019 Motion.

15. In aggregate, the Noteholders own over $3.3 billion dollars of the Debtors' securities, making the Noteholders the major stakeholders in these Chapter 11 Cases. The Debtors, however, failed to apprise the Noteholders of their negotiations with JPM or the proposed "compromise" contained in the 9019 Motion—specifically the Debtors' reversal in position with regard to the liabilities associated with the pending litigation related to the Savings Plan.

III. JURISDICTION AND VENUE

16. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§1408 and 1409.

IV. RELIEF REQUESTED

17. For the reasons set forth herein, the Noteholders request that this Court deny Debtors' 9019 Motion because (i) it does not adequately disclose necessary information regarding the issues that the Debtors seek approval to settle, and thus does not provide the court with a proper basis for determining the reasonableness of the proposed compromise; and (ii) the proposed settlement is not in the best interests of the Debtors' estates because proposed Settlement Agreement is too one-sided and does not protect the interests of the estates or its creditors.

V. BASIS FOR RELIEF

18. While the Debtors cite numerous cases in the 9019 Motion for the propositions that the approval of proposed settlements need only be reasonable, fair and

in the best interests of the estate, they neglect to provide the fundamental information necessary for the Court to make such determinations with respect to the Settlement Agreement.

19. The burden of proof is on the Debtors to persuade the Court that the compromise is fair and reasonable. In re Key3media Group, Inc., 366 B.R. 87, 93 (Bankr. D. Del. 2005). A bankruptcy court "may not simply accept the trustee's word that the settlement is reasonable, nor may [it] merely 'rubber-stamp' the trustee's proposal." LaSalle Nat'l Bank v. Holland (In re American Reserve Corp.), 841 F.2d 159, (7th Cir. 1987). The court must exercise its own independent and informed judgment when considering a settlement proposal and,

> There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 419, 424 (1968) (reversing and remanding approval of a settlement as part of plan of reorganization where there were no factual findings by the court or facts in the record sufficient for the court to make an informed, independent decision with regard to the compromise);[3] Myers v. Martin (In re Martin), 91 F.3d 389 (3d Cir. 1996) (stating that "the bankruptcy court must be apprised of all relevant information that will enable it to determine what course of action will be in the best interest of the estate.") (emphasis

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[3] "The standards for approval of a settlement under section 1123 are generally the same as those under Rule 9019. . . ." In re Coram Healthcare Corp., 315 B.R. 321, 335 (Bankr. D. Del. 2004); In re Texaco, Inc., 84 B.R. 893, 901 (Bankr. S.D.N.Y. 1988).

added); Rafool v. Goldfarb Corp. (In re Fleming Packaging Corp.), 2007 Bankr. LEXIS 4234 (Bankr. C.D. Ill. Dec. 20, 2007) ("The court may not simply accept the trustee's representation that the settlement is reasonable. Instead, the court must apprise itself of all facts necessary to evaluate the settlement and make an informed and independent judgment about the settlement.").

20. The relevant information required for an informed, independent determination of whether a proposed settlement is fair and in the best interests of the estate are actual facts and not conclusory statements or allegations proffered by the debtor. TMT Trailer, 390 U.S. at 437 ("To make an informed and independent judgment, however, the court needs facts, not allegations."). The Debtors offer no facts in the 9019 Motion to enable the Court to make such an informed and independent determination; instead they allege that there will be significant "cost savings" to warrant the approval of the Settlement Agreement. (9019 Motion ¶ 18-19.)

21. The Noteholders do not dispute the cost-saving benefits to the estates from not having to litigate the JPM claims related to the Savings Plan—but merely saving the cost of such litigation, without establishing the probability of success or how those costs compare to the liabilities of the associated litigation that the Debtors propose to retain, cannot itself form the basis for compromising the interests of the estates as Debtors propose here. See TMT Trailer, 390 U.S. at 435 ("Litigation and delay are always the alternative to settlement, and whether that alternative is worth pursuing necessarily depends upon a reasoned judgment as to the probable outcome of litigation.").

22. Here, not only have the Debtors failed to present any facts or evidence regarding the exposure facing the estates in the Pending Litigation that the Debtors propose to retain liability for, they have failed to address the ramifications of retaining the liability for the Pending Litigation while surrendering the Savings Plan to JPM.

23. Additionally, that Weil appears as counsel of record on the 9019 Motion raises a serious question as to whether it—and not Quinn, which was retained to handle litigation involving JPM due to Weil's conflicts—was Debtors' primary advisor on the terms of the settlement and whether such advice fundamentally impugns the process by which Debtors agreed to those terms. It is difficult to imagine that a law firm could conclude that either a current-client conflict or a conflict with its business interests bars it from adequately representing its client's interests in litigating an issue, and yet also conclude that it can adequately represent those interests in settling the same issue.

24. "[B]ankruptcy court approval requires a bankruptcy judge to assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." In re Martin, 91 F.3d at 393. How can the Court determine if the costs of further litigating whether JPM purchased the Savings Plan from the FDIC, and the Pending Litigation with it, outweigh the potential liability associated with the Pending Litigation if the Debtors do not offer any evidence as to the potential exposure or probability of success of the Pending Litigation? The Court cannot assess or balance the competing interests in this case because the Debtors have not given the Court enough facts.

25. The glaring lack of facts in the 9019 Motion regarding issues that are central to an informed assessment of the proposed Settlement Agreement prompts a question as to whether the Debtors have performed the kind of analysis required to enter not only this Settlement Agreement, but any settlement regarding the Savings Plan. Rather than a compromise, the Settlement Agreement appears on its surface to be a mere surrender to JPM. That is, JPM wanted to assume the Savings Plan without any of the associated Pending Litigation, and the Debtors seem to have given JPM what it wanted without receiving much more than simply not having to litigate the issue further.

26. Where a proposed settlement agreement is so one-sided that it is no longer a compromise of a dispute but rather just a surrender of the debtor's rights, the court should not approve the proposal. Cf. In re Selected Cases in Which the Chapter 13 Trustee Seeks Relief Against Countrywide Home Loans, Inc., 396 B.R. 138, 144 (Bankr. W.D. Pa. 2008) (finding a proposed settlement too favorable to one side and stating, "[p]erhaps there is a justifiable reason for such a one-sided allocation, but the information which has been submitted to date . . . is not sufficient to make that case."). A debtor owes fiduciary duties to the estate and all creditors. See, e.g., In re Martin, 91 F.3d at 394. The Debtors cannot forfeit rights of the estate in dereliction of their duty to protect those interests—especially here, where retaining the liability for the Pending Litigation could wind up costing the estates hundreds of millions of dollars.

27. The lack of disclosure regarding how the Debtors have arrived at their decision to reverse their previous position and now retain the Pending Litigation leaves the Court with little alternative but to deny the settlement, given that it seems

singularly favorable to JPM, without justifying such radical concessions.

28. Another factor that courts consider in determining the reasonableness of a proposed settlement is the "the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." In re Heritage Org., LLC, 375 B.R. 230, 260 (Bankr. N.D. Tex. 2007) (quoting In re Cajun Elec. Power Coop., Inc., 119 F.3d 349, 356 (5th Cir. 1997)). Here, because the Debtors failed to include other parties in the negotiation process and the arm's length nature of the negotiations received no attention in the 9019 Motion, there can be no assurance that the conflicts inherent in these Chapter 11 Cases—that many of the former officers of Debtors are now officers in JPM—did not unfairly prejudice the proposed settlement given the purported compromise that gives JPM essentially what it wanted and requires JPM to give up very little in return.

VI. CONCLUSION

29. WHEREFORE, based on the foregoing, the Noteholders respectfully request that this Court deny the 9019 Motion as an unreasonable compromise of the disputed liabilities related to the Savings Plan and thus not in the best interests of the Debtors' estates.

Dated: July 15, 2009

Wilmington, Delaware

FOX ROTHSCHILD LLP

By: ______________________

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EXHIBIT B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
WASHINGTON MUTUAL, INC., *et al.*,	.	Case No. 08-12229(MFW) (Jointly Administered)
	.	
	.	October 20, 2008
	.	2:00 p.m.
Debtors.	.	(Wilmington)
	.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 rights which need to be digested. But I don't want to,
2 anyone to believe that we are at odds with JP Morgan Chase.
3 And we're not investigating the sale to JP Morgan Chase.
4 That was our sale. We are investigating - - I mean, that
5 would be funny. But we are not investigating the sale, we're
6 investigating the circumstances that led to the sale. Which
7 is our statutory duty. So I just wanted to make sure the
8 record was clear on those points. Thank you, Your Honor.
9 THE COURT: Odder things have happened, but.
10 MR. LAURIA: Good afternoon, Your Honor. My name is
11 Tom Lauria with White & Case. I represent a group of
12 bondholders of WMI. I don't think there's any dispute that
13 we are creditors of this bankruptcy estate and have standing.
14 Our *pro hac* was submitted at the prior hearing and has been
15 granted. I just wanted to make three quick comments. Number
16 one, I think that it is important to add to the comments of
17 the prior counsel here that interestingly in the FDIC
18 receivership the bondholders of the bank have certain limited
19 rights to assert claims and to then seek review of how those
20 claims are disposed of by the FBI, FDIC. I guess that was a
21 Freudian slip calling it the FBI. It would be ironic, and I
22 think would stand things on its head if these same
23 bondholders were to have broader rights in this Chapter 11
24 case where they are not a creditor than the rights that
25 they've been given by statute FERIA (phonetic) in the

1 receivership proceeding where they are direct creditors.
2 Point two, as a practical matter, there are going to be many
3 voices heard here, and there are going to be many complicated
4 issues. I think that adding a voice to represent the same
5 interest, not a similar interest, will not advance the ball,
6 but in fact will retard the ability to make progress. For
7 example, negotiating an order with the FDIC, and then having
8 somebody else come in and purport to represent the same
9 interest and saying that order is not acceptable. Final
10 point I'd like to make, Your Honor, is that the bondholders
11 of the bank have now argued three times, once in the memo
12 they filed, and twice here on the record, and have still
13 failed to state a direct cognizable interest in this
14 litigation or this Chapter 11 case, other than their borrower
15 may be advantaged or disadvantaged by the outcome here.
16 Which would, if it was a basis for standing would make every
17 creditor of the banks - -
18 THE COURT: Um-hum.
19 MR. LAURIA: - - parties in interest in this
20 Chapter 11 case. So we think standing should be denied.
21 MS. BROWN-EDWARDS: Your Honor, if you would indulge
22 me for one more - -
23 THE COURT: Okay.
24 MS. BROWN-EDWARDS: - - go around. We just want to
25 point out, Your Honor, that it doesn't have to be one or the

1 for the Debtor mentioned, there are ongoing business issues
2 and relationships between the estate and JPM that are not the
3 subject of the stipulation. And I would hate to think that
4 the stipulation is now being delayed for the purpose of
5 somehow tying up resolutions on these other issues. So we're
6 extraordinarily concerned, and we hope that the Court can
7 help us get things moving here in some direction so that the
8 ongoing harm to this estate is minimized.
9 THE COURT: Well I'm not sure what I can do other
10 than have a hearing on Monday.
11 MR. LAURIA: I, I don't know, assuming that the
12 Debtor is unwilling, and it sounds like the Debtor is
13 unprepared to go forward at this time, I don't think there's
14 anything else before the Court. You know, I mean, I think
15 we're all to some extent just having a little bit of fun here
16 with oration. But you know, the point is it's not fun, and
17 the stakes are extraordinarily high. And as creditors here,
18 the group we're representing is today over $1.1 billion.
19 We're just very concerned that - -
20 THE COURT: I understand.
21 MR. LAURIA: - - our recovery is at risk.
22 THE COURT: I understand.
23 MS. BROWN-EDWARDS: Your Honor, I just wanted to ask
24 one clarifying question. Again, on behalf of the bank
25 noteholders. Did you say that you would be looking for the

EXHIBIT C

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

Case No. 08-12229 (MFW)

- -x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

November 25, 2008

10:38 a.m.

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

1 APPLICATION of Debtors Pursuant to Sections 327(e) and 328(a)
2 of the Bankruptcy Code and Rule 2014 of the Federal Rules of
3 Bankruptcy Procedure for Authorization to Employ and Retain
4 Perkins Coie LLP as Special Counsel to the Debtors Nunc Pro
5 Tunc to the Commencement Date
6
7 DEBTORS' Motion Pursuant to Sections 105(a), 327, 328, and 330
8 of the Bankruptcy Code Authorizing the Debtors to Employ
9 Professionals Used in the Ordinary Course of Business
10
11 MOTION Pursuant to 28 U.S.C. Section 959(b) for an Order
12 Compelling the Debtor to Comply With Section 8-401 of the
13 Delaware Uniform Commercial Code by Registering Stock Transfers
14 and Issuing New Certificates Without a Restrictive Legend
15
16 MOTION Pursuant to 28 U.S.C. Section 959(b) for an Order
17 Compelling the Debtor to Comply With Section 8-401 of the
18 Delaware Uniform Commercial Code by Registering Stock Transfers
19 and Issuing New Certificates Without a Restrictive Legend
20
21
22
23
24
25

1 APPLICATION of Debtors and Debtors in Possession Pursuant to
2 Sections 327(e) and 328(a) of the Bankruptcy Code and Rule 2014
3 of the Federal Rules of Bankruptcy Procedure for Authorization
4 to Employ and Retain Miller & Chevalier Chartered as Special
5 Tax Litigation Counsel to the Debtors Nunc Pro Tunc to
6 October 8, 2008
7
8 APPLICATION of Debtors and Debtors in Possession Pursuant to
9 Sections 327(e) and 238(a) of the Bankruptcy Code and Rule 2014
10 of the Federal Rules of Bankruptcy Procedure for Authorization
11 to Employ and Retain Shearman & Sterling LLP as Special Tax
12 Litigation Counsel to the Debtors Nunc Pro Tunc to
13 October 8, 2008
14
15 APPLICATION for an Order Pursuant to 11 U.S.C. Sections 328(a)
16 and 1103 Authorizing and Approving the Employment and Retention
17 of Pepper Hamilton LLP as Delaware Counsel to the Official
18 Committee of Unsecured Creditors
19
20 APPLICATION of the Official Committee of Unsecured Creditors of
21 Washington Mutual, Inc., et al., to Retain and Employ Akin Gump
22 Strauss Hauer & Feld LLP as Co-Counsel, Nunc Pro Tunc to
23 October 15, 2008
24
25

1 AMENDED Motion of Debtors to Authorize Washington Mutual, Inc.
2 to Provide Financial Support to WM Mortgage Reinsurance
3 Company, Inc.
4
5 MOTION of Debtors Pursuant to Sections 105(a), 361, 362 and
6 542(b) of the Bankruptcy Code Seeking Approval of a Stipulation
7 and Agreement Concerning Deposit Accounts at JPMorgan Chase
8 Bank, National Association
9
10 MOTION of Debtors for an Order Pursuant to Section 365(a) of
11 the Bankruptcy Code and Bankruptcy Rule 6006, Approving
12 Rejection of Transfer Agent Agreement
13
14 MOTION of Debtors Pursuant to Bankruptcy Rules 1007(c) and
15 2002(c) and Local Rule 1007-1(b) for an (I) Extension of Time
16 to File Schedules of Assets and Liabilities, Schedules of
17 Current Income and Expenditures, Schedules of Executory
18 Contracts and Unexpired Leases, and Statements of Financial
19 Affairs and (II) a Waiver of the Requirements to File the
20 Equity Security Holders
21
22
23
24 Transcribed by: Barb Enneking
25

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1 THE COURT: All right.

2 MR. BERZ: Is that right? All right. And thank you

3 for your consideration, Your Honor.

4 THE COURT: All right.

5 MR. STARNER: Your Honor, if I may?

6 THE COURT: Yes.

7 MR. STARNER: It's Greg Starner of White & Case on

8 behalf of the WMI noteholders' group.

9 THE COURT: Yes.

10 MR. STARNER: We just wanted to note, with respect to

11 the relief sought in this motion, that the noteholders' group

12 has been engaged with Weil Gotshal in the very open discussions

13 with respect to the material issues in this case, and respect

14 to the motion, and I expect to continue in that dialogue.

15 I just wanted to note that they do support the relief

16 sought in the motion but do expect to continue to play a very

17 active and constructive role in reviewing any additional

18 funding that's required or requested by Weil Gotshal with

19 respect to the trusts. But with respect to the modifications

20 requested by the trustee, the creditors' committee and now the

21 Court, we do support the relief sought in the motion.

22 THE COURT: All right. Thank you.

23 MR. BERZ: Thank you, Your Honor, and thank you for

24 your patience.

25 THE COURT: All right.

EXHIBIT D

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF DELAWARE

IN RE: WASHINGTON MUTUAL, INC., et al., Debtors,	Bankruptcy Action Case No. 08-12229(MFW) Chapter 11
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, Plaintiff, v. WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP., Defendant for all claims and FEDERAL DEPOSIT INSURANCE CORPORATION, Additional Defendant for Interpleader claim	Adv. Pro. No. 09-50551(MFW)
WASHINGTON MUTUAL, INC., AND WMI INVESTMENT CORP., Plaintiffs, v. JPMORGAN CASH BANK, NATIONAL ASSOCIATION, Defendant.	Adv. Proc. No. 09-50934 Wilmington, DE June 24, 2009 10:38 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

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1 the stay.

2 If Your Honor has any questions, I'd be happy to

3 answer them.

4 THE COURT: No. Thank you.

5 MR. STRATTON: Thank you,

6 MR. O'CONNOR: Your Honor, my name if Paul O'Connor.

7 And a pro hac vice application has been filed in the Court

8 earlier this week. We represent -- I represent Washington

9 Mutual note holder's group, which collectively holds at least

10 3.3 billion dollars of value of outstanding debt securities of

11 the debtor Washington Mutual.

12 We've submitted a statement pursuant to Section 1109

13 of the Bankruptcy Code in opposition to the motions filed by

14 JPMorgan and FDIC that have been argued here today.

15 And I don't want to belabor any of the points that

16 have been made. We obviously associate ourselves and join with

17 the remarks that have been made by the debtor and for counsel

18 for the Committee.

19 However, there are a couple of points I would like to

20 make. And that is, first, as the holder of 3.3 billion dollars

21 in the face mount of WMI debt, we are obviously the principal

22 stakeholder in this -- these Chapter 11 cases.

