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A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

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January 29, 2010

Advisory Committee on Bankruptcy Rules
c/o Peter G. McCabe, Secretary
Committee on Rules of Practice and procedure
Administrative Office of the United States Courts
Washington, DC 20544

09-BK-024

To the Members of the Advisory Committee:

I write on behalf of the National Bankruptcy Conference (the "Conference") to express the views of the Conference regarding the proposed amendment of Rule 2019 of the Federal Rules of Bankruptcy Procedure.[1] I have attached a description of the Conference as Appendix "A". At the outset, the Conference would like to commend the Advisory Committee for what is clearly a thoughtful and well-considered revision of Rule 2019 that is far more compatible with current economic realities, and provides far more transparency in the reorganization process, than Rule 2019 in its current form.

This is not the first time that the Conference has written to the Advisory Committee regarding potential amendments to Rule 2019. By letters dated September 22 and December 10, 2008, copies of which are attached as Appendix "B", the Conference opposed the request of certain trade associations that Rule 2019 be repealed and recommended that Rule 2019 be broadened in a number of respects to increase disclosure and transparency in the chapter 11 process.

The proposed amendment of Rule 2019 mirrors the Conference's recommendations in many respects. The proposed amendment does, however, depart from the Conference's recommendations on a number of material points. Nevertheless, on balance, the Conference supports the adoption of the proposed amendment (but suggests the changes outlined below), based on the Conference's view that the proposed amendment represents a material improvement in disclosure and transparency over Rule 2019 in its current form.

The Conference would, however, like to raise three issues that are implicated by the proposed amendment, as to which the Conference believes that further clarification or modification is necessary. Though we hope that implementation of clarifications or modifications based on these suggestions does not delay the adoption of the proposed amendment to Rule 2019, we nevertheless believe that the importance of these suggestions outweighs the potential cost of a one-year delay in the implementation of the amendment.

[1] The views expressed in this letter are those of the Conference, on whose behalf this letter is being written, and do not necessarily reflect either my personal views or those of my law firm, Stutman, Treister & Glatt P.C.

PMB 124, 10332 MAIN STREET • FAIRFAX, VA 22030-2410 • TEL: 703-273-4918 • FAX: 703-802-0207
E-mail: info@nbconf.org • Website: www.nationalbankruptcyconference.org

I. <u>Limiting the Overbroad Application of Rule 2019 to Require Law Firms' Disclosure of Client Information in Certain Circumstances.</u>

The Rule as proposed to be amended would impose on each "entity . . . that . . . represents more than one creditor or equity holder," the obligation to disclose certain information, including economic holdings, as to each creditor or equity holder that is "represented." Without some clarification or modification, this language could be read in an overly broad fashion to require a law firm that is retained concurrently by more than one client with respect to a bankruptcy case to disclose the firm's retention by, and the "disclosable economic interest" of, every one of the clients, including: (i) a client that has separately retained the law firm and is not acting in concert with any other client of the law firm to advance a common interest; and (ii) a client on whose behalf the law firm does not appear in court to seek or oppose the granting of relief. The Conference believes that the application of Rule 2019 to require disclosure by law firms as to clients who fall into either of these categories is unwarranted. If a client of the firm is not acting in concert with other clients, the client should be subject only to *discretionary* (in the court's discretion) disclosure under subdivision (b) as an "entity that seeks or opposes the granting of relief," rather than subjecting the law firm to the *mandatory* disclosure imposed on an "entity . . . that . . . represents more than one creditor or equity holder." Moreover, the law firm should not be required to make any disclosure as to a client on whose behalf the firm does not seek or oppose the granting of relief. Requiring Rule 2019 disclosure with respect to a client by a law firm in either of these circumstances places an undue burden on the law firm and the client and creates ethical problems for the law firm, without any corresponding benefit to the reorganization process.

To illustrate the point, two or more clients with a common interest may jointly retain a law firm to advise them on issues relating to a chapter 11 case (for example, so that they can determine whether to buy or sell certain debt, or whether to object or not to object to certain motions), without appearing in court to seek or oppose the granting of relief. There is simply no reason to require the public disclosure of the holdings of creditors or equity holders who elect to play a passive role in a case but seek advice from the same counsel (and even share costs), simply because they happen to use the same counsel.

In a similar vein, two or more existing clients of a law firm (e.g., a landlord and a trade creditor) may each separately engage the law firm to advise them with respect to a particular chapter 11 case (possibly for unrelated matters) without electing to appear and be heard in the case; and the law firm may even set up an "ethical wall" so that the attorneys advising one of the clients do not advise the others or share information about the case with attorneys on the other "side" of the "wall." In such a situation, there is no interest to be served by requiring the law firm to disclose the respective holdings of the separate clients.

Even if one of the two clients in this illustration does elect to appear and take positions in court and subject itself to the court's discretionary power under subdivision (b) to impose the disclosure requirements of the proposed rule on a creditor who elects to seek or oppose the granting of relief in court, there is still no reason to require the law firm to disclose publicly its retention by, or holdings of, the *other* client who does *not* so appear.

The broad application of the proposed amendment to the circumstances in these illustrations can create awkward ethical problems for a law firm with multiple clients. An entity that retains a law firm to advise it in connection with a chapter 11 case, but elects not to appear in that case, may not want the law firm to disclose publicly the fact of the retention or the client's interest in the case—let alone client holdings, which are disclosed to the law firm in confidence. Forcing a law firm to disclose its representation of such a client (and its holdings)—when the client has elected not to appear in court and thereby publicize its involvement in the case—essentially forces the law firm to disclose a client confidence, over the objection of the client. In theory, this problem might be resolved by law firms not representing more than one of their clients in any particular chapter 11 case (even with the informed consent of both clients); however, such a Hobson's choice (i.e., the creditor must either retain counsel other than its first choice of counsel, or be forced to disclose the creditor's holdings even though it does not elect to appear in the case) seems to be an unwarranted intrusion on a client's right to counsel of its choice and client confidentiality—an intrusion that is not offset by any countervailing benefit to the reorganization process.

