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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	Chapter 11
THE McCLATCHY COMPANY, *et al.,*	Case No. 20-10418 (MEW)
Debtors.	(Jointly Administered)

LIMITED OBJECTION AND RESERVATION OF RIGHTS OF CHATHAM ASSET MANAGEMENT, LLC TO THE *EX PARTE* APPLICATION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ENTRY OF AN ORDER PURSUANT TO FEDERAL RULES OF BANKRUPTCY PROCEDURE 2004 AND 9016 AUTHORIZING THE EXAMINATION OF THE DEBTORS, CHATHAM ASSET MANAGEMENT, LLC AND LEON COOPERMAN

Chatham Asset Management, LLC ("Chatham")[1] submits this limited objection (the "Limited Objection") to the *Ex Parte Application of the Official Committee of Unsecured Creditors for Entry of an Order Pursuant to Federal Rules of Bankruptcy Procedure 2004 and 9016 Authorizing Examination Of Debtors, Chatham Asset Management, LLC And Leon Cooperman* [ECF No. 132] (the "Application"). In support of the Limited Objection, Chatham respectfully represents as follows:

[1] Capitalized terms not defined herein have the meanings ascribed to them in the Application (defined below) or *Joint Chapter 11 Plan of Reorganization of The McClatchy Company and Its Affiliated Debtors and Debtors In Possession* [ECF No. 25] (the "Plan").

PRELIMINARY STATEMENT

1. Chatham joins in the Debtors' Response[2] in so far as it corrects the record regarding misstatements and mischaracterizations set forth in the Application. As detailed in the Debtors' Response, Chatham did not "exert outsized pressure over the Debtors"[3]—a publicly traded company, where Chatham had no board representation, and in which Chatham's equity ownership conferred only 5% of the Debtors' voting control.[4]

2. Moreover, as set forth in the Debtors' Response, McClatchy had sound business justifications for pursuing the Transactions, and received consideration in exchange for entering them. Chatham facilitated a refinancing and contributed new money through a second-lien investment. That satisfaction of antecedent debt alone constitutes reasonably equivalent value as a matter of law. In doing so, Chatham waived its rights under the Unsecured Indentures[5] that required McClatchy to secure Chatham's obligations on an equal-and-ratable basis should McClatchy pledge certain assets in favor of a new revolving credit facility or debt that refinanced the then-existing first lien notes.[6] By any objective measure, these transaction provided liquidity at a critical time so McClatchy could implement a digital transformation business plan and continue to operate.

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2 *See Debtors' Response to Ex Parte Application of Official Committee of Unsecured Creditors for Entry of an Order Pursuant to Federal Rules of Bankruptcy Procedure 2004 and 9016 Authorizing the Examination of the Debtors, Chatham Asset Management, LLC and Leon Cooperman* [ECF No. 140] (the "Debtors' Response").

3 *See* Appl., ¶ 15.

4 Voting power, not equity ownership, is the relevant fact when determining if a shareholder is an insider or affiliate under the Bankruptcy Code. *See In re UVAS Farming Corp.*, 89 B.R. 889, 890 (Bankr. D.N.M. 1988) (holding that voting power is the appropriate calculation when measuring of percentage of ownership for affiliate insider purposes).

5 The term "Unsecured Debentures" shall mean, collectively, the 2027 Debentures and the 2029 Debentures, and the indentures governing the Unsecured Debentures are referred to herein as the "Unsecured Indentures".

6 *See* Indenture, dates as of November 1998, § 1007 (Restriction Upon Mortgages).

3. Yet, the Application is nevertheless riddled with mischaracterizations that are squarely contradicted by these facts, which are not reasonably in dispute and which are evidenced by publicly available materials or documents provided by the Debtors to various stakeholders, including the Committee. The counterfactual narrative spun by the Committee, by contrast, has no discernable support either in the public record or through any declarations or other competent evidence supplying a credible basis for the Committee's allegations.