23 We have a real interest in the outcome of this estate

24 and ensuring a maximum value for creditors. Second, the real

25 issue that we're all arguing about here today, is what to do

1 with this 4.4 billion dollars in deposits at JPMorgan. And as
2 others have said, and I'll reiterate here today, those are core
3 assets of the estate. Those are the assets of the estate.
4 There's really -- there's other stuff to argue about,
5 but without those assets being decided and ruled upon by Your
6 Honor in the context of this proceedings, moving forward on
7 plans and plan reorganizations is almost impossible.
8 If this matter is not dealt with in this Court,
9 resolving these Chapter 11 cases, in our view, will
10 fundamentally be impossible. And I do want to also point out
11 that the prejudice to creditors from the delay that's likely to
12 come if we are sent to D.C. is significant.
13 And since we're all here and the assets can be dealt
14 with here, we think they should be dealt with here.
15 Finally, you know, I think it's also important to
16 point out that there are two adversary proceedings that we're
17 dealing with here today. One of which is an adversary
18 proceedings that JPM brought.
19 They chose this forum. They picked it. They filed
20 the papers here, and then the debtor responded with some
21 counterclaims. And now we're hearing arguments that having
22 picked this forum, the debtor having then filed counterclaims
23 in that, that somehow or another, because they were forced by
24 statute to file a more limited pleading in D.C., they should be
25 prohibited from going forward in the proceeding that JPM filed

EXHIBIT E

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
WASHINGTON MUTUAL, INC., *et al.*,	.	Case No. 08-12229(MFW) (Jointly Administered)
	.	
Debtors.	.	Jan. 29, 2009 (2:07 p.m.) (Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

1 MR. CLARKE: Your Honor, very briefly. John Clarke
2 from DLA Piper. We represent the FDIC.
3 THE COURT: Uh-huh.
4 MR. CLARKE: Just standing up to say, given the
5 complexity of the issues that JP Morgan and the debtors and
6 the FDIC are sorting through, we do believe there is some
7 merit in granting JP Morgan additional time to file a proof
8 of claim in these cases.
9 THE COURT: Okay.
10 MR. CLARKE: Thank you, Your Honor.
11 MR. LAURIA: Your Honor, Tom Lauria for the WMI
12 noteholder group. Just to create some brief context here and
13 to underscore some of the earlier comments that were made, I
14 think parties are in fact making substantial progress in
15 coming to an understanding of the critical issues that have
16 to be resolved for this estate to be able to move out of
17 Chapter 11, and in fact, I think with respect to some of the
18 most material moving parts, one of the surprising things is
19 perhaps how simple some of the issues are. Nevertheless,
20 despite the progress that people have made in understanding
21 assets and liabilities, it's clear that there are
22 contingencies that are going to need to be framed,
23 understood, and addressed either by agreement or by this
24 Court or perhaps in some cases in another forum, and we think
25 that the establishment of a bar date as requested by the

1 debtors is one of the very important and in fact appropriate
2 ways to facilitate moving that process forward, and so we
3 support the debtors' motion and believe that a bar date is
4 needed as soon as possible. I think in reverse order as to
5 the beneficiaries, the issue addressed by the United States
6 Trustee, we don't know how the Court can possibly make a
7 determination regarding the debtors' liability for these
8 claims unless the claimants are before the Court and have
9 asserted claims. Typically, that's how the process works.
10 People file claims, the debtor objects to them, and the Court
11 resolves them or they're otherwise resolved by agreement. If
12 the parties aren't before the Court, the mechanism for claim
13 resolution is stalled, and I think that we don't have to
14 necessarily have a resolution in this Court of who is liable
15 for these obligations. We need a determination as to whether
16 or not the debtor is liable in order to move forward in a
17 Chapter 11 process. And I just can't think of how that gets
18 underway without requiring people to file proofs of claim.
19 THE COURT: Well, maybe you can tell me or the
20 debtor can tell me, what exactly would be in any employee's
21 proof of claim that would advance my determining whether the
22 debtor's liable for that claim or not?
23 MR. LAURIA: Well, I think there certainly is an
24 opportunity for disagreement about the amount that people are
25 going to be owed and the type of benefits that people believe

1 they're entitled to. Your Honor, you, I'm sure, have been
2 through this process more than I have, but just because the
3 debtor believes it has certain plans that entail certain
4 benefits and obligations to certain people, doesn't mean that
5 the people on the other side of that agree, and in fact -
6 THE COURT: The debtor hasn't said that it owes
7 that. That's the difference here. The debtor hasn't admitted
8 it.
9 MR. LAURIA: That's the - people who filed claims
10 are people who either have claims that the debtor says are
11 contingent, disputed, or unliquidated, or who disagree with
12 the way the claim's been scheduled by the debtor. That's how
13 the dispute is set up.
14 THE COURT: The underlying dispute is whether the
15 debtor owes it or the bank owes it; isn't that the underlying
16 dispute?
17 MR. LAURIA: That's one of the disputes, Your Honor,
18 that's one of the disputes. I mean I think we're engaging in
19 a game of speculation to say that's the dispute. Until the
20 claimants come forward, we don't know what all the disputes
21 are, and I think that we're at risk of putting ourselves in a
22 do-loop that at the end of the day is just going to delay
23 resolution of issues rather than progress them if we don't
24 get people to come forward and file claims, and you know, the
25 act of filing a claim is not a great hardship. You know,

1 thousands and thousands of people do it in every bankruptcy
2 case. It's -
3 THE COURT: And lots of people don't do it.
4 MR. LAURIA: And to that point, Your Honor, this
5 Court, as well as others, have dealt with that in due course,
6 and I don't think that you're going to tolerate the parties
7 before this Court acting in an inequitable fashion. I think
8 that the Supreme Court authority on bar dates clearly gives
9 the Court room to determine whether or not a claim is time
10 barred under certain circumstances and, you know, I'm not
11 concerned about that problem here. I do think it would be
12 very helpful though to crystalize the issues, to get people
13 to put the cards on the table, and I think that really is
14 kind of my transition point with the JPM issue. JPM is key
15 to this, and they're key to it in two respects. I found it
16 amazing that JPM could stand here and criticize the debtors'
17 schedules realizing or understanding the fact that the
18 debtors' access to its records is primarily a function of JPM
19 having possession of those records and restricting access,
20 and for JPM now to bootstrap that circumstance is a basis for
21 relieving it of the obligation to file a proof of claim, just
22 doesn't seem right. It doesn't seem fair or equitable
23 certainly, and it seems to me that the best solution today is
24 for the Court to fix a bar date, and if JPM believes that
25 there is a basis for it being relieved of the bar date or

1 getting an extension of the bar date, it should come forward
2 and it should bear the burden of establishing cause for that
3 extension, which may or may not require an evidentiary
4 record, but to do so today, to give JPM that relief today
5 really kind of turns things around, and it's trying to put
6 the burden on the debtor to establish that JPM should be
7 subject to a bar date in that. I just don't think that's the
8 way the process works, and it's incredibly important here,
9 and we've talked - not to use the analogy of a card game in
10 any pejorative sense at all, but as this Court is well aware,
11 that's how these bankruptcy cases play out in large part as a
12 card game between the principal stakeholders, and it's time
13 for people to put their cards on the table and JPM may say, I
14 can only put some cards on the table now and I have to put
15 some cards on the table later, but let's get it going. Let's
16 find out. Let's subject the extent to which their entitled
17 to delay putting their cards on the table to this Court's
18 determination of cause based on a record, not just because
19 JPM who's in control of the records and who has restricted
20 the debtors' access and continues to restrict the debtors'
21 access to the records, saying the schedules aren't good
22 enough.
23 MR. ROSEN: Your Honor, just briefly, in reply. Ms.
24 Feldstein stood up and she made a point of handing out our
25 first amended schedules and reading into the record a certain

EXHIBIT F

1 UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

2

3 IN RE: . Case No. 05-17930 (ALG)

4 NORTHWEST AIRLINES . (Jointly Administered)
CORPORATION, et al, .

5 . New York, New York
Debtors. . Thursday, March 15, 2007
6 . . . . 2:43 p.m.

7 TRANSCRIPT OF MOTIONS
BEFORE THE HONORABLE ALLAN L. GROPPER
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1 THE COURT: I'm not -- I'm not proud to be the
2 oldest person in this courtroom, but as I've said, I don't go
3 back to the '30s. Now neither do you --
4 MR. HAZAN: Right. We --
5 THE COURT: -- so why don't we get to the point?
6 MR. HAZAN: The point being, Your Honor, I think
7 that if you look at each of the elements and you consider the
8 history of the 2019 and its predecessors, there is no
9 reasonable likelihood of success on the merits. And on an
10 equitable basis, transparency is important here, and I think
11 that is the depth of why the rule is in place: To permit the
12 continued prosecution of numerous matters, whether it's the
13 examiner, the disclosure statement hearing, or exclusivity --
14 the disclosure statement hearing may or may not be in
15 contest, but the others are -- without the transparency that
16 the rule requires, which Your Honor has ruled, is
17 inappropriate. To give them the stay is to give them the
18 secrecy which Your Honor has concluded is not within the
19 confines of the statute.
20 The Supreme Court in a case called Young v. Higby,
21 it goes to the merits, 1945; a case Your Honor may be
22 familiar with, where two preferred shareholders get up --
23 THE COURT: Yes, that's the case -- one of the cases
24 in the Supreme Court that says that a committee like this is
25 a fiduciary.

1 MR. HAZAN: Yes, Your Honor. They should file, they
2 should disclose.
3 THE COURT: I'm not going to decide that in the
4 context of this motion. That might give Mr. Rosner a real
5 agita.
6 MR. HAZAN: It should. Because when you put all
7 these pieces together, it should.
8 THE COURT: I think that -- but it's -- I did not
9 get to that point, and I don't think I need to get to that
10 point, as to whether or not this committee is a fiduciary.
11 I'm not finding that, and my opinion held to the contrary.
12 I'm not saying that these individual funds can't take action
13 in their own interests; I'm just saying that Rule 2019 says
14 that, if they're a group that wants to affect this case --
15 and they certainly do -- that they've got to file certain
16 basic information that I didn't make up. I didn't create
17 that requirement. It's on the books, it should be filed.
18 MR. HAZAN: Only point --
19 THE COURT: And I think I understand the arguments
20 on the motion for a stay. Let's get to the motion for an
21 examiner.
22 MR. HAZAN: Thank you, Your Honor.
23 MR. ZIRINSKY: Do you want to do that first or
24 exclusivity, Your Honor?
25 THE COURT: It doesn't matter. I'm going to hear

EXHIBIT G

1
2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 Case No. 09-50002
5 -x
6 In the Matter of:
7
8 CHRYSLER LLC, et al.
9
10 Debtors.
11 -x
12
13 United States bankruptcy court
14 One Bowling Green
15 New York, New York
16
17 May 4, 2009
18 10:22 AM
19
20 B E F O R E:
21 HON. ARTHUR J. GONZALEZ
22 U.S. BANKRUPTCY JUDGE
23
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25

♀
2

1

2 Hearing re Motion of Debtors and Debtors-in-Possession,
3 Pursuant to Bankruptcy Rule 1015(c), for an Administrative
4 Order (i)Establishing Case Management and Scheduling
5 Procedures; and (ii)Scheduling Initial Case Conference (Final
6 Order)
7
8 Hearing re Motion of Debtors and Debtors-in-Possession,
9 Pursuant to Sections 342 and 521(a) of the Bankruptcy Code,
10 Bankruptcy Rules 1007(a) and 2002(a), (f), (l) and (m) and
11 Local Bankruptcy Rule 1007-1, for an Order (i)Waiving the
12 Requirement that Each Debtor File a List of Creditors;
13 (ii)Approving the Form and Manner of Notice of the Commencement
14 of the Debtors' Chapter 11 Cases; and (iii)Authorizing the
15 Filing of a Consolidated List of Top 50 Unsecured Creditors
16 (Final Order)
17
18 Hearing re Motion of Debtors and Debtors-in-Possession,
19 Pursuant to Bankruptcy Rule 2002, 28 U.S.C. § 156(c) and Local
20 Bankruptcy Rule 5075-1, for an Order Appointing Epiq Bankruptcy
21 Solutions, LLC as Claims and Noticing Agent (Final Order)
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3

1
2 Hearing re Motion of Debtors and Debtors-in-Possession,
3 Pursuant to Bankruptcy Rule 1007, for An Order Extending the
4 Time Within Which They Must File Their (i)Schedules of Assets

5 and Liabilities; (ii)Schedules of Executory Contracts and
6 Unexpired Leases; and (iii)Statements of Financial Affairs
7 (Final Order)
8
9 Hearing re Motion of Debtors and Debtors-in-Possession,
10 Pursuant to Sections 105(a) and 503 of the Bankruptcy Code and
11 Bankruptcy Rules 3002 and 3003, for an Order Establishing
12 Procedures for the Assertion of Section 503(b)(9) Claims
13 Relating to Goods Received by the Debtors Within Twenty Days
14 Before the Petition Date (Final Order)
15
16 Hearing re Motion of Debtors and Debtors-in-Possession,
17 Pursuant to Sections 105(a), 362 and 546(c) of the Bankruptcy
18 Code and Bankruptcy Rule 9019(b), for an Interim Order:
19 (i)Establishing Procedures for Resolving Reclamation Claims
20 Asserted Against the Debtors; and (ii)Granting Certain Related
21 Relief (Interim Order)
22
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4

1
2 Hearing re Motion of Debtors and Debtors-in-Possession,
3 Pursuant to Sections 105(a) and 331 of the Bankruptcy Code,
4 Bankruptcy Rule 2016(a) and Local Bankruptcy Rule 2016-1, for
5 an Order Establishing Procedures for Interim Monthly
6 Compensation of Professionals (Final Order)
7

8 Hearing re Motion of Debtors and Debtors-in-Possession,
9 Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code,
10 for an Order (A)Authorizing the Debtors to (i)Continue Their
11 Existing Workers' Compensation Programs; and (ii)Pay Certain
12 Pre-Petition Workers' Compensation Premiums, Claims and Related
13 Expenses; and (B)Granting Certain Related Relief (Final Order)
14
15 Hearing re Motion of Debtors and Debtors-in-Possession For an
16 Order Confirming the Administrative Expense Priority Status of
17 the Debtors' Undisputed and Liquidated Obligations for Post-
18 Petition Deliveries of Requested Goods and Provision of
19 Requested Services (Final Order)
20
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5

1
2 Hearing re Motion of Debtors and Debtors-in-Possession,
3 Pursuant to Section 366 of the Bankruptcy Code, for Interim and
4 Final Orders: (i)Prohibiting Utilities from Altering, Refusing
5 or Discontinuing Services to, or Discriminating Against, the
6 Debtors on Account of Pre-Petition Invoices; (ii)Determining
7 that the Utilities are Adequately Assured of Future Payment;
8 (iii)Establishing Procedures for Determining Requests for
9 Additional Assurance; and (iv)Permitting Utility Companies to
10 Opt Out of the Procedures Established Herein (Interim Order)

11

12 Hearing re Motion of Debtors and Debtors-in-Possession,

13 Pursuant to Sections 105(a) and 363(c) of the Bankruptcy Code,

14 For Interim and Final Orders Authorizing the Debtors to Honor

15 or Pay Pre-Petition Obligations to or for the Benefit of Their

16 Dealers and Other Customers, and for Related Relief (Interim

17 Order)

18

19 Hearing re Motion of Debtors and Debtors-in-Possession,

20 Pursuant to Sections 105(a), 363(b) and 503(b)(9) of the

21 Bankruptcy Code, for Interim and Final Orders Authorizing Them

22 to Pay the Pre-Petition Claims of Certain Essential Suppliers

23 and Administrative Claimholders, Continuing the Debtors'

24 Troubled Supplier Program and Granting Certain Related Relief

25 (Interim Order)

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1

2 Hearing re Motion of Debtors and Debtors-in-Possession,

3 Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code,

4 for an Order Authorizing Them to Pay the Pre-Petition Claims of

5 Certain Potential Lienholders (Final Order)

6

7 Hearing re Motion of the Debtors and Debtors-in-Possession,

8 Pursuant to Sections 105(a), 363(b), 507(a) and 541 of the

9 Bankruptcy Code, Authorizing Them to Pay Certain Pre-Petition

10 Taxes (Final Order)

11

12 Hearing re Motion of Debtors and Debtors-in-Possession for

13 Interim and Final Orders (i)Authorizing them to Obtain Post-

14 Petition Financing; and (ii)Granting Adequate Protection to
15 Certain Pre-Petition Secured Parties (Interim Order)
16
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1
2 Hearing re Motion of Debtors and Debtors-in-Possession,
3 Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code
4 and Bankruptcy Rules 2002, 6004 and 6006, for (A)An Order
5 (i)Approving Bidding Procedures and Bidder Protections for the
6 Sale of Substantially All of the Debtors' Assets; and
7 (ii)Scheduling a Final Sale Hearing and Approving the Form and
8 Manner of Notice Thereof; and (B)an Order (i)Authorizing the
9 Sale of Substantially All of the Debtors' Assets, Free and
10 Clear of Liens, Claims, Interests and Encumbrances; (ii)
11 Authorizing the Assumption and Assignment of Certain Executory
12 Contracts and Unexpired Leases in Connection Therewith and
13 Related Procedures; and (iii)Granting Certain Related Relief
14 (Procedures Order)
15
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25 Transcribed by: Lisa Bar-Leib

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1 P R O C E E D I N G S

14 identified publicly as holders of the first lien debt that are
15 in this group have received death threats which they perceive
16 as being bonafide. There have been contacts made to local
17 police and the FBI about this. And the concern, of course,
18 that other people have is that they will be putting themselves
19 in harm's way by making a public disclosure of who they are.
20 We haven't filed that motion and so I'm not asking
21 for any relief on that issue at this time. But I thought it
22 was appropriate, given the Court's question, that I indicate
23 the intention to do so.
24 THE COURT: All right. You're going to file the 2019
25 by tomorrow at noon and any motion that you intend to file

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1 seeking some protection.
2 MR. LAURIA: Thank you, Your Honor.
3 THE COURT: All right.
4 MR. PANTALEO: Good morning, Your Honor. Peter
5 Pantaleo, Simpson Thacher & Bartlett. I represent JPMorgan.
6 JPMorgan is the first lien administrative agent. And the debt,
7 as Your Honor, I think, knows from the pleadings under the
8 first lien agreement, is approximately 6.9 billion dollars.
9 Your Honor, just to provide a little bit more clarity
10 to the Court not with respect to the parties that Mr. Lauria
11 claims to represent because I'll leave it to him to make the
12 disclosures, obviously, as the Court has directed. But just to
13 be clear in terms of he doesn't represent, Your Honor, the
14 agent has -- the agent itself is obviously the largest lender
15 under the first lien facility. In addition, at the company's
16 request in concluding negotiations over the amount by which the

17 required lenders would agree to liquidate the collateral in
18 this case in the context of a sale to Fiat, the agent solicited
19 written consents from each of the holders of the first lien
20 debt. And just so Your Honor has a broad sense of who actually
21 signed and gave the agent written consents, there were holders
22 who held approximately ninety percent -- ninety percent in
23 dollar amount of the debt and lenders who control
24 approximately -- sixty-two percent of the lenders who actually
25 control the voting in the syndicate. Now, I don't know whether

♀

1 those who didn't vote didn't vote because they are simply
2 sitting on the sidelines, are indifferent, have concluded that
3 their vote doesn't count because, as a matter of the contract,
4 it's purely a required lender vote and we have more than
5 required lender vote. It's fifty-one percent in dollar amount
6 for required lender. And I don't know if, in fact, any of
7 those individuals or how many of those individuals, if any,
8 have retained Mr. Lauria. But I think it's important to figure
9 out in order to understand at a minimum, at a minimum, the
10 number of lenders who have agreed in writing to support the
11 transaction and have done so directly to the agent. Thank you,
12 Your Honor.
13 THE COURT: All right. Thank you. All right.
14 Turning now to the scheduling of the hearing, I have one
15 question for the U.S. trustee's office. First, just regarding
16 the organizational meeting, when is that to be held?
17 MS. ADAMS: Good morning, Your Honor. Diana Adams,
18 United States trustee. The organizational meeting is scheduled
19 for 10:30 tomorrow morning, Your Honor.