Moreover, in large chapter 11 cases, a single law firm may represent a number of unaffiliated clients as a matter of necessity, since most, if not all, business bankruptcy practitioners within the jurisdiction may already have positions in the case. This may be particularly true in less populated judicial districts, but can be the case in any judicial district. There is no basis under these circumstances to require Rule 2019 disclosures, when identically situated clients that hired different law firms are not required to do so.

Finally, there are also instances in which a law firm may represent two related entities that should be treated as a single client for purposes of Rule 2019. For example, a husband and wife, or parent company and its subsidiary, may jointly hold claims against a chapter 11 debtor and hire a single law firm to represent them. There is no reason why these creditors and their counsel should be subject to broader disclosure requirements than a single, similarly situated creditor. Joint representation by affiliated entities does not raise any of the concerns that traditionally have supported Rule 2019 disclosures.

The Conference recommends three modifications to proposed amendment to address the problems highlighted by the foregoing illustrations. These changes are reflected in the accompanying blackline included as Appendix "C".

First, the proposed amendment should be augmented by language to the effect that for purposes of the Rule, an attorney is deemed to "represent" a creditor or equity holder only if the attorney seeks or opposes the granting of relief on behalf and in the name of such creditor or equity holder. In other words, a law firm does not "represent" a creditor or equity holder for purposes of this rule unless it seeks or opposes the granting of relief on behalf of the creditor or equity holder. This would be accomplished by adding a new definition of "represent" in subdivision (a).

Second, the Conference recommends that an exception to the disclosure requirements be included for joint representations of affiliates or insiders. This would be accomplished by adding language to this effect in subdivision (b).

Third, the proposed Committee Note to amended Rule 2019 recognizes that the principal purpose of the rule is to address entities "that are acting in concert to advance common interests." The Conference agrees and accordingly recommends that the proposed amendment make clear that those entities that are not "acting in concert" and that do not act to "advance common interests" should not be subject to the Rule, unless the Court specifically so orders under subdivision (b) as to an entity that seeks or opposes the granting of relief. This would also be accomplished by adding "acting in concert" language to subdivision (b).

II. Refining the Application of Rule 2019 To Indenture Trustees and Agent Banks

As now written, the proposed amendment to Rule 2019 could be read to require: (i) every indenture trustee to disclose the "disclosable economic interest" of every holder of bonds issued under the applicable indenture; and (ii) every agent bank or other creditor agent (referred to collectively as "agent") to disclose the "disclosable economic interest" of every holder of debt under the applicable credit agreement. In the case of indenture trustees, subdivision (c)(3) of the proposed amendment provides that the verified statement required under Rule 2019 "shall include," among other information, "if not disclosed under subdivision (c)(1) or (c)(2), *with respect to each creditor or equity security holder represented by the . . . indenture trustee*," the listed information which follows (emphasis added). Thus, while it is not clear to the Conference that such a result was intended, the proposed amendment could be read to require indenture trustees to list all of the holdings of individual bondholders whom the indenture trustee is deemed to "represent," for no reason other than that the bonds were issued under an indenture.

The proposed amendment to Rule 2019 might also be read to require (again, perhaps inadvertently) that every agent in a bankruptcy case, as an "entity" that arguably "represents more than one creditor," i.e., every holder of debt under the applicable credit agreement, disclose the individual economic positions of each holder of claims under the credit agreement (and provide constant updates), whether or not any individual bank debt holder is acting collectively with other holders or elects to seek or oppose relief in court. The Conference can discern no reason to require such public disclosure with respect to holders of debt under a credit agreement simply on the basis that there is an agent, without more.

Reading the proposed amendment to impose such a requirement on agents is not the only plausible interpretation of subdivision (b): It is arguable that, because individual lenders are free to be adverse to the agent, and the agent is not really an "agent" in a traditional sense, an agent does not "represent" each holder of claims under the applicable creditor facility, as the term "represents" is used in Rule 2019. However, if the latter interpretation is intended, then the language of the Rule should be clarified to avoid an unintended interpretation of subdivision (b) that would require public disclosure of the holdings of every lender under a credit facility with an agent, simply because there is an agent.

In any event, there is no policy reason to require an indenture trustee or agent to disclose the holdings of every individual bondholder under an indenture or holder of debt under a credit agreement, simply because the debt issuance involves an indenture trustee or agent. To avoid such an interpretation of amended Rule 2019, the Conference recommends

the following changes, which are reflected in the blackline included in Appendix "C": (i) the phrase "or by the indenture trustee" at the end of the introductory paragraph of subdivision (c)(3), immediately preceding clause (A), should be deleted; and (ii) clarifying language should be added, either to the Committee Note, or to the text of the proposed amendment itself, to the effect that an agent will not be deemed to "represent" holders of debt under the applicable credit agreement. To be clear, if the agent and certain holders of bank debt become part of a "group" that is acting in concert to advance common interests (for example, by forming a bank steering committee), the disclosure requirements for Rule 2019 would still apply—but this would occur, not because the agent "represents" any other lender, but because the agent and certain lenders have formed a "group."