4. Chatham understands Rule 2004 is an investigatory tool available to statutory fiduciaries like the Committee. For that reason, Chatham does not necessarily oppose the relief requested in the Application, but believes the requested relief is demonstrably premature, as (a) substantially all of the materials the Committee needs to evaluate the Transactions at issue have already been provided by the Debtors, or will be provided by the Debtors in the near term,[7] and (b) the Debtors, Chatham, the PBGC and the Committee are currently involved in the mediation ordered by this Court to resolve the treatment of the PBGC and general unsecured creditors under the Plan, which necessarily implicates the very subject matter of the Rule 2004 Topics (the "Mediation").[8]

5. The Committee filed the Application without notice to, or prior discussion with, the Debtors or Chatham, without permitting the Debtors to complete their mediation production to the Committee, and likely without completing a review of the materials already provided by the Debtors. As such, the Committee's filing of the Application, on the eve of Mediation, seeking overly broad discovery from Chatham under the guise of

[7] *See Debtors' Response*, ¶ 4.

[8] *See Order Establishing Terms For Plan Mediation* [ECF No. 107] (the "Mediation Order").

Rule 2004 rather than under the Mediation Order calls into question whether the Committee intends to pursue Mediation in good faith or whether it is seeking instead to scuttle or materially delay the Mediation before it even gets underway.

6. Seeking Rule 2004 discovery from third parties such as Chatham at this time is unwarranted. Consistent with its obligations under the Mediation Order, Chatham is willing to exchange information to the extent reasonably necessary to pursue Mediation as directed by the Mediator. For that reason, given the Mediation and forthcoming information promised by the Debtors, the Application should be deferred as to Chatham, and continued until after the Mediation concludes if a basis for the Rule 2004 discovery exists at that time. To the extent the Mediation is unsuccessful, and the Committee has not obtained the information necessary to assess the Transactions from the Debtors and Chatham, the Committee can revisit the relief requested in the Application as to Chatham.[9]

7. If, alternatively, the Court determines that the relief requested as to Chatham is proper at this time, Chatham is prepared to cooperate despite the Committee's failure to satisfy the standards applicable to Rule 2004 discovery. Even official committees must demonstrate "good cause," which requires some showing that a viable claim may exist. There are none. Unfortunately, that has not stopped the Committee and its dominant creditor, the PBGC, from perpetuating a smear campaign through pleadings that

[9] *C.f.*, *In re Wilcher*, 56 B.R. 428, 433 (Bankr. N.D. Ill. 1985) ("The proper mode of discovery which ordinarily must be utilized against a third party who may be liable to the bankruptcy estate for various wrongful acts is contained in the Federal Rules of Civil Procedure, which provide numerous procedural safeguards against unfairness to the party from which discovery is sought;" noting that while rule permits examination of third parties possessing knowledge of debtor's acts, conduct, or financial affairs so far as it relates to bankruptcy cases, "[i]t is clear that Rule 2004 may not be used as a device to launch a wholesale investigation of a non-debtor's private business affairs"); *In re Mathews*, 2018 WL 5024167, at *3 (D. Del. Oct. 17, 2018) (same) (citing *Wilcher*).

mischaracterize the Transactions as some form of land-grab initiated by Chatham.[10] The Committee provides no explanation as to why a public company would seek to favor Chatham's interest over its own. The Transactions were consummated publicly, and their terms were widely disseminated to the market at the time, including to the PBGC. And, to the extent the Committee's use of inflammatory terms like "alarming" and "Suspect Transactions" is intended to insinuate foul play without an underlying factual basis, or to intimidate Chatham as mediation begins, these are not a permissible grounds to order Rule 2004 discovery.[11]

8. Finally, in contrast to the suggestion that Chatham exerted some control over the Debtors to enter the Transactions, it was in fact the Debtors that approached Chatham regarding their need to refinance, because the Debtors required a new revolving credit facility and Chatham was uniquely situated as the Debtors' largest stakeholder and the only party that could provide the Debtors with the necessary covenant waivers under the Unsecured Debentures. Through the Transactions, the Debtors obtained, and Chatham facilitated, (a) a new revolving credit facility to support operations, (b) the refinancing of the first lien notes that existed at the time, (c) much needed maturity extensions, and (d) additional new money financing on a junior secured basis—all of which materially benefitted the Debtors and provided the Debtors the means to implement their digital transformation.

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[10] *See also Pension Benefit Guaranty Corporation's Limited Objection to Debtors' Motion for Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expenses Status, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hering, and (VII) Granting Related Relief* [ECF No. 58].

[11] *C.f., In re Duratech Indus., Inc.*, 241 B.R. 283, 289 (E.D.N.Y. 1999) ("Rule 2004 examinations may not be used for the purposes of abuse or harassment"); *In re Coffee Cupboard, Inc.*, 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991) ("Rule 2004 examinations may not be used to annoy, embarrass or oppress the party being examined").