20 THE COURT: All right. Thank you. All right. Any
21 other comments with respect to the request for an adjournment?
22 All right. What I will do is in light of the filing of that
23 request -- not the request for the adjournment but the sales
24 procedures motion last evening at approximately 7:30, I will
25 adjourn consideration of that until 2:30 tomorrow afternoon

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1 with any supplemental objection to be filed -- and I say
2 supplemental because there was a preliminary objection already
3 filed. But any objection or supplement to an existing
4 objection to be filed by 10:00 tomorrow morning. All right.
5 MS. BALL: Thank you, Your Honor.
6 THE COURT: Thank you.
7 MS. BALL: And thank you for making more time for us
8 tomorrow. Moving to the motions that we have this morning,
9 Your Honor, this morning we have actually scheduled seven
10 procedural motions as to which no objections were filed and
11 there are motions which will be supported by the evidence of
12 the seven affidavits, seven of the eight affidavits filed
13 Thursday and Friday. As to those eight substantive motions
14 which do require presentation of evidence to Your Honor,
15 objections, I understand, were filed at 7:30 this morning to
16 five of those eight. So what I would propose, Your Honor, is
17 that you permit me to move through the six procedural motions
18 as to which no objection has been received.
19 THE COURT: All right. Go ahead.
20 MS. BALL: Thank you, Your Honor. And I'd like to
21 note, Your Honor, that we would ask, in light of the
22 organizational meeting being held tomorrow to select our

23 creditors' committee, that the motion to approve a case
24 management order be deferred so that we can work through the
25 terms of that proposal with our committee. So we would ask

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1 that that motion, though scheduled for today, be adjourned.
2 THE COURT: All right. I will adjourn that and we
3 can set it probably sometime tomorrow at the conclusion of the
4 hearing --
5 MS. BALL: Thank you, Your Honor.
6 THE COURT: -- with respect to the sales procedures
7 motion.
8 MS. BALL: Thank you, Your Honor. By way of
9 housekeeping, reporting from where we were last Friday, we have
10 mailed a notice of the Chapter 11 filing and notice of this
11 morning's agenda to the fifty largest creditor holding claims
12 against the debtors' estate, counsel to the administrative
13 agent for the debtors' pre-petition first lien lenders, counsel
14 to our owners, counsel to the UAW, counsel to the Treasury and
15 counsel to the Canadian lending authorities who are supporting
16 our loan efforts this morning. It's called the Export
17 Development Canada. In those notices, Your Honor, you had set,
18 so there's no confusion, May 14th as return date for the
19 utilities motion and you had set May 20th as the final hearing
20 date for the remainder of the motions.
21 Your Honor, with that, I would like to move to the
22 motion to waive the requirement for filing a consolidated list
23 of creditors and approving the form and manner of notice of the
24 case commencement and permitting us to file a consolidated list
25 of the top fifty unsecured creditors.

EXHIBIT H

SECURITIES AND EXCHANGE COMMISSION

REPORT

ON THE

STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES

PURSUANT TO SECTION 211 OF THE SECURITIES EXCHANGE ACT OF 1934

PART I

STRATEGY AND TECHNIQUES OF PROTECTIVE AND REORGANIZATION COMMITTEES

WASHINGTON, D. C.
May 10, 1937

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1937

both beneficial and detrimental results. Even the striker-lawyer, who, operating in the most direct way for his personal advantage, creates a client by seeing to it that a friend willing to appear as plaintiff acquires a bond, and then settles his claims out of court, may confer benefits upon investors. The settlement which he obtains reduces the assets of the corporation in which investors have placed their funds; but realistically that may be at times a price paid by investors to the striker for police services. In this respect, the striker may be considered as providing a deterrent to reckless, careless, or fraudulent management or banking practices and to irresponsible or unfair reorganizations. The threat of the striker who may create undesirable publicity or financial injury causes management, bankers, and their committees to exercise care in matters which might otherwise be handled carelessly, to be meticulous in transactions which might otherwise be conducted for personal profit. Regardless, therefore, of the nature or objectives of the litigant, suits and threats of suit against the insiders have a function which cannot properly be disregarded. In this connection it is appropriate to indicate that many courts, as well as the dominant financial and legal interests generally, are apt to ignore the useful functions of outside groups, partially, perhaps, because of the conspicuous and flagrant nature of the abuses which outside groups at times perpetrate. In their commendable zeal to protect estates from the raids of lawyers and committees who have no real interest in the situation and have performed no real services, some courts have not been solicitous of the claims of *bona fide* independents, and have denied them any compensation or reimbursement of expenses. Blocking an unfair reorganization and ousting disqualified persons from control are, we believe, services of value, along with activities which result in the adoption of a plan of reorganization. We believe that it is important that this point be kept in mind, lest courts, anxious to facilitate the rehabilitation of corporations and to minimize expenses, break down the salutary activities of independents. In the absence of more economical and effective methods of control over corporate management or committees, the litigant, whether he be "striker" or investor, plays an important role. However, the beneficial results of this process could be increased and the possibilities of its abuse by way of excessive payments, unsubstantial claims and preferential payments would be diminished if secret settlements were forbidden, and if complete accounting for sums expended for settlement were required.

THE SOLICITATION PRACTICES OF COMMITTEES

The strategic position which the banker-management groups occupy in reorganization is not based solely upon their customary

control over the proceedings, trustees, and security holders lists. Once their committees are formed, superior resources and skill in marshalling the assents, proxies or deposits of security holders also contribute to their success. These solicitation campaigns are usually well organized and effectively conducted; insiders may even employ public relations counsel to advise them as to strategy and tactics.

Committees organized by inside groups find the use of the good offices of the management extremely valuable. Banker-controlled managements synchronize the announcement of default with the announcement of the formation of the inside committees. In a great many instances managements have participated directly in the solicitation of deposits or assents. In voluntary reorganizations the management of the company almost invariably lends its prestige and resources to the solicitation campaign. Frequently the employees of the company are used as personal solicitors.

Committees sponsored by inside groups have also received considerable assistance from bankers in their solicitation efforts. Bankers often use their associations with customers and their sales and "advisory" organizations in support of a committee's campaign for deposits. In some reorganizations, the bankers have sent out their own circular letters recommending particular reorganization plans. The sales forces of large underwiting houses are often used personally to solicit deposits. Special solicitors are often employed on a commission basis to contact security holders and induce them to send in their deposits or assents. Likewise, it has occasionally been considered necessary to compensate banks, dealers, brokers and their salesmen on a commission basis for soliciting deposits. This use of paid solicitors almost inevitably results in high pressure tactics. Special "solicitation units", nightly pep talks, and lectures on effective answers to bondholders' typical questions give the solicitation drive most of the characteristics of old-time stock selling campaigns.

The security holders themselves ultimately bear the cost of such solicitation, which is generally regarded as a compensable reorganization expense. Thus, the depositing security holder in effect pays for the privilege of being persuaded to consent to a partial extinction of his contract rights. He is seldom advised of this fact. Such nondisclosure is particularly indefensible in that it leads security holders to assume that they are receiving disinterested advice, when in fact they are not.

Theoretically, independent committees as well as management-banker committees could employ these methods for obtaining the support of security holders. And in some instances they doubtless have. Actually, however, these methods are more commonly employed by the inside groups. The superior resources of the manage-

ment-banker groups make it more likely that those groups can finance such operations. Their superior skill in organization of a sales program also makes it more likely that they can perfect in short order an effective campaign for deposits.

Upon the formation of a committee or announcement of a reorganization plan, therefore, security holders are deluged with advertisements and circular letters, soliciting their support and attempting to persuade them of the unfairness of any past or existing attacks by competing committees. The inducements which committees will provide for deposit are many and varied. There are many intangibles which are important in a committee's campaign for deposits. These cannot be readily segregated and labelled. They embrace in part the presentation of the facts to the security holders. From the viewpoint of any committee the task will involve creation of confidence in the committee which is doing the soliciting. In case of management-banker committees this may involve a careful editing of the facts (in those cases where the waste, mismanagement, or extravagance of the management caused or contributed to the failure or where the bankers indulged in fraudulent practices in the sale of the securities) so that no suspicion will be raised in the minds of the security holders of the competence of the committee to represent them in the reorganization. It may entail creation of a picture of strenuous and faithful service by the committee on behalf of the security holders. The temptation will be not to disclose to security holders the importance to the management and the bankers of control over the committee and over the securities to be deposited with it. If the committee is dominantly interested in securities junior or senior to those being solicited, the committee will desire not to disclose the fact. If the committee members have other pecuniary interests to protect or embrace through control over the reorganization, suppression rather than disclosure of such facts may also be expected. In other words, the translation of the cause and effect of default will be handled delicately and subtly, so that fears may be calmed, indignation cooled, and confidence inspired. At times, such technique will produce circulars which are either untrue or misleading.

There are other more direct and specific methods which management-banker committees have employed in the drive for deposits in order to overcome the normal inertia of security holders. The pressure may be exerted by the threat of undesirable consequences from failure to deposit or through the extension of favors for deposits. The devices utilized have entailed, apart from misrepresentation or non-disclosure of material facts, many abuses of fiduciary powers and the skillful dispensation of committee patronage. They have taken the form of special services offered to depositors, which on examina-

tion merely reflect advantage taken of the security holders' unfamiliarity with the situation. Thus, they may advertise that they will file proofs of claim for depositors only, making this service appear indispensable though forms for the purpose may be obtained by any one from the court. Special favors are extended to induce the deposit by particular groups of security holders. These include institutional and other large holders, banks, clients of selected investment houses, brokers and dealers. The kinds of special treatment vary. More favorable terms with respect to possible charges and the right to withdraw are offered. Special types of deposit not subject to the control of the committee are permitted. Deposit agreements frequently give committees the power to permit security holders to participate under the agreement without depositing. Institutional holders have been permitted to take advantage of this power. Bank accounts have been opened by companies with banks that deposited their security holdings with the insiders' committees. Brokers and dealers have been paid commissions for depositing their own securities.

The threat of discrimination is often used to spur security holders to deposit. Committees have given the impression in their solicitation literature that, provision being made only for depositors, non-depositors would suffer complete loss. In some instances where committees came into funds for the payment of interest on securities, payment was actually withheld from non-depositors, either by the decision of the committee or by express provision in the deposit agreement.

The desire of security holders to hold a security that is listed on an exchange has been taken advantage of by committees. Committees may have certificates of deposit listed. Subsequently, with the cooperation of the company, the undeposited security may be stricken from the list, thereby giving the listed certificate of deposit a superior market to the undeposited security. The mere threat that the directors may undertake to do so, if sufficiently publicized, may for a time have the same result. An advantage is also enjoyed over the certificates of deposit of other committees which are not listed. This greater market has been stressed in soliciting deposits. If both the deposited and undeposited securities enjoyed listed or unlisted trading privileges on the same exchange, attempts may even be made to stimulate purchases of the certificates of deposit to raise their market price to that of the undeposited security.

Committees, as an inducement to deposit, have held up the necessity of deposit in order to avoid receivership. Security holders have been asked to assent to voluntary plans of reorganization by depositing in order to avoid receivership. Such statements are made with the mental reservation that a "short receivership" probably is nec

essary as a legal device to put the plan into operation. When receivership occurs, depositors who seek to withdraw on the ground that they had deposited to avoid receivership are told that the original plan contemplated a "short" receivership, as distinguished from a prolonged receivership. A further device then used as an "antidote" to the receivership is declaring the plan "operative"; this is supposed to signify that the plan is "nearer to consummation." This again is intended to stimulate deposits. And, finally, the fact of receivership, once it occurs, is cited as evidence of the necessity for further deposits in order to lift the receivership.

Another device frequently used by committees in their drive for deposits is the announcement of a relatively short period for deposit. This is calculated to hasten deposit by creating the fear that unless immediate deposit is made, the security holder will be deprived of participation in a promulgated plan or will be denied the benefits of the committee's activity. Successive extensions of the closing date for deposits follow with the security holder still led to believe that each date set will be the last. Deposit agreements almost universally authorize committees to fix, in their uncontrolled discretion, the periods within which deposits will be received. A substantial proportion of deposit agreements also permit committees to assess penalties for late deposits. The threat of such penalties has been used as a pressure device to spur deposits. In virtually all of the cases where time limits are set, there is no intention to carry out the express or implied threats. The threats are used to capitalize on security holders' fears.

At times the endorsement of a plan by impartial investment services is sought for the influence that an apparently disinterested recommendation will have in the committee's drive for support. These agencies are contacted to win their favorable recommendation for a plan, sometimes before the plan is submitted to security holders. Such recommendations will be advertised in the committee's literature. In one instance an agreement (later changed) was made with a statistical agency whereby it would study the condition of the corporation and analyze the terms of the plan to determine its merit and fairness. It was to receive a fee in the event that it recommended the plan but get nothing if it did not.

In conclusion, it may be granted that a certain amount of pressure on security holders is necessary in order to overcome their conventional and traditional inertia. Latitude must be allowed committees if investors are to be galvanized into action. But unfair and discriminating practices are other matters. Exhortation is one thing; misrepresentation and oppression another. To state the matter otherwise, pressure is needed; but it should be applied by fair means, not by foul.

The One-Sided Nature of Deposit Agreements.—The powers vested in committees by security holders have been conferred in one of two ways: by the execution of proxies from security holders to committees, without transfer of possession of the securities; or by transfer of possession, subject to the terms of an elaborate deposit agreement. In the case of the insiders, this control has usually been obtained by use of a deposit agreement. Sometimes proxies are taken, but generally they are characteristic of the technique of independent groups. Sometimes a committee will ask for no authorization at all, requesting merely registration of the names of the security holders. Sometimes deposit agreements will be used by independent committees. But by and large, the machinery of taking deposits is a device of the insiders.

The deposit agreements are one-sided contracts. They are not negotiated by the parties dealing at arm's length. They are prepared solely by the committee, or more realistically, its counsel. In fact, seldom does the depositor see the completed agreement. Even if he did, it is doubtful that he could understand it, for the documents are complicated, legalistic instruments. Accompanying circulars may advise the security holders of particular provisions which the committee desires to emphasize as showing its honesty of purpose or as making deposit seem not unattractive. But ordinarily the security holders are not advised of the fact that the agreements confer upon the committees powers that are as broad as the ingenuity of counsel can design, and that give the committee almost unlimited control and dominion over the securities.

The security holder who enters by depositing finds retreat by withdrawing difficult, hazardous and expensive. The almost complete dominion which the deposit agreement typically vests in the committee is made secure by reason of the legal, contractual, and practical deterrents placed in the way of withdrawal. It is indeed rare to find a deposit agreement which in terms permits a depositor to withdraw any time at his election. Sometimes the committee is given the discretionary right to permit or deny depositors the privilege of withdrawing, generally upon such terms and conditions as the committee may choose. The exercise of this discretionary power can easily be abused, and it has been abused. Withdrawal has been permitted to accommodate friends who wished to sell their securities. On the other hand, it has been denied depositors who sought to withdraw in order to assert claims against friends or affiliates of the committee. It has been denied at times at the expense of fairness and justice to depositors simply because the committee did not wish to relax its hold upon any of the deposited securities.

To be sure, an "absolute" right is commonly given the depositors to withdraw in certain contingencies, such as the submission of a

plan of reorganization to the depositors for acceptance or rejection, or the adoption of a material amendment to the deposit agreement. But in case of amendments the committee is the judge of their materiality. And these absolute rights of withdrawal are so hedged with other limitations and conditions that they are virtually meaningless. Thus, the right of withdrawal must be exercised within a limited period of time; it is the rare case in which the time is more than 30 days; not infrequently it is as short as 10 days. Inadequate provisions for notice may mean that the period will have passed, or almost passed, before the depositor learns that his right of withdrawal has accrued. And means have been devised whereby committees by resort to technicalities and formalities have been able to defer granting the "absolute" rights of withdrawal for many months. For example, nothing short of formal abandonment by affirmative action of the committee gives rise in the usual case to a right to the return of the securities or to withdrawal upon "abandonment" of a plan. The agreement will vest in the sole province of the committee the right to determine whether conditions have so changed that the plan should be abandoned.

Furthermore, withdrawal is generally conditioned upon payment of a *pro rata* share of the committee's fees or expenses, or both. Assessments have been levied apparently more with reference to their deterrent effect upon withdrawal than with reference to the actual expenses which the committee has incurred. The only limitation upon the committee's power to make this assessment may be a provision that the assessment cannot exceed a specified percentage of the face amount of the bonds. Committees have levied assessments which have amounted to a substantial percentage of the market price of the securities, and, in fact, as much as the entire amount of the market price, thus making withdrawal impractical if not completely useless.