The Conference also believes, however, that an agent that seeks or opposes the granting of relief from the court, or takes any position before the court with respect to a request for, or opposition to, the granting of relief, should be *required* to make the disclosures set forth in subdivision (c) (in lieu of making such disclosures simply discretionary with the court, as contemplated under proposed subdivision (b) with respect to "an entity that seeks or opposes the granting of relief"). This is because when an agent appears in court, it is viewed (rightly or wrongly) as speaking not merely for its own individual interest as a creditor, but in the interest of holders of debt under the applicable credit agreement. Accordingly, an agent that seeks or opposes relief from the court should be required to make disclosure under Rule 2019, without the need for case by case litigation, so that other lenders in whose interest the agent may purport to speak and the court are aware of the agent's actual economic interest. (In contrast, if an agent chooses to remain passive and not appear in court, the Conference sees no reason to require disclosure under Rule 2019 where the agent has not become part of a "group" or "committee"). To accomplish the foregoing, the Conference recommends that the following language be added to subdivision (b) (as reflected in the accompanying blackline): ", every agent that seeks or opposes the granting of relief, or takes any position before the court with respect to a request for, or opposition to, the granting of relief . . ."

III. Disclosure of Purchase Price/Date of Purchase Information.

The third issue which the Conference would like to raise relates to the disclosure of purchase price and date of purchase information. In its December 10, 2008 letter, the Conference recommended that disclosure of purchase price information and date of purchase be required only of members of ad hoc or unofficial committees[2] or groups (however denominated) and individual creditors or equity holders that claim to be representative of (or to speak on behalf of) claims or interests similar to those represented on the committee or group or held by the individual. The Conference saw no need to require the disclosure of purchase price or date of purchase information from individual creditors or creditor groups that do not purport to speak for or on behalf of others. Further, because purchase price

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[2] As to official committees, including an express provision in Rule 2019 empowering the bankruptcy court to order the public disclosure of purchase price information from committee members (as distinguished from disclosure to the U.S. Trustee) may inhibit the willingness of parties to serve on official committees.

information can often be extrapolated from the date of purchase (at least by parties who are active in the distressed debt market),[3] the Conference recommended against requiring the disclosure of date of purchase information from any creditor or "group" that was not also required to disclose purchase price information.

The proposed amendment of Rule 2019 differs from the Conference's recommendation in two important respects. First, it would expressly empower the court to order the disclosure of purchase price information from *any* creditor, equity holder or "group" that is covered by Rule 2019, without limitation. The Conference recommends against including such a broad power to order the disclosure of purchase price information in Rule 2019, because such a provision would encourage collateral litigation over the disclosure of purchase price information in cases when it is irrelevant to any issue before the court and lend itself to abuse by parties seeking to use the threat that a creditor or "group" will be forced to disclose the purchase price paid for its claims as leverage to pressure the targeted creditors toward some desired end, without any benefit to the reorganization process.

To place the Conference's concern in context, the bankruptcy court already has the power to order the disclosure of purchase price information when it is actually relevant to an issue that is before the court. For example, if a fiduciary is alleged to have purchased claims in violation of its fiduciary duties, the court has the power, in the course of related litigation, to order disclosure of relevant information, including purchase price. Because the court already has the power under existing discovery rules to order the disclosure of such information when it is relevant to an issue before the court, the addition to Rule 2019 of a provision that expressly authorizes the court to compel the disclosure of purchase price information from *all* parties who are subject to Rule 2019 could easily be read to mean something more—i.e., that the court can order the disclosure of purchase price information from any entity that is subject to Rule 2019 even if such information is irrelevant to any issue before the court. Otherwise, why add this provision to the Rule? There is nothing in the language of the proposed amendment or the Committee Note to negate such a broad interpretation. As a result, bankruptcy courts could become embroiled in collateral litigation over whether the disclosure of purchase price information should be required, in situations where that information is otherwise irrelevant to any issue before the court. The Conference

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[3] Although day by day bid/ask quotes and pricing information for debt (other than publicly traded debt) may not be readily available to the general public, participants in the distressed debt market do have access to such data (in order to engage in their business)—for example, through subscription services such as Bloomberg. Thus, while the public at large may not be able to extrapolate purchase price data from purchase date information, the sophisticated distressed debt market participants who participate in chapter 11 cases (and their counsel) can often derive purchase price information from purchase date information. Moreover, while the price for any particular debt issue may vary during a particular day, and daily pricing information for larger and more liquid debt issues may be easier to come by than that for smaller and less liquid debt issues, the fact remains that the public disclosure of purchase date information will often enable parties in interest in chapter 11 cases to determine the correlating purchase price information. Accordingly, the Conference does not believe that it is appropriate to consider specific purchase date information for each disclosable economic interest and the price paid for the disclosable economic interest, as discrete items to be treated separately for purposes of Rule 2019.

can discern no benefit to the reorganization process that would result from broadly inviting such tactically-motivated litigation.

Second, the purposed amendment would require the disclosure of date of purchase information even where the disclosure of the purchase price itself is not required by the Rule or the court. In many cases, however, requiring the disclosure of the date of purchase is tantamount to requiring the disclosure of the purchase price, because the purchase price can often be derived (at least by sophisticated market participants and their counsel) from the date of purchase. Thus, making the disclosure of purchase date information *mandatory* makes the "discretionary" nature of the court's power to order the disclosure of purchase price information illusory.