LIMITED OBJECTION

I. Rule 2004 Does Not Authorize Unfettered Examinations

9. While the Committee tries to stress that Rule 2004 authorizes examinations that are of "extraordinarily broad scope" and akin "fishing expedition[s],"[12] courts impose limitations. *See In re Enron Corp.*, 281 B.R. 836, 840-42 (Bankr. S.D.N.Y. 2002) ("[T]he availability of Rule 2004 as a discovery tool is not unlimited …. [D]espite the breadth of Bankruptcy Rule 2004, it must first be determined that the examination is proper"); *In re Fearn*, 96 B.R. 135, 138 (Bankr. S.D. Ohio 1989) ("While the scope of Rule 2004 examination is very broad, it is not limitless. The examination should not be so broad as to be more disruptive and costly to the party sought to be examined than beneficial to the party seeking discovery."); Hr'g Tr. 18:17-19:1, *In re Pacific Drilling S.A.*, Case No. 17-13193 (MEW) (Bankr. S.D.N.Y. Jan. 19, 2018) [ECF No. 182] (recognizing that information requests under Rule 2004 should be tailored to avoid "unnecessarily and unreasonably overbroad document request[s]" of third parties "because by its nature, a discovery request emphasizes thoroughness more than it emphasizes value of information.").

II. The Committee Has Not Established "Good Cause" To Conduct a Rule 2004 Investigation of Chatham At This Time

10. "A party seeking relief under Rule 2004 has the burden of demonstrating good cause for conducting the requested discovery." *In re Brown*, 2018 WL 4944816, at *3 (Bankr. S.D.N.Y. Oct. 11, 2018). "Good cause" may be shown "by establishing that the proposed examination is necessary to establish the claim of the party seeking the

[12] *See* Appl., ¶ 33.

examination or denial of such request would cause the examiner undue hardship or injustice." *In re SunEdison*, 562 B.R. at 249. While the Committee's [Proposed] Order granting the Application would compel "the production of documents ***relevant*** to the Rule 2004 Topics,"[13] relevance is not the governing standard—"good cause" is. *See id.* ("That documents meet the requirement of relevance does not alone demonstrate that there is good cause for requiring their production."). "[R]elief lies within the sound discretion of the Bankruptcy Court." *In re SunEdison, Inc.*, 562 B.R. 243, 249 (Bankr. S.D.N.Y. 2017).

11. While Chatham is prepared to voluntarily exchange information in a timely manner to the extent reasonably necessary to pursue Mediation, it bears emphasis that the Committee has for multiple reasons not established "good cause" under Rule 2004 as to Chatham.

12. ***First***, the information the Debtors have already provided, or that is in the process of being provided by the Debtors, will reflect that no estate causes of action lie against Chatham. *C.f., In re Serignese*, No. 19-10724 (JLG), 2019 WL 2366424, at *1 (Bankr. S.D.N.Y. Jun. 3, 2019) (denying Rule 2004 motion "devoid of any information that could support a claim that the Debtor committed fraud or defalcation while acting in a fiduciary capacity"); *In re Strecker*, 251 B.R. 878, 883 (Bankr. D. Colo. 2000) ("The Court simply cannot permit *carte blanche* authorization to [movant's] 'fishing expeditions' without some alleged conduct or other facts, which could lead to a cause of action"); *In re CIS Corp.*, 123 B.R. 488, 491 (S.D.N.Y. 1991) ("Before placing on D&T the burden of producing thousands of pages of internal documents which are proprietary and then

[13] *See* Appl., Ex. A ([Proposed] Order), ¶ 2.

engaging in oral discovery relating to those internal documents, a Rule 11 determination should be made that the Trustee has an adequate basis for filing a claim against D&T.").