Any questions of interpretation of the terms of the agreement are determined usually by the committee. The agreements give the committee power to construe their provisions and the committee's construction is made conclusive and binding. In addition, they usually permit the committee complete freedom in amending the agreement. If the amendment is deemed by the committee to be "material and adverse", the depositors are given the privilege to withdraw, subject, however, to the obstacles customarily placed in the way of withdrawals. Committees have not hesitated to use their amending power to increase the amounts they might spend for expenses, and the fees they might charge.

Deposit agreements typically supply the machinery for paying the fees and expenses of the committee. Commonly the agreement ex-

pressly provides that the committee has a lien upon the deposited securities for fees and expenses. In addition, it is also customary to provide that the securities may be pledged for loans for these purposes. Seldom have the deposit agreements provided for independent review of fees and expenses. Furthermore, a surprising number of deposit agreements do not provide machinery even for an accounting to depositors. Where accounting provisions have appeared, they have seldom assured the depositors a reasonable opportunity to examine and to question the committee's accounts. Thus, in cases not subject to the provisions of Section 77 or Section 77B of the Bankruptcy Act, the committee is left the sole arbiter of its own charges, an evil we shall discuss at length in a subsequent part of this report.

There are a number of other objections, from the point of view of security holders, to a committee's taking deposits in any case. It is an expensive process. An elaborate agreement is necessary. The printing of this document is alone an item of considerable expense. In addition, lawyers' fees must be paid, and the time of committee members is consumed, for which payment must be made, in arranging for a depositary and determining and drafting the terms of the contract. Certificates of deposit must be engraved; lawyers must be paid to draft their form; and the depositary must be reimbursed for the work involved in the issuance, certification, and holding of the securities. Arrangements must be made for a transfer agent for the certificates. Vast sums are paid depositaries for their services in these and other connections. Similarily, if holders of the certificates are registered, payment must be made to a registrar. The costs of transmitting, by registered mail, securities to the depositary and certificates to the depositor, must be borne.

Deposit Agreements versus Proxies.—In the light of the objections to deposit of securities and to the broad powers contained in deposit agreements, it may be questioned to what extent it is necessary for a committee to take actual possession of the securities. In turn this will require a determination of what power and authorization a committee should have to perform its functions in reorganization. For it is clear that in view of the disadvantages of deposit agreements, deposits should be permitted only where necessary for the protection of the security holders and that only those powers should be permitted a committee that are useful in the interests of the security holders. By and large, proxies afford the desirable medium of representation. The following are the reasons.

It is easier to organize security holders and to procure their united action for common purposes if they are asked merely to execute proxies rather than to deposit their securities. This results from a natural reluctance of investors to surrender possession of

their securities. The reasons for this reluctance are, in the first place, inertia—disinclination to perform the acts necessary to transmit the securities to the committee's depositary; in the second place, unwillingness to surrender to another the important rights and powers involved in deposit of securities; and in the third place, the fact that securities have frequently been pledged by the owners as collateral for loans and it is difficult to obtain their release for purpose of deposit. It is illuminating to note that independent committees customarily ask for proxies rather than deposits. This, in itself, is evidence of the greater ease of obtaining support in this manner.

A security holder who has executed a proxy can by reason of the revocable nature of proxies continue to exercise some control over the destiny of his investment. By the same token, the committee does not have blanket and virtually irrevocable control over the securities. It must incur the risk that its actions will not meet with the approval of security holders and they will revoke their proxies; or that security holders, for reasons unconnected with the activities of the committee, will sell their securities and thereby revoke the proxy. From the viewpoint of a committee which is unwilling to take into account factors other than its own power, it may be highly advisable to have authorizations that are virtually irrevocable. But the reasons which are advanced in support of the virtual irrevocability of powers, obtained by deposit of securities, do not carry conviction. No conclusive reason appears why the deposit of bonds is necessary to negotiate a plan. It is argued that, in order to negotiate effectively, a group must demonstrate that it has control over or represents a substantial amount of securities, or that its judgment, in all probability, will be accepted by security holders. But this is a far cry from saying that deposit of bonds is necessary. Committees have effectively negotiated a plan of reorganization without having bonds on deposit. These groups have generally obtained proxies from security holders, and these proxies have been recognized by other parties in the negotiation as sufficient to vest the committee with authority to speak for security holders.

Again, it is urged that if proxies are used and revocations occur in large volume, the committee may be genuinely handicapped in other respects. It may not be certain that action which it takes, requiring approval of a designated amount of securities, will in fact be approved. This argument is not particularly persuasive. As a general matter, committees need assurance of adequate support only in connection with commitment to a plan of reorganization. Usually few issues arise, as to which committees must be certain in advance of the support of every one of their constituents. And in respect of the reorganization plan, it is clear that a prior and general authorization to the committee should not, as a matter of

equity and sound practice, operate as a commitment to the plan. Security holders should not be committed to the approval of a reorganization plan which they have not had an opportunity to consider. A contrary principle is a denial of the democratic forms upon which the theory of reorganization by majority consent is based. If approval of a reorganization plan can be obtained before the plan is submitted to security holders, real consent to that plan is not in fact obtained.

Some insist that deposit of securities, together with power to pledge the deposited securities, and a lien thereon, coupled in turn with restriction of the right to withdraw to stated contingencies and upon payment of enough to redeem the pledge and discharge the lien, is essential if committees are to finance themselves. Clear it is that committees must have some funds with which to operate; clear it also is that such funds should not be the gift of persons who may be interested in influencing the committee to the detriment of security holders. But it does not follow that committees must or should, for this purpose, take possession of securities with the collateral rights, powers and restrictions necessary to make the deposited securities serve the end. It is significant to note that the most vigorous advocates of the necessity of the deposit system are committees affiliated with the management and bankers of the company in reorganization. On the other hand, most independent committees, working in opposition to the managements and bankers who have greater resources at their disposal, have operated without deposit of securities. Committee members have borne individual expenses; and their combined contributions have borne expenses of the committee. Counsel has taken the matter either on the basis of the promise of committee members to pay, or, perhaps more generally, in anticipation that the committee and they would receive payment in the course of the reorganization from the estate. Occasionally, they have been financed by an interested person who may or may not have been a member of the committee or a security holder, or perhaps a person who sought some advantage from the committee's operations. Sometimes, they have financed themselves by assessment upon security holders, unaccompanied by deposit of securities. The fact that these committees have operated and sufficiently financed their activities without obtaining deposit of securities is proof positive that it can be done. To a large extent, deposit of securities inspires a vicious circle. As it makes it possible for the committee to pay its expenses, so it increases those expenses by substantial amounts. The bulk of the expenses incident to the use of deposits are avoided if proxies are used. The proxy form is simple, and the cost of preparing and printing it is not, in the usual case, likely to aggregate a substantial sum. The example of many independent committees

shows, we believe, that expenses not incident to or resulting from deposit can be borne by the committee itself.

For these reasons, it is our opinion that in most instances the deposit of securities should be outlawed. But, as we have indicated, there are situations where deposit may be necessary or desirable. For example, while we have shown that committees can finance their operations without deposit of securities, it does not follow that deposit of securities for purpose of financing the committee should be outlawed in every instance. Furthermore, with respect to various technical requirements of reorganization, as we shall discuss, deposit may be necessary. It must be borne in mind, however, that while deposit may be urged as necessary for a particular act, it does not inevitably follow that the deposit should, as is currently the case, be accompanied by transfer of all rights and privileges incident to the security, except beneficial ownership.

There are a number of situations where it may be contended that deposit is necessary to satisfy technical requirements, but where in fact it is not. Thus, voluntary reorganizations, which do not proceed under court sanction, do not require deposits as a general matter. Such reorganizations are planned and engineered by the company's management and bankers, with or without the use of committees. Generally speaking, they rely for effectuation upon charter provisions empowering a majority of stockholders to bind the aggregate to certain modifications, or upon provisions in trust indentures depriving a minority of holders of bonds, debentures or notes of any remedy. Under the latter, if a necessary percentage of securities declines to sue, holders may have no remedy under the indenture. Occasionally, such reorganizations are consummated by consent of a large majority of securities and purchase of the remainder.

So far as the stockholders are concerned, where the reorganization is effected under charter provisions as stated above, or under statutory provision making the will of the majority binding upon all, deposit of securities clearly is not necessary. Votes in person or by proxy are all that is necessary. Similarly, with respect to securities representing a creditor position in the corporation, it is not necessary that they be deposited in order to consummate the plan. All that is necessary is that they accept it, which they can do by vote followed, as in the case of the stock, by acceptance of the exchange or submission for stamping, or by proxy.

From the viewpoint of the company, however, the latter may appear to have a definite disadvantage. It may leave the security holder free, despite his vote or proxy, to join with other holders in suit on their securities, which may have the effect of gaining for them a preference or blocking consummation of the plan, or both. There must, it is true, come a time when the company knows how

many securities are committed to the plan and will be voluntarily exchanged under it. Deposit of securities under the conventional form of deposit agreement is not, however, necessary for this purpose. This limited purpose does not seem to justify use of the elaborate deposit machinery, with its attendant expenses, disadvantages and dangers of abuse. The same purpose could be served, we believe, by stamping an appropriate legend upon the securities. So far as the mechanics of reorganization are concerned, the committee is interested in having the power to intervene in any proceedings and to participate therein as a matter of right. Proxies in the usual form, authorizing the committee to act for the creditor or security holder in the reorganization, will give the committee any right to intervene which the giver would have.

The requirements for consummating the mechanics of reorganization have been regarded as proof that deposit of securities cannot be completely avoided. Relevant in this respect is the machinery of sale which is part of receivership and foreclosure proceedings. The usual reorganization under Section 77B of the Bankruptcy Act is effected without sale, though one of the alternative methods under this section does provide for sale. Presumably this latter method is based upon analogy to the equity procedure which we shall hereinafter discuss. But generally in proceedings under Sections 77 and 77B of the Bankruptcy Act, it is clear that the absence of the device of a sale makes the deposit of securities unnecessary for the purpose of consummating the plan.

With respect to reorganizations in equity receivership proceedings and by foreclosure, the problem is more difficult. The traditional machinery for transferring the property of the corporation in reorganization to a new corporation has been a judicial sale. It has long been recognized that this procedure, in respect of properties being reorganized, is nothing more than formal; there is no sale in the sense of transfer for a consideration which is distributed to the vendors; in substance, there is merely a modification of rights of security holders and other creditors pursuant to a plan of reorganization, which may or may not take the form of an exchange of new securities for old. But in the present state of the law it has been assumed that the forms of sale are still necessary to effect reorganization in equity or by foreclosure. Translating this into practical terms, it means that protective committees, their nominees or other agencies must be prepared to bid in the property at a price approved by the court and to pay for it in such manner as the court will sanction. Traditionally, payment takes the form of a tender of securities which have been deposited with the agency plus sufficient cash to pay dissenters their *pro rata* share of the price at which the property was bid in, and, sometimes, to pay administration expenses.

If this procedure is made necessary by local law, it follows that the security holder must at some time surrender possession of his securities. It follows also that this surrender must take the form of deposit with a committee before time of sale; otherwise, the committee will not be able to bid at the sale because of uncertainty as to the amount of securities it can tender. Where reorganization is pending in state receivership or foreclosure, therefore, and where tender is necessary to consummate the process, committees and others must have license to solicit and obtain deposit of securities. Such deposit should, of course, be strictly limited to the purposes of tender in payment of the bid price. The toleration necessary because of antiquated machinery should not be allowed to become a general license for the entire catalogue of abuse. But with increasing use of Sections 77 and 77B of the Bankruptcy Act, the entire machinery of foreclosure becomes of less importance for reorganization purposes. Under these sections, as we have stated, the formal procedure of foreclosure and sale to effect reorganization is largely unnecessary. It will continue to have significance only in state court proceedings.

A similar problem arises in connection with committees representing municipal security holders. As we elsewhere discuss, the only legal remedy which such committees have available is suit for the principal and interest of the bonds and petition for mandamus to enforce the judgment. Use and threat of use of this remedy is the powerful weapon in the hands of municipal committees to expedite favorable settlement on the part of the committee. It appears likely that use of this weapon depends upon possession of securities by the committee. In order to exert the pressure implicit in the threat of bringing suit, they must, at the time of threat, have the means at hand or readily available to effectuate the threat. And if any suit is to be brought for purposes other than obtaining an undesirable preference for one or a few bondholders, it must be brought on behalf of holders of a substantial number of bonds. It appears that, in order to bring such suit, the committee must have the bonds on deposit.

Municipal committees, as we elsewhere discuss, have found that resort to the federal courts is generally necessary in order effectively to obtain judgment and mandamus order. The courts of the state in which the debtor municipality is incorporated, by and large, have not been friendly to the debtors' creditors. Jurisdiction of the federal courts is established on the basis of diversity of citizenship: a committee composed of persons not resident in the debtor's state sues the debtor. But in order to establish such jurisdiction, the committee, in the language of the United States Supreme Court, must not hold the bonds "simply for purposes of collection". It may therefore be necessary, if municipal committees are to have access to the fed-

eral courts, that they should be allowed to obtain deposit of securities under deposit agreements broad enough to constitute them trustees of express trusts.

With the exception of cases such as we have enumerated, in which necessity for deposit can be shown, the deposit of securities for reorganization purposes should be outlawed. In those instances where deposit of securities is inescapable if the committee is to function effectively, the terms of the deposit should be narrowly restricted to the necessities of the occasion. And in such cases adequate provision should be made for independent review of certain actions taken by the committee thereunder. Thus, the committee should no longer be allowed to be the sole arbiter of the time when, and the conditions under which, a deposit may be made or a withdrawal effected; of the amount of assessments and penalties which may be levied against the security holders; and of the fees and expenses of the committee.

SECTION V

CONCLUSIONS AND RECOMMENDATIONS

The foregoing survey supplies ample evidence of the necessity of refashioning the process of reorganization to the end that primary emphasis be given to the protection of the interests of investors. There are three needs which should be met in this connection.

First: It is essential that measures should be taken to place the control of reorganizations with *bona fide* security holders and their direct representatives. It is their investment which is at stake in any reorganization. The right to be heard in all matters arising in a reorganization proceeding, and the privilege of submitting plans and suggestions for plans should be freely accorded them. The activities of independent groups who represent *bona fide* interests should be encouraged. By the same token, control of reorganizations should be denied to persons whose sole claim is derived from a position in the management of the corporation or from banking associations with it. The history of reorganization demonstrates that the objectives of such persons are often incompatible with the interests of the real owners. Racketeering groups who neither own nor represent *bona fide* interests should be excluded from participation in the reorganization, so that the pressure of their nuisance value will be removed. Similarly, control of reorganizations should not be subject to seizure by financial interests primarily motivated by the desire to obtain control of the new or reorganized company. Likewise, measures should be adopted to deal with those who acquire securities or claims at default prices and either capitalize on their nuisance position or endeavor to effectuate settlements or plans favorable to those who bought at depressed prices but disadvantageous to those who purchased at pre-default prices.

Second: It is essential that renewed emphasis be given to the fact that representatives of security holders in reorganization occupy a fiduciary position. It is intolerable that they or their lawyers should possess dual or multiple interests. Likewise, neither committees nor other participants in reorganization should be permitted to be the sole arbiters of their fees and expenses.

Third: It is essential that the abuses which have characterized the strategy and techniques of reorganization should be eliminated. The use of deposit agreements as means of preserving or obtaining arbitrary and exclusive control over security holders should not be permitted. The virtual monopoly on lists of security holders

possessed by the banker-management groups should be broken. High pressure salesmanship, misrepresentation and non-disclosure in solicitation methods must be controlled, so that security holders may be assured of an honest and complete portrayal of all material facts affecting their investment.

In its operation any legislative program designed to achieve these ends must involve an extension of the supervisory power of judicial or administrative agencies. The federal courts now exercise certain regulatory powers over reorganizations effected under Section 77B of the Bankruptcy Act, and, to a lesser degree, over reorganizations accomplished through the use of the federal equity receivership. In cases arising under Section 77 of the Bankruptcy Act, the court's jurisdiction is supplemented by regulatory powers conferred upon the Interstate Commerce Commission. The Securities and Exchange Commission has a measure of supervision over reorganizations of companies subject to its jurisdiction under the Public Utility Holding Company Act of 1935. Differing powers are possessed by a number of state courts and administrative bodies, some with respect to particular types of companies, such as banks and insurance companies; others with respect to corporations in general. In so far as reorganizations in federal courts are concerned pervasive controls can and should be provided. As respects other reorganizations a further degree of regulation can and should be afforded.

A. REORGANIZATIONS IN FEDERAL COURTS

The federal courts have exercised a jurisdiction over corporate reorganizations which has become traditional. Equity receiverships, and more recently Section 77B of the Bankruptcy Act, have developed a form of proceeding which in its broadest outlines is appropriate and acceptable. The federal courts have become trained and experienced in the technical aspects of reorganization. We do not believe there is any present necessity that they should be divested of control over and responsibility for the administration of these estates by placing the functions which they perform in the hands of administrative agencies. Nor do we believe that such control and responsibility over these estates should be shared by the courts and administrative agencies. Rather, we recommend that the powers of the courts over these estates be broadened, that they be provided with further and more specific standards to guide their administration of them, and that machinery be designed to afford the courts the benefits of administrative assistance in these complicated financial and business situations. That is to say, without disturbing the control by the courts, their powers should be supplemented in particular matters by administrative action. The following recommendations, suggested

EXHIBIT I

New York Law Journal
Volume 237
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Thursday, March 15, 2007

BANKRUPTCY PRACTICE

Information Disclosure by **Distressed Claims** Purchasers

John J. Rapisardi

What started out as a discovery dispute has become a matter which some claim changes the dynamics of chapter 11 cases and sends shockwaves throughout the corporate restructuring and investment communities.

On Feb. 26, 2007, the U.S. Bankruptcy Court for the Southern District of New York upon motion in In re Northwest Airlines Corporation, et al. [FN1] entered an order pursuant to Federal Rule of Bankruptcy Procedure 2019 (Rule 2019) directing the Ad Hoc Committee of Equity Security Holders (the Ad Hoc Committee) to disclose the date each committee member purchased its Northwest common stock and/or creditor claims as well as the price paid for such securities and/or claims. Among the many members of the Ad Hoc Committee are various distressed investment funds representing a little over quarter-billion-dollars in claims and common stock. The Ad Hoc Committee has since moved to file its Rule 2019 statement under seal and has obtained an extension of time to seek an appeal.