To the extent that it is important to know the period of time during which the disclosable economic interests were acquired, Rule 2019 can require the disclosure of such more general information, without requiring further specificity as to the date of purchase. Beyond this point, Rule 2019 should not make the disclosure of date of purchase information for each specific purchase mandatory. This is not to say that the bankruptcy court should not have the power to order the disclosure of more specific date of purchase information when it is be relevant to an issue before the court; rather, it is simply that a "one size fits all" rule that requires such disclosure in every case is unnecessary and unwarranted.

Accordingly, the Conference recommends that the inclusion in the proposed amendment to Rule 2019 of an express grant of power to the court to order the disclosure of purchase price information be limited to individual holders of "disclosable economic interests" and "groups" or "committees" that claim to act on behalf or in the interest of a larger group of creditors or equity holders. The Committee Note should further clarify that the Rule does not affect any power of the court under existing law to order such disclosure by other creditors, equity holders, committees or groups. The disclosure of date of purchase information should be *mandatory* only to the extent of requiring the disclosure of the general period of time during which the disclosable economic interests were acquired. However, the court should also be authorized, in its *discretion*, to order the disclosure of more specific date of purchase information from creditors, equity holders, "groups" and "committees" that claim to act on behalf or in the interests of a larger group.

Granting the court the discretion to direct the disclosure of purchase price information by this narrower group of parties is consistent with one of the major purposes of Rule 2019 (and its predecessors)—to require transparency on the part of committees and similar creditor and equity holder groups that purport to represent the interests of a class, and not just to speak for the interests of individual stakeholders who jointly retain counsel. Once a group of creditors or equity holders elects to seek greater credibility by portraying themselves as an "ad hoc committee" that is looking out for the economic interests of a class of claims or interests, rather than merely the parochial interests of individual members, greater transparency on their part is appropriate because of the greater credibility and influence they seek by acting as a "committee." The same can be said for individual stakeholders who claim to be looking out for the interests of those similarly situated. *Cf. In re Northwest Airlines*, 363 B.R. 704. 707 (Bankr. S.D.N.Y. 2007) (noting that Rule 2019 "requires unofficial committees that play a significant public role in reorganization

proceedings *and enjoy a level of credibility and influence consonant with group status* to file a statement containing certain information") (emphasis added).

As explained by the Bankruptcy Court in *Northwest Airlines*:

> *Ad hoc* or official 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 positions a degree of credibility appropriate to a unified group with large holdings. Moreover, the Bankruptcy Code specifically provides for the possibility of the grant of compensation to "a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title [an official committee], in making a substantial contribution in a case under chapter 9 or 11 of this title." 11 U.S.C. § 503(b)(3)(D). A committee purporting to speak for a group obviously has a better chance of meeting the "substantial contribution" test than an individual, as a single creditor or shareholder is often met with the argument that it was merely acting in its own self-interest and was not making a "substantial contribution" for purposes of § 503(b)(3) . . .

In re Northwest Airlines, 363 B.R. at 703 (citations omitted).

When "ad hoc" and "unofficial" committees or other "groups" seek greater credibility and influence by styling themselves as such and claiming to act for the benefit of a larger group, it is appropriate to empower the court to require greater disclosure of the actual economic interest of their members in and relating to the debtor, so that the court and parties in interest can understand their motives and verify whether their economic interests are aligned with those of the larger group for whom they purport to speak:

> [T]he other [stakeholders] have a right to information as to Committee member purchases and sales so that they can 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 a bankruptcy case and play a major role.

Id. At 709. In contrast, the Conference does not believe that specific purchase date or purchase price information is an appropriate subject of inquiry where creditors, equity holders, "committees" and "groups" do not claim to be acting for the benefit of a larger class; in such a situation, the disclosure of specific purchase date and purchase price information

should be limited to situations where it would otherwise be discoverable under some other applicable rule or principle.

* * *

To facilitate the Advisory Committee's consideration of these recommendations, attached as Appendix "C" is a blackline of the proposed amendment and the accompanying Committee Note that reflects their incorporation.

The Conference appreciates your consideration of our views.

Very truly yours,

/s/ Isaac M. Pachulski

Isaac M. Pachulski
Vice Chair
Chapter 11 Committee
(310) 228-5655
ipachulski@stutman.com

APPENDIX "A"

National Bankruptcy Conference

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

Technical and Advisory Services to Congress. To facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

National Bankruptcy Conference
PMB 124, 10332 Main Street • Fairfax, VA 22030-2410
703-273-4918 Fax: 703-802-0207 • Email: info@nbconf.org • Web: www.nationalbankruptcyconference.org

National Bankruptcy Conference

Chair
Donald S. Bernstein, Esq.
Davis Polk & Wardwell
New York, NY

Vice Chair
Richard B. Levin, Esq.
Cravath, Swaine & Moore LLP
New York, NY

Treasurer
R. Patrick Vance, Esq.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre L.L.P.
New Orleans, LA

Secretary
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Stutman, Treister & Glatt, Prof. Corp.
Los Angeles, CA

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Sidley Austin LLP
Los Angeles, CA

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Hofstra University School of Law
Hempstead, NY

Hon. Thomas L. Ambro
U.S. Court of Appeals for the Third Circuit
Wilmington, DE

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University of Chicago Law School
Chicago, IL

R. Neal Batson, Esq.
Alston & Bird LLP
Atlanta, GA

Michael St. Patrick Baxter, Esq.
Covington & Burling LLP
Washington, D.C.