13. ***Second***, the Committee's requests are overboard. The Committee's document requests to Chatham and the Debtors are almost identical—the Committee does not even attempt to differentiate between the parties. *See, e.g.*, Appl., Schedule 1, ¶ 30 (requesting documents provided to "Brigade, the PBGC or any other party in connection with the Transactions"). Because the Committee chooses to lump together the parties, Chatham is asked to produce, for example, "[a]ll documents and communications concerning any of McClatchy's business plans…." *See* Appl., Schedule 1 ¶ 11. These requests are overly broad and unduly burdensome because Chatham is not likely to have these documents in its possession, and there has been no reasonable effort by the Committee to tailor their document requests in any way. As courts have noted, the "net…can be carefully stitched to limit its catch." *In re Drexel Burnham Lambert Group, Inc.*, 123 B.R. 702, 711 (Bankr. S.D.N.Y. 1991). The Committee has not even attempted to limit its catch.

14. ***Third***, as set forth in the Debtors' Response, the Debtors already have provided, and will continue to provide, the Committee with the information requested in the Application. Of the thirty-three document requests the Committee proposes to make of Chatham, thirty-two of the requests are identical to requests made to the Debtor.[14] The

[14] The Committee intends to propound 33 separate document demands (excluding subparts) largely mirroring those it will propound on the Debtors and seeks depositions. *Compare* Appl., Ex. 1 (pp. 23-32 of 98 (Debtors)), *with*, Appl., Ex. 2 (pp. 59-66 of 98 (Chatham)). If the Court grants the relief requested in the Application and the Committee properly serves such demands, Chatham will prepare written responses and objections in accordance with the proposed schedule, *i.e.*, within ten (10) days of service, but expressly reserves any and all rights, claims, and defenses, including challenges on relevance, scope, and burden. Nor should anything herein be construed as a waiver of Chatham's rights to seek its own discovery, either informally or pursuant to Rule 2004.

Committee should thus first attempt to gather all relevant information from the Debtors before asking Chatham, and the Debtors' estates, to incur the additional expenses for Chatham to gather and produce materials that are more likely to be in the Debtors' possession and are likely to be largely duplicative of what the Debtors produce to the Committee.

15. ***Fourth***, the Court should not require Chatham to respond at this time to the Committee's proposed document requests because such requests are overly broad and unduly burdensome under the circumstances and will assuredly delay any timely engagement in the Mediation. "The purpose of Rule 2004 is to allow the [parties in interest] to acquire information [they] lack." *In re Gawker Media LLC*, No. 16-11700, 2017 WL 2804870, at *6 (Bankr. S.D.N.Y. Jun. 28, 2017). Here, the Debtors have provided sufficient documentary evidence, and plan to provide additional materials, that will enable the Committee to assess that the Transactions were not fraudulent transfers, and that the Transaction are not susceptible to equitable subordination or recharacterization challenges. Such information is already, or soon will be, in the possession of the Committee.

16. ***Finally***, the Committee is part of the Mediation. While the Mediation is ongoing, it is not an appropriate time for the Committee to request extensive discovery from Chatham. The Mediation should move forward with minimal disruption until it is successful or proven futile. Only then should the Committee be entitled to an examination. This Court noted at the hearing for the motion to order mediation, "if the committee thinks there's some more information that it needs, it can raise that with the mediator once the mediation gets underway." Hr'g. Tr., 24:5-7, *In re The McClatchy Company*, No. 20-10418 (Bankr. S.D.N.Y. Feb. 18, 2020). To the extent the Mediator directs Chatham to provide

certain documents or information to the Committee, Chatham is happy to honor the Mediator's reasonable request.

17. For these reasons, at this time, the Committee has failed to establish the necessary "good cause" for the Court to authorize the Committee to conduct discovery on Chatham pursuant to Rule 2004. As stated above, Chatham remains committed to pursuing the Mediation in good faith and will work constructively with the Committee to provide the information reasonably necessary to pursue Mediation. To the extent the Mediation is unsuccessful, and the Committee has not obtained the information necessary to assess the Transactions, the Committee can renew its requests in the Application as to Chatham.

RESERVATION OF RIGHTS

18. Chatham reserves all rights with respect to the Application, including the right to advance additional arguments before or during any hearing on the Application. Should the Court grant the Application in whole or in part, Chatham respectfully reserves the right to seek relief from the Court to the extent that it cannot reach an agreement with the Committee regarding the scope or timing of document production and/or depositions.

[*Remainder of page intentionally left blank.*]

CONCLUSION

19. For the reasons set forth herein, Chatham respectfully requests that this Court deny the Application as to Chatham and sustain this Objection to the extent set forth herein and grant such other and further relief as this Court may deem just and proper.

Dated: March 6, 2020
New York, New York

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