Papers submitted by the debtor and the Ad Hoc Committee raise the issue of whether the mandated disclosure of information by the bankruptcy court represents a sea of change in existing practice or merely reaffirmation of a fairly straight forward procedural bankruptcy rule. The answer may be a little bit of both, though this is not the first time investment funds have been required to disclose such information.

Role of Official Versus Unofficial Committees

In a chapter 11 case, a statutory unsecured creditors' committee is appointed by the U.S. Trustee pursuant to §1102 of the Bankruptcy Code. The appointment of a statutory or 'official' committee under §1102 is intended to ensure the formation of at least one group of creditors that is representative of the unsecured creditor constituency in the debtor's chapter 11 case. The Bankruptcy Code also provides for the appointment of additional 'statutory' or 'official' committees if necessary to assure adequate representation of other constituencies, e.g., a group of shareholders or subordinated bondholders.

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In certain cases, groups of creditors or shareholders may organize their own unofficial or 'ad hoc' committee, retain counsel and interact with the debtor and other statutory committees. Ad hoc committees serve an important role in chapter 11 cases as they allow certain constituencies who are not represented by statutory committees a voice in the case, albeit in an 'unofficial' capacity. As seen in the Northwest chapter 11 case, the issue that frequently arises under Bankruptcy Rule 2019 is whether, and to what extent, members of an ad hoc committee must disclosure sensitive information such as the amount they paid for their claims or shares.

Bankruptcy Rule 2019

In the 1930s, a study for the Securities and Exchange Commission (SEC) was conducted on the perceived abuses by unofficial committees in equity receiverships and other corporate reorganizations. The study resulted in Rule 10-211 under Chapter X of the Bankruptcy Act of 1898, as amended by the Chandler Act of 1938, which required the disclosure of 'personnel and activities of those acting in a representative activity' in order to foster fair and equitable plans free from deception and overreaching. [FN2] In short, the rule was designed to ensure an 'insider group' does not manipulate a committee to 'secure a dominant position in the reorganization' and capture control. [FN3]

After the enactment of the Bankruptcy Code in 1978 and the promulgation of the Bankruptcy Rules, Rule 10-211 carried through to the current Federal Rules of Bankruptcy Procedure, Rule 2019. The pertinent portions of Rule 2019 state:

In a ...chapter 11 reorganization case, except [statutory committees], every...committee representing more than one creditor or equity security holder...shall file a verified statement setting forth

(1) the name and address of the creditor or equity security holder;

(2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition;

(3) a recital of...the names or names of the entity or entities at whose instance, directly or indirectly...the committee was organized or agreed to act; and

(4) with reference to the time of...the organization or formation of the committee...the amounts of claims or interests owned by...the members of the committee, the times when acquired, the amounts paid therefore, and any sales or dispositions thereof. [FN4]

At its core, Rule 2019 uses disclosure to regulate ad hoc committees and other representative entities (e.g., class actions classes), over which the bankruptcy court holds no other statutory oversight. In comparison, statutory committees are exempt from Rule 2019 because other means exist by which the bankruptcy court may

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exert authority. Because of the limited oversight over ad hoc committees, bankruptcy courts have used Rule 2019 to verify an ad hoc committee actually represents the claims and interests which such committee purports to represent.

Taking a step back, a significant amount of information mandated by the bankruptcy court in Northwest requires the Ad Hoc Committee to disclose information that is already public. Creditor positions at the commencement of the case are disclosed in the debtor's schedules of assets and liabilities. Notices of Transfer of Claims record any subsequent transfer of legal title of claims and the approximate date thereof. On the equity side, equity security holders disclose equity holdings in their Schedule 13D SEC filings.

What is not public information, however, is the price at which parties purchase claims and stock and the precise times of such purchases. This 'trade data' is the crux of the issue.

As an aside, the effectiveness of any public disclosure is limited, as many claims and shares may be held by proxy through participation or similar agreements. Consequently, who controls the claims or shares may still be hidden, though commentators suggest a court may use Rule 2019 to pierce such agreements. [FN5]

Case Law

A dearth of case law regarding Rule 2019 exists. What little case law has been published discusses the use of the Rule 2019 by debtors to vet attorneys who purport to represent a large class of plaintiffs and bring a class action claim against the debtor's estate. [FN6] The argument is that, if an attorney could not disclose all the members of the class, the attorney could not represent the class in the bankruptcy proceeding and subsequently could not bring the class action claim against the estate.

Despite Rule 2019's mandate, courts have not always uniformly enforced the rule's disclosure requirements. In fact, some commentators have advocated against strict enforcement, even beyond the class action context. [FN7]

In Wilson v Valley Elec. Membership Corp., the district court upheld a bankruptcy court decision which approved a verified statement by an attorney who represented a class of plaintiffs without disclosing all the members within the class. [FN8] In contrast, in In re Ionosphere Clubs, Inc., the bankruptcy court suggested a Rule 2019 statement filed on behalf of a class of claimants must include all 100,000 airline ticket holders in order to be proper. [FN9]

At the end of the day, neither decision is incorrect. Courts uniformly agree the degree to which a bankruptcy court decides to enforce or interpret Rule 2019's requirements is within the bankruptcy court's discretion. [FN10]

Certain courts have crafted measures to protect the contents of Rule 2019 statements. While not requiring the statement to be filed with the court under seal, in

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In re Kaiser Aluminum Corp., the court required parties seeking to access the Rule 2019 statement to file a motion with the court to show cause. [FN11] A similar procedure was also adopted in In re Owens Corning. [FN12]

'Northwest' History

In response to the Ad Hoc Committee's discovery tactics, Northwest filed a motion to impose civil contempt sanctions and seek a protective order from Ad Hoc Committee's discovery requests. In the same motion, Northwest also sought to compel the Ad Hoc Committee to file a verified statement pursuant to Rule 2019 and prohibit the Ad Hoc Committee from participating in the Northwest chapter 11 case until the Ad Hoc Committee filed the Rule 2019 statement.

Rule 2019 requires an ad hoc committee to disclose 'the amounts of claims or interests owned by the members of the committee, the times when acquired, the amounts paid therefore, and any sales or dispositions thereof.' [FN13] In its motion, Northwest contended the Ad Hoc Committee failed to disclose these items.

The Ad Hoc Committee responded that the Rule 2019 statement already filed with the bankruptcy court was sufficient. The statement on file named each of the 13 committee members, who collectively owned a sum of 19,065,644 shares of Northwest common stock as well as claims against the estate in the aggregate amount of $264,287,500. Further, the Ad Hoc Committee contended that Rule 2019 required the committee to disclose information about the committee as a whole, not the individual committee members. As such, the Ad Hoc Committee argued Rule 2019 did not require each committee members to disclose the value of its claim, the purchase price, the purchase time and sales or dispositions thereof.

As noted above, the bankruptcy court granted Northwest's motion, and ordered the Ad Hoc Committee to amend its Rule 2019 statement which, as filed, failed to include 'the amounts of claims or interests owned by the members of the committee, the times when acquired, the amounts paid therefore, and any sales or dispositions thereof.'

'Northwest' Court's Analysis

The Ad Hoc Committee's primary challenge to Northwest's motion was that Rule 2019 applies to the committee as a whole, not the individual committee members. Counsel to the Ad Hoc Committee argued that because no member of the committee represented any party other than itself, counsel to the Ad Hoc Committee was the only entity that represented more than one creditor. Accordingly, because the Ad Hoc Committee's counsel held no claims or interests in the Debtors, the detailed disclosure requirements of Rule 2019 should not apply.

In dismissing the Ad Hoc Committee's argument, the bankruptcy court noted that while the Ad Hoc Committee acted as a committee, the committee members must disclose the information required by the plain language of Rule 2019. In rejecting the Ad Hoc Committee's arguments, the bankruptcy court stated:

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Rule [2019] cannot be so blithely avoided. [Ad Hoc Committee Counsel's] clients appeared in these chapter 11 cases as a 'Committee.' Their notice of appearance was as a committee, and it is the 'Ad Hoc Committee' that has moved for the appointment of an official shareholders' committee and has been actively litigating discovery issues in numerous hearings and conferences before the court. Counsel was retained by 'Committee' and is compensated by the 'Committee' on the basis of work performed for the 'Committee' (and not each individual member). The law firm does not purport to represent the separate interests of any Committee member; it takes instructions from the Committee as a whole and represents one entity for purposes of Rule 2019. [FN14]

The bankruptcy court further observed that there could be a situation where a law firm represented several clients and it was the only entity required to file a Rule 2019 statement on its own behalf. However, the court quoted relevant case law commenting on the scope of Rule 2019: 'Rule 2019 more appropriately seems to apply to the formal organization of a group of creditors holding similar claims, who have elected to consolidate their collection efforts.' [FN15] The Northwest bankruptcy court observed 'that exactly is the situation in this case, except here there are shareholders rather than creditors.' [FN16]

The bankruptcy court also noted the following:

• the importance of ad hoc or unofficial committees in restructuring cases;

• by appearing as a committee of shareholders, the Ad Hoc Committee purported to speak as a group and implicitly sought a 'degree of credibility' in the chapter 11 case; and

• at some point in the chapter 11 case, the Ad Hoc Committee 'purporting to speak for a group' could, perhaps, have a better chance in requesting compensation under the Bankruptcy Code if they established a 'substantial contribution' to the chapter 11 case.

As such, the bankruptcy court concluded the Ad Hoc Committee's Rule 2019 statement failed to provide 'the amounts of claims or interests owned by the members of the committee, the times when acquired, the amounts paid therefore, and any sales or dispositions thereof' [FN17] and ordered the Ad Hoc Committee to comply with Rule 2019 and file an amended statement.

Conclusion

While garnering much attention, the disclosure of information is not unprecedented. As such, the bankruptcy court's Northwest decision merely enforces the plain language of Rule 2019. Nonetheless, in the future, debtors and other parties in interest may use Rule 2019 to gain access to increase bargaining leverage or trade data. Courts, however, are within their discretion to apply Rule 2019 as they see fair and just.

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FN1. Case No. 05-17930 (ALG). See Memorandum of Opinion and Order dated Feb. 26, 2009 (the Opinion).

FN2. Baron & Budd, P.C. v. Unsecured Asbestos Claimant Committee, et al., 321 BR 147, 166 (D. N.J. 2005).

FN3. Id.; Federal Rule of Bankruptcy Procedure 2019 advisory committee note.

FN4. Federal Rule of Bankruptcy Procedure 2019(a)(1)-(3).

FN5. Colliers on Bankruptcy §2019.5[2] (15th ed. 2006).

FN6. See Wilson v. Valley Elec. Membership Corp., 141 BR 309, 314 (E.D. La. 1992); In re Ionosphere Clubs, Inc., 101 BR 844, 852 (Bankr. SDNY 1989).

FN7. Id.; Colliers on Bankruptcy §2019.04[4] (15th ed. 2006).

FN8. Wilson v. Valley Elec. Membership Corp., 141 BR 309, 314 (E.D. La. 1992).

FN9. In re Ionosphere Clubs, Inc., 101 BR 844, 852 (Bankr. SDNY 1989).

FN10. Baron & Budd, P.C., 321 BR at 166; In re Kaiser Aluminum Corp., 327 BR 554, 559 (D. Del. 2005).

FN11. In re Kaiser Aluminum Corp., 327 BR 554, 559 (D. Del. 2005).

FN12. In re Owens Corning, et. al., Case Nos. 00-3837-3854(JFK) [Docket No. 12968] at 55.

FN13. Federal Rule of Bankruptcy Procedure 2019(4).

FN14. Opinion pp. 4-5.

FN15. Id. at 5.

FN16. Id.

FN17. Id. at 4.

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EXHIBIT J

BUSINESS BANKRUPTCY COMMITTEE
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08-BK-P

REPORT OF THE BUSINESS BANKRUPTCY COMMITTEE SPECIAL TASK FORCE ON BANKRUPTCY RULE 2019

MICHAEL ST. PATRICK BAXTER
CHAIR, BUSINESS BANKRUPTCY COMMITTEE

DECEMBER 12, 2008

REPORT OF THE BUSINESS BANKRUPTCY COMMITTEE
SPECIAL TASK FORCE ON BANKRUPTCY RULE 2019

December 12, 2008

Introduction

The Judicial Conference of the United States Advisory Committee on Bankruptcy Rules has asked the Business Bankruptcy Committee to comment on a proposal to repeal or amend Bankruptcy Rule 2019. The Chair of the Business Bankruptcy Committee established the Special Task Force on Bankruptcy Rule 2019 (the "Task Force") to review and provide comments, suggestions and recommendations on the proposal to repeal or amend Bankruptcy Rule 2019. The Task Force was comprised of the Chairs or Vice-Chairs of the following Subcommittees: (1) Rules Subcommittee, (2) Avoiding Powers Subcommittee; (3) Trust Indentures; (4) Corporate Governance, (5) Bankruptcy Crimes, Fraud and Abuses of Bankruptcy Process, (6) E-Newsletter; (7) Claims Trading, (8) Secured Creditors; (9) Legislation; (10) Current Developments; (11) Partnerships and Limited Liability Entities in Bankruptcy; and (12) Legislation.

The following is the report of the Task Force **THIS REPORT DOES NOT REPRESENT THE OFFICIAL POLICY OR POSITION OF THE AMERICAN BAR ASSOCIATION.**

Background

A History of Rule 2019

Rule 2019 provides, in relevant part, as follows·

> (a) Data Required. In a chapter 9 municipality or chapter 11 reorganization case. .every entity or committee representing more than one creditor or equity security holder. shall file a verified statement setting forth
>
> (1) the name and address of the creditor or equity security holder;
>
> (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition,
>
> (3) .. in the case of a committee, the name or names of the entity or entities at whose instance...the employment was arranged or the committee was organized and agreed to act, and

> (4) .. the amounts of claims or interests owned by the entity, the member of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof

Fed. R Bankr. P. 2019 (a).

Bankruptcy Rule 2019 (and its predecessor rules) has existed for nearly 70 years. It is a disclosure rule designed to facilitate open and fair negotiations in reorganization proceedings. Bankruptcy Rule 2019 is derived from Rule 10-211 of the former Chapter X of the Bankruptcy Act. Rule 10-211 was enacted following the SEC Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1937) (the "SEC Report").

The SEC Report examined perceived abuses by unofficial committees in corporate reorganizations The SEC Report examined the then common practice of the formation of "protective committees," which were formed to protect the interests of security holders, but in practice were often dominated by insiders, financial advisors or other parties with potential or actual conflicts. The SEC Report noted that other security holders may be misled by such groups' participation in a reorganization by the mistaken belief their cause would be well served by the committees *In re Northwest Airlines,* 363 B.R. 701 at n.6 (S.D N.Y 2007)(quoting SEC Report at 880) As such, the SEC Report recommended "that persons who represent more than 12 stockholders . . be required to file with the court a sworn statement containing the information now required by Rule 2019." *Northwest*, 363 B R. at 704. Bankruptcy Rule 2019 is substantially the same as its predecessor rule under Chapter X of the Bankruptcy Act

<u>*B The Northwest and Scotia Decisions*</u>

Courts in the past often have not required strict compliance with the disclosure requirements of Bankruptcy Rule 2019 However, as hedge funds and other distressed security investors began to participate more frequently in reorganization proceedings, parties in interest began to focus more on Bankruptcy Rule 2019 and whether Bankruptcy Rule 2019 was being followed, because these parties are more likely to form unofficial committees and actively trade debt prior to and after the commencement of a Chapter 11 case

A dispute over the scope of the disclosure required by *ad hoc* committees recently erupted in the *Northwest* case. In *Northwest*, an *ad hoc* committee of equity security holders entered an appearance in the case and filed a Bankruptcy Rule 2019 disclosure statement that did not include the amounts of claims or interests owned by members of the committee, the times when acquired, the amounts paid for the interests, and any sale or disposition of the interests. *Northwest*, 363 B R. at 701. The Debtors filed a motion seeking to compel the *ad hoc* committee to disclose this information and the *ad hoc* committee opposed its disclosure. The *ad hoc* committee contended that this information was confidential proprietary information and that disclosing it would be highly

prejudicial. The Court found that Bankruptcy Rule 2019 required the members of the *ad hoc* committee to disclose this information. In support of its ruling, the Court noted that *ad hoc* committees play an important part in the reorganization process and by appearing as a committee, the members purport to speak for a group and ask the Court and other parties to give their positions a level of credibility that is appropriate for a large group. *Id.* at 703. In a subsequent decision, the court denied the committee's request to file the disclosures under seal *In re Northwest Airlines Corp*, 363 B.R. 704, 706 (Bankr. S.D N.Y 2007).

This issue also surfaced in *In re Scotia Development, LLC*, Case No. 07-20027 (Bkrtcy. S.D. Tex). Many of the same arguments (both for and against disclosure) were raised in *Scotia*. However, the Court never reached the merits of how Bankruptcy Rule 2019 should be applied. In *Scotia*, a group of noteholders claimed that they were not subject to the disclosure requirements of Bankruptcy Rule 2019 because they were just a group of different noteholders represented by the same law firm The Court agreed It found that the *ad hoc* group of noteholders appearing before it was not a committee but rather "just one law firm representing a bunch of creditors " Tr. of Hearing, at 5 The *Scotia* Court went on to remind counsel for such creditors that counsel has an ethical obligation to disclose conflicts The *Scotia* Court did not elaborate on the basis for its determination or publish an opinion on the matter.

Subsequent to the *Northwest* and *Scotia* decisions, issues involving Bankruptcy Rule 2019 have been raised in reorganization proceedings with greater frequency.

C The Proposal to Repeal or Amend Bankruptcy Rule 2019

The Loan Syndications and Trading Association ("LSTA") and the Securities Industry and Financial Markets Association ("SIFMA") are currently seeking to have Bankruptcy Rule 2019 repealed. The primary issue which they have raised as a concern is the requirement that *ad hoc* committee members in Chapter 11 cases disclose the purchase price and purchase date of distressed securities that they hold. LSTA and SIFMA contend this type of information, *i e.*, the trade date and purchase price of distressed securities, is proprietary information confidential to the purchaser and that requiring the disclosure of the purchase price and trade date will have a chilling effect on the willingness of distressed security investors to (a) trade in such distressed securities in the future, and (b) participate in the bankruptcy process. They further contend that the chilling effect on distressed security investors will result in more expense and time for Bankruptcy Courts because, without ad hoc committees, the Courts will be clogged with duplicative pleadings filed by similarly situated claimholders.