Richard F. Broude, Esq.
New York, NY

Hon. Leif M. Clark
U.S. Bankruptcy Court
San Antonio, TX

Michael J. Crames, Esq.
Davis Polk & Wardwell
New York, NY

***Murray Drabkin, Esq.**
Washington, D.C.

Prof. David G. Epstein
Dedman School of Law
Southern Methodist University
Dallas, TX

Chaim J. Fortgang
Silver Point Capital Advisors, LLC
Greenwich, CT

Prof. S. Elizabeth Gibson
Univ. of North Carolina Law School
Chapel Hill, NC

Daniel M. Glosband, Esq.
Goodwin Procter LLP
Boston, MA

Marcia L. Goldstein, Esq.
Weil, Gotshal & Manges LLP
New York, NY

Robert A. Greenfield, Esq.
Stutman, Treister & Glatt, Prof. Corp.
Los Angeles, CA

Hon. Allan L. Gropper
U.S. Bankruptcy Court
New York, NY

Nell Hennessy, Esq.
Fiduciary Counselors Inc.
Washington, D.C.

Hon. Barbara J. Houser
U.S. Bankruptcy Court
Dallas, TX

Marshall S. Huebner, Esq.
Davis Polk & Wardwell
New York, NY

Prof. Melissa B. Jacoby
Univ. of North Carolina Law School
Chapel Hill, NC

Carl M. Jenks, Esq.
Jones Day
Cleveland, OH

***John J. Jerome, Esq.**
Saul Ewing LLP
New York, NY

Richardo I. Kilpatrick, Esq.
Kilpatrick and Associates, P.C.
Auburn Hills, MI

Prof. Kenneth N. Klee
UCLA School of Law
Los Angeles, CA

David A. Lander, Esq.
Thompson Coburn LLP
St. Louis, MO

Jonathan M. Landers, Esq.
Milberg LLC
New York, NY

***Hon. Joe Lee**
U.S. Bankruptcy Court
Lexington, KY

E. Bruce Leonard, Esq.
Cassels Brock & Blackwell LLP
Toronto, Ontario, Canada

Marc A. Levinson, Esq.
Orrick, Herington & Sutcliffe LLP
Sacramento, CA

Hon. Keith Lundin
U.S. Bankruptcy Court
Nashville, TN

Ralph R. Mabey, Esq.
Stutman, Treister & Glatt, Prof. Corp.
Salt Lake City, UT

***Morris W. Macey, Esq.**
Macey, Wilensky, Kessler,
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Kramer Levin Naftalis & Frankel LLP
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Vinson & Elkins, LLP
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Cambridge, MA

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U.S. Bankruptcy Court
Chicago, IL

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Austin, TX

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Los Angeles, CA

Brady C. Williamson, Esq.
Godfrey & Kahn, S.C.
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APPENDIX "B"

NATIONAL BANKRUPTCY CONFERENCE

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September 22, 2008

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Advisory Committee on Bankruptcy Rules
c/o Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Comments on Federal Rule of Bankruptcy Procedure 2019

To the Members of the Advisory Committee:

I write on behalf of the National Bankruptcy Conference (the "Conference"). We understand that the Loan Syndications and Trading Association (LSTA) and the Securities Industry and Financial Markets Association (SIFMA) have requested that Bankruptcy Rule 2019 be repealed. The Conference opposes repeal and urges the Committee to carefully consider the ramifications of repealing the Rule before acting on the LSTA/SIFMA's request.

During the past year, the NBC has been reviewing the overall plan negotiation and approval process in light of today's highly complex capital structures. One of the issues we have identified as potentially affecting plan outcomes is cross-voting. Cross-voting occurs when one holder (or a related party) holds debt 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. The Conference has been considering recommendations to modify section 1126(e) of the Bankruptcy Code to deal with this and other potential conflicts of interest. It is also considering recommendations to modify Rule 2019 to require adequate disclosure, possibly broadening it in certain respects, while limiting or eliminating some disclosures. For example, the Conference is currently considering whether the Rule should be amended to require members of official committees appointed under sections 1102 and 1114 of the Code to disclose their holdings or whether all creditors should be required to disclose their holdings when they file pleadings or vote on a plan. The Conference is also considering what disclosures should be made under the Rule, including whether it might make sense to abridge or eliminate certain disclosures required under the current Rule. We will be discussing all of these issues at our meeting in Washington, DC on October 23rd and 24th and intend to update the Advisory Committee with our conclusions shortly thereafter.

We strongly urge the Committee to allow for further study of Rule 2019. Its substance has been part of the bankruptcy law since 1938 and should not be repealed without considerable thought given to the reasons and consequences.

The Conference appreciates your consideration of our views.

Very truly yours,

/s/ Richard Levin

Richard Levin
Vice-Chair

PMB 124, 10332 MAIN STREET • FAIRFAX, VA 22030-2410 • TEL: 703-273-4918 • FAX: 703-802-0207
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December 10, 2008

Advisory Committee on Bankruptcy Rules
c/o Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

To the Members of the Advisory Committee:

I write on behalf of the National Bankruptcy Conference (the "Conference") in order to provide you with an update of our letter to you of September 22, 2008 (copy attached), regarding the request of the Loan Syndications and Trading Association ("LSTA") and the Securities Industry and Financial Markets Association ("SIFMA") that Bankruptcy Rule 2019 be repealed. As explained in our earlier letter, during the past year (actually, for more than one year), the Conference has been considering recommendations to modify Rule 2019 to require adequate disclosure, possibly broadening it in certain respects, while limiting or eliminating some disclosure. Our earlier letter noted that we anticipated discussing these issues at our annual meeting in Washington, D.C., on October 23rd and 24th, and intended to update the Advisory Committee with our conclusions shortly thereafter. The purpose of this letter is to provide you with that update.