Comments, Suggestions and Recommendations

The Task Force has reviewed numerous materials regarding the issues associated with the proposed repeal of Bankruptcy Rule 2019 including the November 30, 2007 letter by LSTA and SIFMA, relevant case law on the subject, law review articles and other information addressing these issues. Upon careful consideration, the Task Force believes

that Bankruptcy Rule 2019 should not be repealed. The Task Force believes that disclosure of certain minimum information is necessary and important for understanding the motivations of parties in negotiations in the reorganization process.[1]

The Task Force believes that several modifications should be considered to clarify the language contained in Bankruptcy Rule 2019 and to help achieve the main purpose of Bankruptcy Rule 2019, namely transparency

1. Bankruptcy Rule 2019 should be amended to apply uniformly to *ad hoc* committees, official committees, and all other groups of claim or equity holders who band together through shared professionals to advance common positions and strategies.

2. Bankruptcy Rule 2019 should be amended to include a provision giving the Bankruptcy Court authority, upon the showing of good cause by a party in interest, to enter an order waiving the requirement of disclosure of the purchase price or trade date information or other information that a claim or equity holder believes is confidential proprietary information. The burden to establish good cause should be on the party in interest seeking relief from the disclosure requirements of Bankruptcy Rule 2019. In determining whether good cause exists, the Bankruptcy Court should take into consideration, among other things, whether the information sought to be withheld is a confidential trade secret that would more properly be filed under seal and whether the group of claim or equity holders at issue represents a material portion of the holders of such claims or equity interests

3. Bankruptcy Rule 2019(a)(4) should be amended to provide more clarity as to when supplemental disclosure is required. Bankruptcy Rule 2019(a)(4) should not be triggered every time that a trade is made. There should be a cumulative trading threshold before Bankruptcy Rule 2019(a)(4) is triggered. Additionally, it is advisable to clarify in the Rule the timing for when supplemental disclosures are required.

The Task Force believes that the disclosure requirements of Bankruptcy Rule 2019 are important to maintaining the transparency of the bankruptcy process. The proposed amendments will help further the transparency and openness that is necessary to facilitate fair and orderly negotiations in reorganization proceedings

[1] The Task Force understands that the National Bankruptcy Conference is also examining Bankruptcy Rule 2019 Specifically, the National Bankruptcy Conference is focusing its review of Bankruptcy Rule 2019 on the issue of cross-voting, *i e*, one holder holds debts or securities in different parts of the capital structure and votes against the remaining holders' interests in one class to further its interest in another class

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EXHIBIT K

American Bankruptcy Institute Journal
March, 2009

Feature

***58** SHOW AND TELL: AD HOC COMMITTEES' RULE 2019 DISCLOSURES UNDER EXAMINATION

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Unofficial (or *ad hoc*) committees, including committees of secured (or undersecured) lenders, equity-holders, noteholders and trade creditors, have long been a feature of chapter 11 cases. Such committees are typically comprised of claimants or interest-holders that are similarly situated but believe they are not adequately represented on an official creditors' committee or hold unique claims against a debtor. Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure, unofficial committees in chapter 9 and chapter 11 cases [FN2] are required to disclose information about their claims or interests including, among other things, (1) the nature and amount of their claims or interests, (2) the date of acquisition of their claims or interests acquired in the year before filing of the bankruptcy cases, (3) the amount paid and (4) any subsequent sales of claims or interests. [FN3]

Historically, such disclosures were not rigorously enforced. In many cases, if any disclosure was made by an *ad hoc* committee, it would include only the names of the members of the committee and the amount of their claim. However, in recent cases debtors and others have sought to compel strict compliance with Rule 2019's required disclosures. [FN4] Entities that buy and trade securities--especially when purchased at a discount--are generally reluctant to share with the public the information required by Rule 2019 because, among other things, (1) they may be actively trading in the market. (2) disclosure may weaken their bargaining power and (3) disclosure may illuminate actual or perceived conflicts where members hold different types of claims against or interests in a debtor. Efforts to enforce Rule 2019's disclosure requirements have been met with fierce opposition in court, and more recently, there have been efforts to repeal the rule altogether.

The efforts to resist the effects of Rule 2019 moved beyond a case-by-case defense in November 2007 and became a concerted effort by its opponents to repeal it altogether. The Loan Syndications and Trading Association (LSTA) and Securities Industry and Financial Markets Association (SIFMA) submitted a joint letter to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States suggesting the repeal of Rule 2019. The American Bar Association's Business Bankruptcy Committee and the National Bankruptcy Conference submitted position papers in response in December 2008, arguing that Rule 2019 should be maintained, although both recommended that it be amended. [FN5] The fight over the scope of Rule 2019 and its very existence promises to be a hard-fought battle in the coming years.

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This article will examine (1) the role and responsibilities of *ad hoc* committees in contrast to the role and responsibilities of official committees, (2) the purpose behind the enactment of Rule 2019, (3) recent decisions that have refocused scrutiny on the rule and (4) the arguments against repeal or limitation of the scope of disclosures the rule requires.

Differing Roles and Responsibilities of Ad Hoc and Vis-a-Vis Committees

An official committee of unsecured creditors is generally appointed by the U.S. Trustee in a chapter 11 case and is comprised of holders of different types of unsecured claims. As such, claimants with competing goals and objectives will often sit on the same official committee. [FN6] This is beneficial to the chapter 11 process because it encourages resolution of intercreditor disputes through compromise and negotiation rather than through litigation. [FN7] In addition, official committees have a fiduciary duty to their constituencies and cannot use the forum of the creditors' committee to advance their own parochial interests. [FN8] Finally, official committees are selected by the U.S. Trustee--often after filling out a questionnaire disclosing conflicts. The U.S. Trustee also has protocols in place to monitor potential conflicts when appointing committee members and can reconstitute committees where necessary. [FN9]

Ad hoc committees are self-appointed--and therefore unregulated--groups that generally represent a single type of claim against a debtor even though members of the group may hold various types of claims. For example, an *ad hoc* committee may represent the interests of senior unsecured noteholders, but some or all of the committee members may hold secured debt, subordinated notes or equity interests in the debtor. Typically, *ad hoc* committees will appear in cases where similarly-situated claimants believe that they have unique rights that will not be adequately advocated by an official committee or where parties (such as secured creditors or equity-holders) cannot sit on an official committee of unsecured creditors. The benefits of acting as an unofficial committee include (a) sharing ***59** costs of counsel and other professionals, (b) increased bargaining power, (c) presenting a united front to the debtor and other stakeholders and (d) avoiding fiduciary obligations to other parties.

On the other hand, *ad hoc* committee members may hold interests adverse to one another and they do not generally owe each other or any other stakeholder a fiduciary duty. As such, there is considerable room for members of an *ad hoc* committee to co-opt the process or act in a manner detrimental to the other members or other stakeholders in the bankruptcy estate. In addition, committee members are often, but not always, entities that purchased securities at a discount. As such, their interests are not necessarily aligned with other creditors, such as trade creditors or par purchasers of securities. In fact, the economic interests of par purchasers and discount purchasers sitting on the same committee may diverge. Finally, participation by one or more *ad hoc* committees in a case may encourage more aggressive bargaining or litigation among creditor groups, because a committee only represents one group of claims and is not as compelled to reach negotiated settlements among creditors as a member of an official committee holding a spectrum of claims.

Rule 2019 Was Implemented to Prevent Abuses by Unofficial Committees

The Bankruptcy Code recognizes the importance of *ad hoc* committees, and Rule 2019 provides a means of mitigating the risks of their participation in the reorganization process. Rule 2019 is derived from Rule 10-211 of chapter X of the old Bankruptcy Act, which was adopted largely as a result of a Securities and Exchange Commission (SEC) report on the "Study and Investigation of the Work. Activities, Personnel and Functions of Protective and Reorganization Committees" (1937), [FN10] and "is part of the disclosure scheme of the Bankruptcy Code and is designed to foster the goal of reorganization and plans which deal fairly with creditors and which are arrived at openly." [FN11] The SEC report examined perceived abuses by unofficial committees in corporate reorganizations, [FN12] and focused on the practice of formation of "protective committees." These unofficial committees were

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formed ostensibly to protect the interests of security holders, but in practice were often dominated by insiders, financial advisors or other parties with potential or actual conflicts. According to the SEC report, dominant members of the protective committees often acquired their claims or interests at "default prices" and sought either to "capitalize on their nuisance value or endeavor to effectuate settlements or plans favorable to those who bought at depressed prices but disadvantageous to those who purchased at predefault prices." [FN13] The report noted that other security holders may be misled by such groups' participation in a reorganization by the mistaken belief "that in the hands of these self-styled independents their cause will be honestly and rigorously served." [FN14] As such, the report recommended "that persons who represent more than 12 stockholders ... be required to file with the court a sworn statement containing the information now required by Rule 2019" [FN15] in order to "provide a routine method of advising the court and all interested parties in interest of the actual economic interest of all persons participating in the proceedings." [FN16] This recommendation was embodied in what is now Rule 2019.

Rule 2019 Has Recently Been the Subject of Renewed Enforcement Efforts

Although adherence to Rule 2019's disclosures by *ad hoc* committees has historically been lax, as hedge funds, private equity firms and other purchasers of distressed securities have increased their role in chapter 11 cases--often through *ad hoc* committees--and the debtors' capital structures have increased in complexity, there have been renewed efforts to strictly enforce Rule 2019's disclosure requirements with respect to members of *ad hoc* committees.

In recent cases, *ad hoc* committees have argued that Rule 2019 does not apply to them because (a) they are merely groups of creditors that are represented by one counsel, rather than committees acting in a representative capacity on behalf of a larger group, and (b) Rule 2019 only applies to *fiduciary* committees. [FN17] Rule 2019 in its plain language applies to committees other than official committees. [FN18] Clearly, in the era of claims trading and shifting interests in chapter 11 cases, the question of what types of entities qualify as a "committee" pursuant to Rule 2019 is an important issue to resolve.

The bankruptcy court in *In re Northwest Airlines Corporation (Northwest)* answered that question when it held that members of an *ad hoc* committee of equity security-holders must disclose the amount of their interests, price paid, dates purchased and any subsequent sales thereof. [FN19] The ***Northwest*** court noted that "*[a]d hoc* or unofficial committees play an important role in reorganization cases. By appearing as a committee of shareholders, the members purport to speak for a group and implicitly ask the court and other parties to give their position a degree of credibility appropriate to a unified group with large holdings." [FN20] In ***Northwest***, the bankruptcy court applied the following factors in support of its holding that the *ad hoc* committee of equityholders in that case was required to file Rule 2019 disclosures: (1) the *ad hoc* committee filed a single notice of appearance; (2) the members appeared as a "committee"; (3) the *ad hoc* committee moved for appointment of an official committee of equity securityholders; (4) the *ad hoc* committee actively litigated discovery issues and other matters; (5) the *ad hoc* committee's counsel was paid for its action on behalf of the committee and not individual members; and, (6) the *ad hoc* committee's counsel took instructions from the ad hoc committee as a whole and did not represent the interests of any individual member. [FN21]

Thereafter, parties in other cases sought to compel similar disclosures from members of *ad hoc* committees. For example, in the *Pacific Lumber* case, [FN22] the court declined to compel ***81** strict enforcement of Rule 2019. [FN23] The court ruled in an oral decision that the *ad hoc* group of noteholders was not a committee but rather "just one law firm representing a bunch of creditors." [FN24]

To the extent any conclusions can be drawn from these two cases, it appears that the ***Northwest*** court was swayed by the *common purpose* of the *ad hoc* committee before it, and that the retention of a single law firm was one piece of evidence of that common purpose. In contrast, the court in *Pacific Lumber* did not address whether

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members of the group before it had a common purpose.

Controversy: Should Rule 2019 Be Amended or Repealed?

In light of the renewed efforts to enforce the disclosure requirements of Rule 2019, there have been calls to repeal or limit the scope of the disclosures by industry groups such as LTSA and SIFMA [FN25] because, in their opinion, among other things: (1) Rule 2019 disclosures are unlikely to provide information that assists parties in reaching successful resolution of a case; (2) the information required by Rule 2019 is available through existing discovery methods; (3) Rule 2019 is improperly limited to *ad hoc* committee members and does not apply to members of official committees; and (4) Rule 2019 discourages active participation in the chapter 11 process. On the other hand, groups including the American Bar Association and the National Bankruptcy Conference have argued that Rule 2019 should not be repealed or amended to limit the scope of disclosures currently required of members of unofficial committees.

These arguments must be considered in light of Rule 2019's goal of illuminating the chapter 11 process through disclosure of potential conflicts and the actual economic interests of participants in the process. The purpose of Rule 2019 is to "further the Bankruptcy Code's goal of complete disclosure during the business reorganization process." [FN26] The Rule fulfills ***82** that purpose by assuring that all participants in the reorganization process are aware of the actual economic stake of members of an *ad hoc* committee. This awareness fosters a more open negotiation process, mitigates certain gamesmanship aspects of negotiation and allows parties to obtain at the outset of negotiations information that is not necessarily available without seeking discovery. In addition, the role and responsibilities of official committees, as well as the process of selecting members, serve to mitigate the concerns that led to enactment of the disclosure requirements for unofficial committees.

Rule 2019 levels the playing field because it assures that parties will not mistakenly rely on *ad hoc* committees appearing to represent their interests and all stakeholders know with whom they are negotiating or litigating. This helps resolve cases because it prevents the gamesmanship attendant to any process in which certain stakeholders are not aware of the type and scope of the actual economic interest of negotiating counterparties. In other words, limiting the scope of disclosures would in effect cause aspects of the chapter 11 process to resemble a poker game where other players have to guess which cards the *ad hoc* committee members actually hold. That will not further the goal of a successful reorganization; instead, it will lead to increased guesswork and in turn delay as parties try to figure out with whom they are negotiating.

Rule 2019 disclosures also allow creditors who may be similarly situated with an *ad hoc* committee to determine whether the committee truly represents the interests of one creditor group or is acting to pursue the parochial interests of the *ad hoc* committee members (which can be comprised of as few as two members). Such disclosure fits squarely within the concerns that Rule 2019 was designed to address. The disclosures foster, rather than impede, negotiations because the other stakeholders (typically other creditors and the debtor) know with whom they are negotiating (*e.g.*, secured, undersecured or unsecured creditors or equityholders).

At first blush, it appears that Rule 2019 may be "underinclusive" because it does not require similar disclosure from members of official committees. However, because official committees have a fiduciary obligation to all similarly situated creditors, parties relying on official committees are afforded some measure of protection from abuses. Moreover, official committees are regulated by the court in other ways: the court can change the membership of official committees, [FN27] review an application of counsel for employment, including counsel's conflicts disclosures, [FN28] and can review a counsel's requests for compensation. [FN29] In addition, members of official committees, by design, often have claims that conflict with other members' claims. As such, official committees do not lend themselves to the abuse perceived by the drafters of the SEC report with respect to unofficial committees. Nev-

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ertheless, the ABA report recommends that Rule 2019 be *expanded* to require disclosure by official committees, as well as unofficial committees.

Rule 2019 also prevents drawn-out discovery and unnecessary delay by requiring disclosures from the outset. While Rule 2019 disclosures can probably be obtained through available discovery methods, compelling discovery of the information required by Rule 2019 would likely only add a layer of confusion in chapter 11 cases because any discovery requests would undoubtedly cause delay that is attendant to any discovery process. Clearly, delay could ensue as parties seek protective orders, produce reams of trading data or litigate over the scope of discovery. Rule 2019 short-circuits any delay by requiring disclosure at the start of the process, thereby minimizing the likelihood of delay while the scope of claims-trading data is produced and analyzed.

Conclusion

Although *ad hoc* committees may be justified in their hesitancy to provide some or all of the disclosures required by Rule 2019, the rationale underpinning the rule--concern about unofficial committees without checks and balances attendant to official committees--is still valid. As such, while there has been renewed focus on Rule 2019 in the wake of the ***Northwest*** decision, unofficial groups acting in concert and represented by one set of attorneys should continue to disclose their economic stake in the process as a check against actual or perceived abuses.

[FNa1]. *Ilan Scharf is an associate in the New York office of Pachulski Stang Ziehl & Jones LLP.*

[FN1]. The author thanks Samuel R. Maizel for his valuable insights and commentary on drafts of this article. Any opinions in this article reflect the personal views of the author and should not be construed as the views of Pachulski Stang Ziehl & Jones LLP or any of its clients.

[FN2]. Rule 2019 does not require similar disclosures of official committees.

[FN3]. Fed. R. Bankr. P. 2019(a)(4).

[FN4]. These decisions have been the subject of prior articles in this publication (*see* n. 24, ***infra***) and law reviews. *See e.g.*, Sparkle L. Alexander, Note, *The Rule 2019 Battle--When Hedge Funds Collide with the Bankruptcy Code*, 73 Brook. L. Rev. 1411 (2008); James M. Shea Jr., *Who is at the Table? Interpreting Disclosure Requirements for Ad Hoc Groups of Institutional Investors Under Federal Rule of Bankruptcy Procedure 2019*, 76 Fordham L. Rev. 2561 (2008); Kevin J. Coco, *Empty Manipulation: Bankruptcy Procedure Rule 2019 and Ownership Disclosure in Chapter 11 Cases*, 2008 Colum. Bus. L. Rev. 610 (2008).

[FN5]. *See* National Bankruptcy Conference's Letter to the Advisory Committee on Bankruptcy Rules on Sept. 22, 2008, available at www.nationalbankruptcyconference.org/other_communications.cfm (last visited on Dec. 24, 2008). *The Report of the Business Bankruptcy Committee Special Task Force on Bankruptcy Rule 2019*, dated Dec. 12, 2008 (ABA Report), is available from the author.

[FN6]. *See, e.g., Mirant Americas Energy Marketing LP v. Official Comm. of Unsecured Creditors of Enron Corp. (In re Enron Corp.)*, 2003 WL 22327118*7 (S.D.N.Y. Oct. 10, 2003) ("Often single committees represent what can be characterized as different 'classes' of unsecured creditors.").

[FN7]. *See, e.g., In re Enron Corp.*, 279 B.R. 671, 688-89 (Bankr. S.D.N.Y. 2002) (quoting *In re Sharon Steel Corp.*, 100 B.R. 767, 779 (Bankr. W.D. Pa. 1989) ("this case will succeed or fail to the extent members of the Offi-

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cial Committee can adjust their differences within the framework of the existing Official Committee.").