At our Annual Meeting, the Conference voted to make the following recommendations with respect to Bankruptcy Rule 2019:

1. The Conference opposes the repeal of Rule 2019 and recommends that Rule 2019 be retained. The Conference further recommends that the Rule be amended as described below to address the fact that the Rule (i) is underinclusive and (ii) does not address the economic reality of derivative investments, options and participations which allow stakeholders to have an economic interest in (or economic exposure to) claims and equity securities without directly owning or acquiring them. Additionally, the Rule should be amended to limit the circumstances under which purchase price and time of acquisition must be disclosed.

2. The disclosure requirements of Rule 2019 should be expanded to require that any party in interest that files any pleading in a case, including a motion seeking any relief or an objection to any relief, be required to disclose all claims or interests held by that party but, except as described below, the disclosure need not include the time of acquisition or the amount paid for the claim or interest.

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3. Rule 2019 should be amended to require that each member of an official committee established under section 1102 or 1114 of the Code be required to disclose, in a publicly-filed pleading (and not just confidentially to the United States Trustee): (1) all holdings of claims or interests in any class, excluding any holdings on the other side of an "ethical wall"l (2) any subsequent changes in holdings; and (3) a description of ethical wall procedures. Further, each member of an official committee should be required to disclose, not only claims or interests that it "owns," but also all derivative, option and participation interests held in or in relation to the debtor.

4. Each member of an ad hoc or unofficial committee of creditors or equity holders (however named) that purports to be representative of a larger group (and not just of the interests of its members), excluding any indenture trustee or any agent for a bank group, and each individual stakeholder who purports to speak for a class or group, should be required to make the same disclosure as required of official committees, as described in paragraph 3, *supra*, and, in addition, to disclose the time of acquisition and price paid for all holdings. This additional disclosure requirement of time of acquisition and price paid would not apply to an ad hoc or unofficial committee or "group" (however named) that does not purport to be representative of any interests beyond those of its own members.

The following table summarizes the level of disclosure which the Conference recommends be required of various parties in interest under an amended Rule 2019, with an "X" in the box indicating that disclosure should be required:

Party	**Nature of Claim**	**Amount of Claim**	**When Acquired**	**Amount Paid**	**Derivatives/ Participations**
Single Party in Interest Appearing in Case	X	X			
Nonrepresentative Ad Hoc or Unofficial Committee or Group	X	X			
Representative Ad Hoc or Unofficial Committee or Group	X	X	X	X	X
Official Committee	X	X			X

These recommendations, and their underlying rationale, are described in more detail in the attached memorandum.

The Conference appreciates your consideration of our views.

Very truly yours,

/s/ Isaac M. Pachulski

Isaac M. Pachulski
Vice Chair
Chapter 11 Committee
(310) 228-5655
ipachulski@stutman.com

Enclosures

NATIONAL BANKRUPTCY CONFERENCE

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

Technical and Advisory Services to Congress. To facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

National Bankruptcy Conference
PMB 124, 10332 Main Street • Fairfax, VA 22030-2410
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U.S. Bankruptcy Court
San Antonio, TX

Michael J. Crames, Esq.
Kaye Scholer, LLP
New York, NY

***Murray Drabkin, Esq.**
Cadwalader, Wickersham & Taft LLP
Washington, D.C.

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Southern Methodist University
Dallas, TX

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Prof. S. Elizabeth Gibson
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Chapel Hill, NC

Daniel M. Glosband, Esq.
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Boston, MA

Marcia L. Goldstein, Esq.
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Stutman, Treister & Glatt, Prof. Corp.
Los Angeles, CA

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U.S. Bankruptcy Court
New York, NY

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Fiduciary Counselors Inc.
Washington, D.C.

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U.S. Bankruptcy Court
Dallas, TX

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University of No. Carolina Law School
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Jones Day
Cleveland, OH

***John Jerome, Esq.**
Saul Ewing LLP
New York, NY

Richardo I. Kilpatrick, Esq.
Kilpatrick and Associates, P.C.
Auburn Hills, MI

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UCLA School of Law
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Thompson Coburn LLP
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New York, NY

***Hon. Joe Lee**
U.S. Bankruptcy Court
Lexington, KY

E. Bruce Leonard, Esq.
Cassels Brock & Blackwell LLP
Toronto, Ontario, Canada

Marc A. Levinson, Esq.
Orrick, Herington & Sutcliffe LLP
Sacramento, CA

Hon. Keith Lundin
U.S. Bankruptcy Court
Nashville, TN

Ralph R. Mabey, Esq.
Stutman, Treister & Glatt, Prof. Corp.
Salt Lake City, UT

***Morris W. Macey, Esq.**
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September 22, 2008

Advisory Committee on Bankruptcy Rules
c/o Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

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/s/ Richard Levin

Richard Levin
Vice-Chair

PMB 124, 10332 MAIN STREET • FAIRFAX, VA 22030-2410 • TEL: 703-273-4918 • FAX: 703-802-0207
E-mail: info@nbconf.org • Website: www.nationalbankruptcyconference.org

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REPORT OF THE NATIONAL BANKRUPTCY CONFERENCE ON FEDERAL RULE OF BANKRUPTCY PROCEDURE 2019

December 10, 2008

1. Rule 2019 Should Not Be Repealed.

Bankruptcy Rule 2019 is a disclosure rule that is designed to increase transparency in the chapter 11 process; reveal potential conflicts of interest on the part of those acting in a representative capacity or purporting to act for the benefit of others; and advise the court and parties in interest of the actual economic interest of those participating in a reorganization case—which is all about economics and economic interests. The Rule requires that "in a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 or 1114 of the Code [an official committee], every entity or committee representing more than one creditor or equity security holder . . . shall file a verified statement setting forth" the following information:

> (1) the name and address of the creditor or equity security holder;
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> (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;
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> (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee 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) with reference to the time of the employment of the entity, the organization or formation of the committee or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof.