[FN8]. *See, e.g.,* Westmoreland Human Opportunities Inc. v. Walsh (In re Life Service Sys. Inc.), 246 F.3d 233, 256 (3d Cir. 2001) (remanding case for determination of whether creditor committee member breached its fiduciary duty) (citing *In re PWS Holding Corp.,* 228 F.3d 224, 246 (2d Cir. 2000)). *See also Official, Unsecured Creditors' Comm. v. Stern (In re SPM Mfg. Corp.),* 984 F.2d 1305, 1315 (1st Cir. 1993) (creditors' committees owe fiduciary duty to their constituency).

[FN9]. *See generally United States Trustee Manual* at chapters 3-4 (available at www.usdoj.gov/ust/eo/ust_org/ustp_manual/volume3/vol3ch04.htm#3-4.2.4.4 (last viewed on Dec. 23, 2008)). Parties in interest can also seek to reconstitute the membership of a committee. 11 U.S.C. §1102(a)(4).

[FN10]. A copy of the SEC report is available at www.sechistorical.org/collection/papers/1930/1937_0514_DefaultedForeign.pdf (last viewed on Dec. 30, 2008).

[FN11]. Alan N. Resnick and Henry J. Sommer, 9 *Collier on Bankruptcy,* ¶2019.01 at 2019-3 (15th ed. rev. 2008).

[FN12]. *See generally, **In re Northwest Airlines Corp.,*** **363 B.R. 701 (Bankr. S.D.N.Y. 2007)** ***(Northwest I);*** *In re Northwest Airlines Corp.,* 363 B.R. 704 ***(Northwest II).***

[FN13]. SEC Report at 897.

[FN14]. *Northwest II,* 363 B.R. at 708 n. 6 (quoting SEC Report at 880).

[FN15]. *Id.* at 704.

[FN16]. SEC Report at 702.

[FN17]. *See, e.g.,* Objection of the *Ad Hoc* Lenders' Committee to Motion of Wachovia Bank, National Association for Order Compelling *Ad Hoc* Committee to Fully Comply with Bankruptcy Rule 2019. *In re Le-Nature's Inc.,* Case No. 06-25454-MBM (Bankr. W.D. Pa. May 25, 2007) (Le-Nature's Objection) (arguing that *ad hoc* committee in that case was "fee sharing *consortia*" of "like-minded stakeholders").

[FN18]. *See, e.g., Barron & Budd PC v. Unsecured Asbestos Claimants Comm.,* 321 B.R. 147, 166 (D. N.J. 2005).

[FN19]. **363 B.R. 701 (Bankr. S.D.N.Y. 2007)**.

[FN20]. ***Id.*** **at 703.**

[FN21]. ***Id.*** In a subsequent decision, the ***Northwest*** court held that Rule 2019 disclosures could not be filed under seal. *Northwest II,* 363 B.R. at 706 (Bankr. S.D.N.Y. 2007). Subsequently, the *ad hoc* committee of equity securityholders in the ***Northwest*** case filed an amended statement pursuant to Rule 2019 disclosing, among other things, that five of the nine *ad hoc* committee members held claims against the debtor in addition to their equity holdings. Verified Amended Statement of the *ad hoc* committee of equity securityholders pursuant to Bankruptcy Rule 2019(a). *In re Northwest Airlines Corp.,* Case No. 05-17930 (ALG) (Bankr. S.D.N.Y., Mar. 21, 2007) [Docket No. 5446].

[FN22]. The cases were jointly administered under the lead case captioned *In re Scotia Development LLC,* chapter

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11 Case No. 07-20027 (Bankr. S.D. Tex.) *(Pacific Lumber)*. For more information on these cases, visit the Web site established by the creditors' committee in the case, at www.pszjlaw.com/creditor-4.html.

[FN23]. Tr. of April 17, 2007, Hearing at 4-5, Docket No. 696, *In re Scotia Devel, LLC*, No. 07-20027, 2007 WL 2726902 (Bankr. S.D. Tex.).

[FN24]. *Id.* at 5:1-2. The ***Northwest*** and *Pacific Lumber* decisions have been the subject of prior articles in this publication that were written shortly after the decisions were issued. In the first article, the authors provided a detailed recital of the actions taken by members of the *ad hoc* committee in ***Northwest*** and appear to assume that the decision was correct. The article also raised the question of whether the decision would chill distressed-purchasers' participation in chapter 11 cases. *See* Mark Berman & Jo Ann J. Brighton, "Will the Sunlight of Disclosure Chill Hedge Funds?." *Am. Bankr. Inst. J.*, May 2007. In a subsequent article, different authors (who represented the *ad hoc* committee in the *Pacific Lumber* case) presented distressed investors' point of view of these issues. They make the same arguments later raised by SIFMA and LTSA and also argued that requiring full disclosures (as the ***Northwest*** court did) would limit *ad hoc* committee members' access to the courthouse and infringe on their property rights in the process. *See* Evan D. Flaschen & Kurt A. Mayr, "Bankruptcy Rule 2019 and the Unwarranted Attack on Hedge Funds," *Am. Bankr. Inst. J.*, Sept. 2007. This article endeavors to pick up where these articles left off by focusing on the objective of Rule 2019 and the role of *ad hoc* committees *vis-à-vis* official committees and the more strategic efforts by SIFMA and LTSA to repeal the rule in an effort to avoid piecemeal litigation of the issue.

[FN25]. *See, e.g.*, Minutes of the March 27-28, 2008 Meeting of the Advisory Committee on Bankruptcy Rules at p21-22, available at www.uscourts.gov/rules/Minutes/BK03-2008-min.pdf (last visited Dec. 24, 2008).

[FN26]. *In re CF Holding Corp.*, 145 B.R. 124, 126 (Bankr. D. Conn. 1992).

[FN27]. *See* 11 U.S.C. §1102(a)(4).

[FN28]. *See* 11 U.S.C. §§328 and 1103; Fed R. Bankr. P. 2014.

[FN29]. *See* 11 U.S.C. §328.

28-MAR Am. Bankr. Inst. J. 58

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EXHIBIT L

1

2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 09-50002

5 -x

6 In the Matter of:

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8 CHRYSLER LLC, et al.

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10 Debtors.

11 -x

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13 United States bankruptcy court

14 One Bowling Green

15 New York, New York

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17 May 5, 2009

18 3:35 PM

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20 B E F O R E:

21 HON. ARTHUR J. GONZALEZ

22 U.S. BANKRUPTCY JUDGE

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2 Hearing re Motion of Debtors and Debtors-in-Possession,

3 Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code

4 and Bankruptcy Rules 2002, 6004 and 6006, for (A)An Order

5 (i)Approving Bidding Procedures and Bidder Protections for the

6 Sale of Substantially All of the Debtors' Assets; and

7 (ii)Scheduling a Final Sale Hearing and Approving the Form and

8 Manner of Notice Thereof; and (B)an Order (i)Authorizing the

9 Sale of Substantially All of the Debtors' Assets, Free and

10 Clear of Liens, Claims, Interests and Encumbrances; (ii)

11 Authorizing the Assumption and Assignment of Certain Executory

12 Contracts and Unexpired Leases in Connection Therewith and

13 Related Procedures; and (iii)Granting Certain Related Relief

14 (Procedures Order)

15

16 HEARING re Motion by the Chrysler Non-TARP Lenders for Order

17 Authorizing White & Case LLP to File in Redacted Form and Under

18 Seal Verified Statement Pursuant to Bankruptcy Rule 2019

19

20 HEARING re Motion of Debtors and Debtors in Possession Pursuant

21 to Sections 105, 363, 364 and 503 of the Bankruptcy Code, for

22 an Order Authorizing Them to (i)Enter Into the GMAC Master

23 Financial Services Agreement and Related Agreements and

24 (ii)Obtain Unsecured Credit

25

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2 HEARING re Motion of Debtors and Debtors in Possession Pursuant
3 to 11 U.S.C. 107(B) and Fed. R. Bank. P. 9018, for an Order
4 Authorizing Them to File Documents Under Seal
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1 P R O C E E D I N G S

2 THE COURT: Please be seated. All right. I think,
3 if my recollection is correct, we were going to begin with any
4 motion filed by certain non-TARP lenders to the filing of the
5 9019 -- not the 9019, excuse me, the 2019 papers. All right.
6 Go ahead.

7 MR. LAURIA: Good afternoon, Your Honor. My name is
8 Tom Lauria with White & Case. I represent the ad hoc group of
9 non-TARP first lien lenders to Chrysler.

10 As provided by the Court yesterday, we did file our
11 motion requesting permission to file our 2019 statement under
12 seal by noon today. And we're prepared to go forward with that
13 motion now.

14 THE COURT: All right. Go ahead.

15 MR. LAURIA: All right. Your Honor, as laid out in
16 the motion, we believe there is basis under 107(b) and (c) and
17 Bankruptcy Rule 9018 for the Court to permit the filing of the
18 2019 statement under the circumstance of this case under seal.
19 The factual basis for the request is that, in particular, this
20 group of creditors who had determined to not agree to a
21 proposed pre-petition settlement of their claims were
22 specifically singled out by the president of the United States
23 and other representatives of the government and derided
24 publicly. They were characterized as speculators. They were
25 wrongfully accused of not being willing to make concessions and

1 they were cited as the reason for the bankruptcy which put at
2 risk thousands of jobs and other interests.
3 THE COURT: Well, would I be right in assuming that
4 these certain non-TARP lenders purchased these claims? Or is
5 it a mixture of people who held or purchased?
6 MR. LAURIA: Pardon me? I'm sorry.
7 THE COURT: Did they purchase the claims or are they
8 original holders of the claims?
9 MR. LAURIA: There's a mix.
10 THE COURT: There's a mix.
11 MR. LAURIA: We have some people who are original par
12 holders. We have some -- at various prices that the debtors
13 traded at.
14 THE COURT: All right. Is it that unusual to you for
15 secured creditors or purchasers of distressed debt that happens
16 to be secured to be subject to criticism or be unpopular in a
17 bankruptcy case?
18 MR. LAURIA: No.
19 THE COURT: All right. So whether the political
20 statements or statements made by officials in the government,
21 it's not terribly surprising that such statements get made
22 whether they would be a local official, national official,
23 state official.
24 MR. LAURIA: Well, Your Honor --
25 THE COURT: -- taking a position that a secured

1 creditor in asserting their rights may be doing so against some
2 interest that the executive believes should be protected. I
3 mean, it's just their opinion. How much more is it than that?
4 MR. LAURIA: Well, Your Honor, I guess it would be --
5 I understand the Court's point. But the difference here is
6 that the accuser was wearing the mantle of the executive
7 branch. And, in particular, the president of the United
8 States. And the accusations have exposed the members of this
9 group to reputational damage, exposure to undue influence and
10 threats of violence in the focus of anger. And, quite frankly,
11 we have struggled -- people are so fearful that we have
12 struggled to get people to put -- to let us put the full
13 details of information relating to issues that surround their
14 circumstances for fear that they will, ultimately, by putting
15 those facts in be subject to being identified. And their
16 preference, quite frankly, is to avoid -- to not get in harm's
17 way. And the issue is should any creditor have to contend with
18 those types of issues merely to be in a position to assert its
19 legal and other rights in connection with a bankruptcy case,
20 particularly where -- Your Honor, we will, to the Court's
21 satisfaction, satisfy the disclosure requirements of 2019. And
22 I think, most importantly, the Court will be able to confirm
23 the truth of the statement that these investors hold only first
24 lien secured debt of Chrysler. They have no other interests in
25 the Chrysler estate that would give rise to any conflict of

1 interest or create the potential that people will not
2 understand the motivation for their actions.
3 THE COURT: But would I then be going in a direction
4 of approving the sealing of a bank who held a mortgage because
5 they will want to move to lift the stay to foreclose on a piece
6 of property that housed many people but it was a very unpopular
7 thing to do but the secured creditor was trying to protect
8 their financial interest. But should they come to me and say
9 we want this under seal because it's not popular and tenants
10 may protest what we're doing and may go to a home office and
11 say that we're unfair in putting them out on the street? I
12 mean, does it move in that direction just because it's a little
13 unpopular to assert one's rights sometimes?
14 MR. LAURIA: Your Honor, I'm not sure that there's a
15 blackline test for this. I presume, and I think the case
16 suggests, this is a fact intensive inquiry. You have to look
17 at the facts and circumstances of each case. I guess I could
18 imagine a circumstance where a creditor is facing credible
19 direct threats of violence that if there was a requirement for
20 a 2019 statement to be filed that the Court would find it
21 appropriate to seal. The example that the Court gave -- I
22 guess I'm not -- it really doesn't apply to a 2019 statement
23 because the single bank with a mortgage wouldn't be presumably
24 in a 2019 position to be identified but rather would be a
25 direct litigant.

1 The fact of the matter is here there's a balancing,
2 or I think there should be a balancing, between the interests
3 protected by 2019, which is that there's an ability to confirm
4 the basis for a party's conduct and action in a Chapter 11 case
5 and that there aren't conflicts of interest, Northwest being
6 the case that I think everybody would cite to, where, in fact,
7 you had participants who had positions in different tranches of
8 the capital structure and there were concerns about what their
9 motivations were going to be in connection with the action that
10 they were taking through the group that they were participating
11 in.
12 THE COURT: I don't think I can quote you but I'm not
13 sure if you used the term "real and credible threats". Now,
14 the only record I saw in the papers are what you reference as
15 real incredible threats of physical harm was a comment made in
16 an e-mail.
17 MR. LAURIA: There were -- I think -- Your Honor, I
18 think we cited to four or five different communications that
19 had been sent out referring to my clients. And I will
20 represent to the Court that there have been other statements
21 made directly to members of the group that have so frightened
22 people, they were reported to the authorities. They've changed
23 their behavior with their families. And they are so concerned
24 that they didn't want to expose themselves to being outed, as
25 it were, through discovery by making factual allegations in a

1 paper. And I don't know -- I mean, on the short time fuse we
2 had, we basically had to say will you give us permission to put
3 this information in and when asked what the potential
4 consequences were, I had to explain to them that it was
5 conceivable in that they're making factual allegations that the
6 maker of the allegations could be subject to discovery. And
7 that held people back. If there's a way to get more of this
8 information to the Court in a fashion that doesn't compromise
9 people's perception of safety -- and, I mean, I think that at
10 some level is what it really comes to is do people really
11 perceive a risk to not only their personal safety but, here,
12 their professional reputation. I think there is -- and I think
13 both interests are protectable properly under Section 107.
14 THE COURT: Well, what could be their professional
15 reputation? They're asserting their rights as a secured
16 creditor and that's it. So someone says I don't think they
17 should. It's not fair. They should make more sacrifices or
18 they should compromise in some other way. Fine. It's someone
19 else's opinion.
20 MR. LAURIA: Well, the someone else was the president
21 of the United States. And that is --
22 THE COURT: Well, I understand he expressed his view.
23 MR. LAURIA: That's the executive. He was expressing
24 that view in an official capacity not in a personal capacity as
25 part of a press statement made as president of the United

1 States and saying in that official capacity, he did not stand
2 with these people. And people have responded to these folks in
3 a very strong way in respect to that. And I think it's not a
4 long step to say that it opens the field. It says maybe if the
5 executive who's charged with enforcing the law says I don't
6 stand with these people, there are messages that people can get
7 from that. And, in fact, people appeared to have gotten those
8 messages based on the open seas and kind of threats that have
9 been made.
10 THE COURT: All right. Anyone else wish to be heard?
11 MR. HAMILTON: Good afternoon, Your Honor. Robert
12 Hamilton of Jones Day on behalf of the debtors. Counsel
13 suggested that the inquiry or the decision for you is to
14 balance what he called the basis for the requirements of 2019
15 to make a finding that they've met those versus their concerns
16 about public embarrassment. But that's not precisely what
17 their motion is about. 2019 is a disclosure statute. It's not
18 something that requires this Court to make particular findings
19 about in secret or in camera. In fact, the whole purpose and
20 raison d'etre of Rule 2019 is to prevent all parties in
21 interest to understand the facts about his clients that he
22 purports to represent in connection with this Chapter 11
23 proceeding. So to file it under seal so that no parties in
24 interest can see it defeats the very purpose of Rule 2019.
25 Moreover, his motion characterizes -- the purpose of

1 the motion is to prevent public disclosure of their identity.
2 But the fact is their motion says "so that only the Court will
3 know" the information in the 2019 filing that they purport --
4 or he purports to have ready to make. In essence, he's asking
5 the Court to prevent the debtors and all other parties in
6 interest and their counsel and professional advisors and their
7 expert witnesses and the U.S. trustee to know the information
8 that Congress has required him to disclose to all parties in
9 interest under Rule 2019. That is an unprecedented request
10 and, as far as I know, is unprecedented in any of the case law
11 in its scope.
12 It is also impractical in the operation and in the
13 conduct of these cases as they'll play out. He cites
14 essentially two sources of authority under the Code for what he
15 claims is authority for what he asks for. The first is he
16 concentrates on threats that were posted on websites, Your
17 Honor, anonymously and claims that the people that he purports
18 to represent fear for their safety and suggests that you are
19 then authorized under Section 107(c) to put the application
20 under seal. 107(c) would authorize you to do so if there is an
21 undue risk of unlawful injury to an individual.
22 The only evidence, as Your Honor pointed out, that
23 they have provided is a series of four or five anonymous rants
24 on a Washington Post website. There is no evidence to support
25 their assertion that the people he purports to represent are

1 afraid for that safety. That's not surprising, Your Honor,
2 because anyone who has even a passing familiarity with the type
3 of hyperbolic rants that occur and the language that occurs
4 that pervades these anonymous message boards on the internet
5 would never take such comments seriously. There is no evidence
6 that any of the people he purports to represent here take them
7 seriously. Just his untested statements of counsel at the
8 podium. There is certainly no evidence in the record of any
9 undue risk of unlawful injury to an individual.
10 In reality, the primary purpose of the motion, as he
11 indicates elsewhere and in his oral presentation, is that
12 they're really concerned about their "professional
13 reputations". He argues that the lenders that he purports to
14 represent want to protect their reputations and that you are
15 justified in, therefore, sealing the order in Section 107(b) of
16 the Code and Bankruptcy Rule 9018.
17 Now, there are -- 1007(b) (sic) and 9018 provide for
18 sealing a piece of paper filed in the court in two
19 circumstances. One, to protect "commercial information" and
20 two, to prevent the dissemination of "scandalous or defamatory
21 material". Your Honor, typically, hedge funds will be claiming
22 that 2019 information should be filed under seal in order to
23 protect commercial information which they call -- which they
24 often refer to as their "trading strategies". Judge Gropper in
25 the Northwest decision that they even cite in their motion

1 characterized that type of assertion as "improbable" as being
2 constituting commercial information. And, in fact, the
3 security holders in Northwest abandoned that "improbable
4 claim". The lenders here that he purports to represent don't
5 even make that argument in this case. They're not arguing that
6 this motion to put something under seal is justified to protect
7 "commercial information". Instead, the only argument they make
8 under 107(b) and 9018 is that it's necessary to prevent the
9 dissemination of "scandalous or defamatory material". And what
10 is the information that they're claiming they want to prevent
11 the dissemination of as being defamatory or scandalous? It's
12 their identity and the circumstances under which they acquired
13 their interest in Chrysler.
14 Far from being defamatory or scandalous, both sources
15 of information, their identity and the circumstances in which
16 they acquired the information, are directly relevant to the
17 legitimate concerns of all parties in interest in this case.
18 As Judge Gropper noted in the Northwest decision that they cite
19 in their case, Rule 2019 "requires unofficial committees to
20 play a significant public role in reorganization proceedings
21 and enjoy a level of credibility and influence consonant with
22 the group status to file a statement containing certain
23 information". Judge Gropper went on to quote from the 1937 SEC
24 report that formed the basis for this rule. He quoted "The
25 report also recommended that attorneys who appear in

1 proceedings should be required to furnish similar information
2 respecting their clients. The SEC specifically found that the
3 foregoing information will provide a routine method of advising
4 the Court and all parties in interest of the actual economic
5 interest of all persons participating in the proceedings."
6 Judge Gropper went on later in the opinion to point out
7 language that is particularly relevant in this case: "It bears
8 recalling that this ad hoc committee purports to control twenty
9 percent of the outstanding stock of the debtors and that it has
10 repeatedly asked the Court to give credibility to its claims
11 that the debtors' equity has substantial value, that the
12 debtors' management has wrongfully undervalued the equity and
13 that it intends to mount a contest as to the valuation of these
14 debtors. By acting as a group, the members of this
15 shareholders committee subordinated themselves to the
16 requirements of Rule 2019." He concludes: "The rule in this
17 instance 'also gives all parties a better ability to gauge the
18 credibility of an important group that has chosen to appear in
19 a bankruptcy case and play a major role.'"
20 In fact, Your Honor, their own motion underscores the
21 direct relevance to all parties in interest of the factual
22 assertions and circumstances of these individuals. In
23 paragraph 4 of their motion, they assert "The Chrysler non-TARP
24 lenders invested in these loans because they were secured." It
25 goes on to say, in that same paragraph, "These liens and the

1 security they afforded were crucial to the senior lenders."
2 And finally, "In exchange for the lower risk of secured liens,
3 the senior lenders agreed to accept an interest rate that was
4 far lower than would have been paid for an unsecured loan."
5 Later, in paragraph 13 of their motion, they assert as a
6 factual assertion with no support, "First, the Chrysler non-
7 TARP lenders are not speculators." They further state in that
8 paragraph "The Chrysler non-TARP lenders have never sought a
9 government bailout." And finally, they say "The Chrysler non-
10 TARP lenders offered to compromise. They offered to accept a
11 forty percent reduction of their debt even though they could
12 receive a better recovery in a Chapter 7 liquidation."
13 Your Honor, as indicated by Judge Gropper in
14 Northwest, all parties in interest in this case have a
15 compelling interest to judge the credibility of those
16 assertions in this case. For instance, with respect to the
17 timing of the acquisition of their interest and securities,
18 what if some or all of the interest or all of the lenders that
19 Mr. Lauria purports to represent acquired their interest late
20 last year or early this year at a substantial discount from a
21 prior holder who thought or had internal analyses that the
22 liquidation value of the collateral was less than a billion
23 dollars? In fact, what if the clients that he represents
24 acquired their interest from such holders at an amount that is
25 substantially below par based on their own internal analyses of

1 the people that he purports to represent, that the liquidation
2 value of the collateral is only a billion dollars?
3 In fact, in that situation, his clients would stand
4 to make a profit if the Fiat transaction were consummated and
5 two billion dollars were provided for the liquidation value of
6 their collateral.
7 In fact, Your Honor, what if these individuals that
8 he purports to represent who, he claims, none of them have any
9 other interest in Chrysler have, in fact, have credit default
10 swaps with other institutions that fully protect them from a
11 risk of a default on their secured interest in Chrysler such
12 that they have no risk of economic loss whatsoever from a
13 default on the senior secured loans of Chrysler. Moreover, in
14 such a situation, what if the facts are that in that
15 circumstance in order to recover on the credit default swaps,
16 it was imperative that they force Chrysler to default on the
17 senior secured loan and go into bankruptcy in order to recover
18 one hundred percent or even more of their investment?
19 These are facts that all parties in this case have a
20 legitimate interest to assess for themselves in connection with
21 assessing the credibility and role and motivation of the
22 clients that he purports to represent in objecting to the sale
23 transaction and in participating further in this Chapter 11.
24 Finally, even if Your Honor were inclined to close to
25 the public the Rule 2019 statement that he purports to have

1 ready to file as soon as you rule, counsel and professionals,
2 advisors for the debtors and all parties in interest need to
3 have access to it in order to test the accuracy and validity
4 and credibility of the assertions that they make in their
5 motion that I've just articulated.

6 All of those assertions --

7 THE COURT: All right. Thank --

8 MR. HAMILTON: Excuse me, Your Honor. Go ahead.

9 THE COURT: Go ahead.

10 MR. HAMILTON: All of those assertions would bear
11 directly on the credibility and potential allegations of bias
12 in any professional expert the people that he purports to
13 represent would be placed on the stand to offer their
14 "liquidation analysis" and competition with the liquidation
15 analysis provided by Capstone in this case, particularly, the
16 timing of when that liquidation value was created and who was
17 paying for it and what their economic risks were. All of those
18 would be legitimate considerations by this Court in deciding
19 which liquidation value has more credibility in your eyes.

20 In addition, extensive discovery may be required with
21 respect to all of the individuals that he purports to represent
22 in determining whether they have standing to participate in
23 this action whatsoever. As counsel for JPMorgan has indicated
24 on a number of occasions yesterday, these individuals have
25 irrevocably granted to the first lien agent the authority to

1 pursue all proceedings in this bankruptcy court with respect to
2 the protection of their collateral. The only thing that I
3 heard Mr. Lauria suggest yesterday in response to that was
4 well, we have some issues with the first lien agent implying, I
5 suggest, that I think what he's going to argue is that there's
6 some sort of conflict of interest between the people that he
7 purports to represent and the first lien agent. And that
8 somehow relieves him of the contractual obligations and
9 promises that his clients made when they acquired their
10 interest contrary to the rulings that this Court made in Enron
11 that was affirmed on appeal that participating lenders in such
12 circumstances do not have standing to take actions that are
13 inconsistent with the actions that have been decided upon by
14 the first lien agent. Those issues, his alleged circumstances
15 or issues with the first lien agent, are subject to discovery
16 and testing of cross-examination by all parties in interest in
17 this case.
18 In short, it is just impractical and unworkable to
19 suggest that you can keep the information in the Rule 2019
20 disclosure that is required by law from these individuals, from
21 the parties and from their professional advisors. And I would
22 urge the Court to deny the application.
23 THE COURT: All right. Anyone else? All right. Any
24 response?
25 MR. LAURIA: Your Honor, I first want to start out

1 with the obvious issue of the repeated use of the word
2 "purported" to suggest that perhaps these people aren't our
3 clients. Clearly, the 2019 statement that we will file will
4 make that clear. There will be no dispute about an
5 attorney/client relationship.
6 Second point -- so I think that was just kind of
7 thrown in just for fun, just to try to incite consideration of
8 something that's clearly going to be irrelevant. As to the
9 issue of the absence of evidence, we have an obvious dilemma.
10 The people who are concerned about protecting their anonymity
11 from a standpoint of fear for their safety aren't before you
12 with sworn affidavits, aren't here to testify because that
13 would kind of defeat the purpose.
14 THE COURT: Well, those --
15 MR. LAURIA: You know, there's a circle there.
16 THE COURT: Wait a minute. Those easily could have
17 been filed under seal. I mean, to the extent you had available
18 actual evidence of direct threats that law enforcement agencies
19 have recognized there is a direct threat of someone's safety,
20 that certainly could have been presented under seal along with
21 this motion if it existed.
22 MR. LAURIA: Well, Your Honor, the timeline didn't
23 really permit us the opportunity to do that. We would have had
24 to file a prior motion to get those things filed and get an
25 order authorizing those things to be filed under seal.

1 THE COURT: Well, the timeline I don't think is quite
2 as short as you believe. You knew you had to file a 2019
3 statement. You have the -- whatever you allege to be the
4 comments that have raised concern amongst your clients.
5 They've been made at least a week ago, I believe. I'm not sure
6 about my time. But it certainly is more than one day ago,
7 yesterday, when you first raised the issue of filing something
8 under seal with respect to Rule 2019. So I don't really think
9 it comes as a surprise that you would be required to file the
10 papers and that if you wanted to seek the protection you seek
11 here today that you would have to support it.

12 MR. LAURIA: Your Honor, we were on the phone last
13 night with our clients at about 10:00 probably for about an
14 hour and a half last night going through this trying to figure
15 out what we could get into the court today by noon. And we
16 didn't really proceed but we had the ability to get a
17 preliminary sealing order, which I'm sure would have been
18 disputed, and then have the resolution of that in time to make
19 another filing requesting the real information be filed under
20 seal. I mean, as a practical matter, I just don't think there
21 were enough hours in the day. So I think we've got a real
22 dilemma here in that regard.

23 One thing that I would like to clarify or correct
24 from the motion, we certainly -- to the extent that there are
25 issues or questions about the motivations of these parties or

1 anything else that is ultimately relevant to the case, we would
2 agree to making the initial filing available for attorneys'
3 eyes only subject to confidentiality to at least a core group
4 of parties who could sufficiently diligence the long list of
5 issues that were identified by counsel and I'm sure whatever
6 other issues can be thought of as people continue to look at
7 this. And we would certainly recognize that discovery could be
8 taken again subject to appropriate confidentiality so that
9 counsel in the case would have the ability to address -- and to
10 the extent that they identify any issue or information that
11 they think is relevant to be brought to the Court's attention
12 that we'd be able to do so.
13 I will add, though, that the long list of what ifs,
14 to me, seemed like a long list of irrelevancies. I think it's
15 long been established that the price that a person pays for
16 their debt in a bankruptcy case absent bad motive, bad
17 intention is irrelevant. When you buy rights under a contract,
18 you accede to those rights under the contract and the pricing
19 is not a relevant consideration. That said, if people want to
20 know the pricing and take discovery, it will be provided. But
21 it will be provided to attorneys and subject to confidentiality
22 and if they believe there's something that needs to be done
23 with that, that can be brought to the Court.
24 I don't think that every party in the case needs to
25 have that information. I think that it can be adequately

1 policed by the counsel to a core group. And maybe that's a way
2 to protect these people to permit them to be able to continue
3 to participate in the case without subjecting themselves to
4 perceived personal injury and harm. And, you know, I think we
5 can even get to a point where if there needs to be a proceeding
6 over the bonafides of people's concern about the threats that
7 have been made then we can have some proceeding on that. But
8 by going this way, we can get the information in, we can get it
9 to counsel, we can have discovery and we can be moving forward
10 in the case without -- forcing these people to make a decision
11 today at this stage of the game is the cost of participating in
12 this case and asserting one's legal rights, exposure to what
13 people perceive is legitimate threats of personal harm.
14 THE COURT: All right. Thank you. Anyone else?
15 MS. ADAMS: Good afternoon, Your Honor. Diana Adams
16 from the United States trustee's office. I think Your Honor
17 has to weigh the requirement of transparency versus the alleged
18 death threats. It is a difficult position and a difficult
19 decision. However, the other requirements of 2019, I don't see
20 why they would be under seal at all, Your Honor. I think the
21 pricing is supposed to be public. And while Your Honor may
22 rule that certain of the names have to be redacted or direct an
23 order as to those parties who can view it and that they must
24 keep the information confidential, I don't see any reason that
25 the additional requirements of 2019 should not be made public.

1 MS. FELDSTEIN: Good afternoon, Your Honor. Hydee
2 Feldstein and Andy Dietderich of Sullivan & Cromwell LLP. We
3 represent the purchaser and Fiat.
4 It's a bit ironic, Your Honor, that what Mr. Lauria
5 stands before you to complain about is anonymous postings on
6 the internet that I think everyone has appropriately recognized
7 are often irresponsible because anonymity promotes
8 irresponsibility.
9 Bankruptcy Rule 2019 is quite clear. When parties
10 take a position before this court in good faith, when attorneys
11 sign pleadings within the confines of Rule 11 and when people
12 take positions that they legitimately say further their
13 economic interest and that they are not acting as spoilers and
14 that they are not here for some untort or unwarranted purpose,
15 they ought to be unmasked. They ought to be willing to stand
16 forward and put their name to it because, ultimately, Your
17 Honor, anonymous postings are irresponsible. And therefore, I
18 think we would urge this Court to deny the motion.
19 THE COURT: All right. Thank you. All right.
20 Certain Chrysler non-TARP lenders seek entry of an order
21 pursuant to Sections 105(a) and 107 of the Bankruptcy Code,
22 Bankruptcy Rule 9018 and General Order M-242 authorizing White
23 & Case to file in redacted form and under seal a 2019
24 statement. For the following reasons, the Court denies the
25 relief requested:

1 According to these lenders, the "Chrysler non-TARP
2 lenders" are seeking to protect commercial information,
3 specifically, to the reputational interests that are being
4 tarnished by inaccurate and misleading information disseminated
5 by the executive branch of the United States. The failure to
6 issue such an order puts these parties at risk of undue
7 influence on the part of the government in physical danger in
8 the form of death threats."
9 Section 107(b) states that the Court shall, on the
10 request of a party in interest, issue an order to protect an
11 entity with respect to commercial information or to protect a
12 person with respect to scandalous or defamatory matter
13 contained in a paper filed in a case under the Bankruptcy Code.
14 In In re Orion Pictures Corp., the Second Circuit held that
15 commercial information has been defined as information which
16 could cause an unfair advantage to competitors providing them
17 information as to commercial operations of the debtor. These
18 lenders assert that their reputational interests require
19 protection. However, reputational interests are not commercial
20 information under the Second Circuit's test and, therefore, are
21 not entitled to protection under 107(b). The Second Circuit
22 has held that a naked conclusory statement that information not
23 placed under seal would cause reputation injury falls willfully
24 short of the kind which raises even an arguable issue as to
25 whether it may be kept under seal.

1 These lenders also do not argue that the required
2 protection from scandalous or defamatory matter contained in a
3 paper filed in this case. Instead, the exhibits to these
4 lenders' motion come from sources outside the case.
5 Accordingly, these lenders do not have grounds under Section
6 107(b) for their 2019 statement to be sealed.
7 For the same reason, these lenders do not have
8 grounds under Rule 9018 for their 2019 statement to be sealed.
9 These lenders' citation to the Global Crossing case with a
10 proposition that the Court's authority to issue any order which
11 justice requires goes not to the protection of the confidential
12 documents but to other confidentiality restrictions that are
13 warranted in the interest of justice is unavailing because the
14 Court only has such authority if the requirements of Rule 9018
15 are met. The relevant 9018 requirements are the same as those
16 under Section 107(b) and these have not been met.
17 Section 107(c) allows the Court for cause to protect
18 an individual with respect to certain types of information
19 including any means of identification where disclosure of such
20 information would create an undue risk of unlawful injury to
21 the individual or to individuals' property. These lenders
22 first cite In re Kaiser Aluminum case in which the district
23 court upheld the bankruptcy court's order limiting access to
24 the 2019 statement that contain personal information of
25 asbestos claimants. The Kaiser court decided Nixon v. Warner

1 Corporation for the proposition that courts have supervisory
2 power over their records and files and may deny access to those
3 records and files to prevent them from being used for an
4 improper purpose. These lenders assert that the use of the
5 2019 statement as a means of identifying targets for coercion
6 and threats is an improper purpose. But they provide no
7 evidence or support that their 2019 statement would be used in
8 this way. Additionally, the bankruptcy court in Kaiser
9 expressed privacy concerns over individuals, personal
10 information being made public on the electronic case filing
11 system. Although the bankruptcy court there stated it would
12 make the information available to a party who requested it, in
13 this case, the interest for the information is apparent. Also
14 in this case, entities' rather than individuals' information
15 would be disclosed in a 2019 statement.
16 These lenders also cite Lorenzo v. the City of
17 Hazelton in which the Court allowed legal and illegal immigrant
18 plaintiffs to proceed anonymously because even Hazelton
19 residents where they lost secured social and legal status than
20 the anonymous plaintiffs were subject to harassment and
21 intimidation. That harassment and intimidation resulted from
22 direct face to face comments. As an exception to the general
23 principle that lawsuits are public events, the Lorenzo court
24 cited other cause protection of litigants' anonymity only where
25 there was a real danger of physical harm or revealing their

1 true identities would lead to physical violence. In this case,
2 these lenders point to certain comments posted on a website.
3 They point to no particularized threat evidencing a real danger
4 of physical harm. And moreover, they did not show that any of
5 these that may have been reported to law enforcement that law
6 enforcement authorities have considered such threats bonafide.
7 Accordingly, these lenders do not have grounds under
8 Section 107(c) for their 2019 statement to be sealed. The
9 Court will issue a minute order sometime later this afternoon
10 or early tomorrow morning incorporating the Court's statements
11 just made.
12 Further, the certain non-TARP lenders are directed to
13 file the 2019 statement by 10 a.m. tomorrow morning.
14 Let's proceed with the next matter.
15 MS. BALL: Your Honor, thank you. Your Honor, the
16 agenda letter, I think, neglected that Your Honor had directed
17 we return to you today on the motion of GMAC. And I see the
18 parties are here for it, as well as, Your Honor, I would like
19 to adjourn once again the case management order which was on
20 this afternoon's agenda because we have not yet been advised of
21 who counsel to the creditors' committee to work through that.
22 We haven't had the opportunity. Ah, I've just been advised
23 that they haven't had the opportunity to see it. So we would
24 ask that that be adjourned until a later date.
25 THE COURT: All right.