The substance of the disclosure requirements now contained in Bankruptcy Rule 2019 has been part of bankruptcy law for seventy years. The progenitor of Rule 2019 was enacted as part of Chapter X of the former Bankruptcy Act in the 1930's (Bankruptcy Act §§ 210-12, former 11 U.S.C. §§ 610-12), in the aftermath of an SEC study which "centered on perceived abuses by unofficial committees in equity receiverships and other corporate reorganizations." *In re Northwest Airlines Corp.*, 363 B.R. 701, 704 (Bankr. S.D.N.Y. 2007).

> Among other things, the SEC Report warned of possible conflicts of interest by outside as well as inside financial interests, finding that "these conflicts permeate the entire protective committee system. Their elimination is as essential toward making the outside groups effective and responsible as it is towards eliminating the abuses of the insiders." *SEC Report*, Part I at 880. As one step toward this end the Commission recommended that persons who represent more than 12 creditors or stockholders (including committees) be required to file with the court a sworn statement containing the information now required by Rule 2019. The Report also recommended that "[a]ttorneys who appear in the proceedings should be required to furnish similar information respecting their clients." The SEC specifically found that the foregoing information "will provide a routine method of advising the court *and all parties in interest* of the *actual economic interest* of all persons participating in the proceedings."

In re Northwest Airlines Corp., 363 B.R. 704, 707 (Bankr. S.D.N.Y. 2007) (first emphasis in original; second emphasis added).[1]

The function of Rule 2019 as a self-reporting device that discloses (and, hopefully, helps prevent) potential conflicts of interest and advises the court and parties in interest of the "actual economic interest" of participants in a reorganization case is as

[1] Bankruptcy Judge Alan Gropper, who authored both of the reported *Northwest Airlines* decisions dealing with Rule 2019, is a member of the Conference.

valid now as it was 70 years ago. To put it colloquially, sunlight is the best disinfectant.. Moreover, compliance with Rule 2019 is not unduly burdensome – a Rule 2109 Statement is not a complex or difficult document to prepare. The shortcoming in Rule 2019 is not that it exists, but that it is underinclusive and has not kept pace with the increasingly sophisticated financial devices whereby a stakeholder can have an economic interest in a claim or interest without "owning" the claim or interest.

To begin with, although the Chapter X antecedents of Rule 2019 were enacted in large measure to address perceived abuses and conflicts of interest on the part of unofficial committees, that was not their only purpose: Another important purpose has been to regulate the conduct of attorneys who purport to act on behalf of multiple parties. Thus, former Chapter X included not only a provision requiring disclosure by committees and representative groups (Bankr. Act §211, former 11 U.S.C. § 611)[2] but also a *separate* disclosure requirement applicable solely to attorneys representing creditors or stockholders:

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[2] Section 211 provided that:

> Every person or committee, representing more than twelve creditors or stockholders, and every indenture trustee, who appears in the proceeding shall file with the court a statement, under oath, which shall include –
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> (1) a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders;
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> (2) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act;
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> (3) with reference to the time of the employment of such person, or the organization or formation of such committee, or the appearance in the proceeding of any indenture trustee, a showing of the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, the times when acquired, the amounts paid therefore, and any sales or other disposition thereof; and
>
> (4) a showing of the claims or stock represented by such person or committee and the respective amounts thereof, with an averment that each

> An attorney for creditors or stockholders shall not be heard unless he has first filed with the court a statement setting forth the names and addresses of such creditors or stockholders, the nature and amounts of their claims or stock, and the time of acquisition thereof, except as to claims or stock alleged to have been acquired more than one year prior to the filing of the petition.

Bankruptcy Act § 210, former 11 U.S.C. § 610. Rule 2019 imposes similar requirements on attorneys under the rubric of "any entity . . . representing more than one creditor or equity security holder . . ."

Those advocating the repeal of Rule 2019 with respect to holders of financial interests have overlooked its equally important role in monitoring and regulating the conduct of attorneys. For example, the disclosure required by Rule 2019 may assist the court in addressing (and enforcing) the ethical obligations of counsel who represents multiple stakeholders with potentially conflicting interests in a bankruptcy case. *See In re Oklahoma P.A.C. First Ltd. Partnership*, 122 B.R. 387, 393 (Bankr. D.Ariz. 1990) ("Moreover, the court should also play a role in ensuring that lawyers adhere to certain ethical standards. Bankruptcy Rule 2019 was designed for such a purpose.").

Similarly, Rule 2019 may assist the court in regulating the conduct of counsel who purport to have the right to vote hundreds (or even thousands) of claims. For example, in *Barron & Budd P.C. v. Unsecured Asbestos Claimants Comm.*, 321 B.R. 147 (D.N.J. 2005), the District Court affirmed an order of the Bankruptcy Court directing various asbestos law firms that represented multiple claimants and asserted the right to vote their claims to include in their Rule 2019 Statements:

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holder of such claims or stock acquired them at least one year before the filing of the petition or with a showing of the times of acquisition thereof.

> a list and detailed explanation of any type of co-counsel, consultant or fee-sharing relationships and arrangements whatsoever, in connection with this bankruptcy case or claims against any of the Debtors, and attachment of copies of any documents that were signed in conjunction with creating that relationship or arrangement . . .

Id. at 154.

In affirming the Bankruptcy Court, the District Court characterized Rule 2019 as a disclosure provision:

> designed to ensure that lawyers involved in the Chapter 11 reorganization process adhere to certain ethical standards and approach all reorganization related matters *openly and* subject to the scrutiny of the court. *See, e.g., In re the Muralo Co. Inc.*, 295 B.R. 512, 524 (Bankr. D.N.J. 2003) (Rule 2019 "is designed to foster the goal of reorganization plans which deal fairly with creditors and which are arrived at openly."); *In re Oklahoma P.A.C.*, 122 B.R. 387, 392-393 (Bankr. D. Ariz. 1990) (same); CF Holding, 145 B.R. at 126 (The "purpose of Rule 2019 is to further the Bankruptcy Code's goal of complete disclosure during the business reorganization process."); *In re F&C Int'l, Inc.*, 1994 Bankr. LEXIS 274, (Bankr. S.D. Ohio 1994) (Absent compliance with Rule 2019, there is a danger that "parties purporting to act on another's behalf may not be authorized to do so and may receive distributions to which they are not entitled.").

Id. at 166 (emphasis added).

In the District Court's view, the required Rule 2019 disclosures bore on the overall fairness of a plan. Among other things, the District Court noted: (i) evidence that two law firms which, together, purported to "speak for" over 75% of all asbestos claimants might not in fact "represent" those claimants in the traditional sense of an attorney-client relationship but, rather, may have represented other attorneys who, in turn, represented the individual claimants (*id.* at 160); (ii) the Bankruptcy Court's concern that many of the creditors purportedly represented by counsel who claimed the right to vote their claims had never seen a copy of the chapter 11 disclosure statement and, for all the

Court knew, had absolutely no idea how their claims would be treated under the plan (*id.* at 166); (iii) the appropriateness of applying Rule 2019 "to prevent conflicts of interest among creditors' counsel from undermining the fairness of the Plan" (*id.* at 167); and (iv) disclosures by some non-Appellant law firms revealing that "some attorneys with an inventory of claims in this bankruptcy share as much as one-third of their fees with members of the prepetition committee, who are also Appellants in this case." *Id.* at 167, 169.

In sum, as illustrated by *Baron & Budd*, Rule 2019 is a disclosure rule that serves to assist the Bankruptcy Court in monitoring and regulating the conduct of counsel who purports to speak and act for multiple parties. There is no reason to deprive the Court of this tool.

Of course, the other major purpose of Rule 2019 (and its predecessors) is to require transparency on the part of committees and similar creditor and equity holder groups that purport to represent the interests of a class, and not just to speak for the interests of individual stakeholders who jointly retain counsel. That purpose is as valid now as it was 70 years ago. Once a group of creditors or equity holders elects to seek greater credibility by portraying themselves as an "ad hoc committee" that is looking out for the economic interests of a class of claims or interests, rather than merely the parochial interests of individual members, greater transparency on their part is appropriate because of the greater credibility and influence they seek by acting as a "committee." *Cf. In re Northwest Airlines*, 363 B.R. at 704 (noting that Rule 2019 "requires" unofficial committees that play a significant public role in reorganization

proceedings *and enjoy a level of credibility and influence consonant with group status* to file a statement containing certain information") (emphasis added).

As explained by the Bankruptcy Court in *Northwest Airlines*:

> *Ad hoc* or official 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 positions a degree of credibility appropriate to a unified group with large holdings. Moreover, the Bankruptcy Code specifically provides for the possibility of the grant of compensation to "a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title [an official committee], in making a substantial contribution in a case under chapter 9 or 11 of this title." 11 U.S.C. § 503(b)(3)(D). A committee purporting to speak for a group obviously has a better chance of meeting the "substantial contribution" test than an individual, as a single creditor or shareholder is often met with the argument that it was merely acting in its own self-interest and was not making a "substantial contribution" for purposes of § 503(b)(3) . . .

In re Northwest Airlines, 363 B.R. 701, 703 (Bankr. S.D.N.Y. 2007) (citations omitted).

When "ad hoc" and "unofficial" committees seek greater credibility and influence by styling themselves as such and claiming to act for the benefit of a larger group, it is appropriate to require greater disclosure of the actual economic interests of their members in and relating to the debtor, so that the Court and parties in interest can understand their motives and verify whether their economic interests are aligned with those of the larger group for whom they purport to speak:

> [T]he other [stakeholders] have a right to information as to Committee member purchases and sales so that they can 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 guage the credibility of an important group that has chosen to appear in a bankruptcy case and play a major role.

Id. at 709.

In sum, the self-reporting function of Rule 2019 continues to provide a useful mechanism to assist the court and parties in interest in dealing with "unofficial" creditor groups who seek enhanced credibility by styling themselves as such.

2. Recommended Amendments To Rule 2019.

a. Rule 2019 Should Be Amended to Require the Disclosure of the Holdings of Individual Creditors and Equity Holders Who Appear In a Case.

In their memorandum dated November 20, 2007, the LSTA and SIFMA note that:

> If the information required by Rule 2019 were truly important to bankruptcy reorganizations, it would be required of all active participants and not merely those who form *ad hoc* committees. Rule 2019 in its current form is therefore irrational because it only requires such purportedly important information from *ad hoc* committee members. The primary explanation for this lies in bankruptcy history which varies dramatically from present bankruptcy practices. In light of that disparity, the Rule is irrational, because it is under-inclusive and does not apply to investors who are not members of *ad hoc* committees but who may nonetheless pursue the same strategies the Rule ostensibly deters.

LSTA/SIFMA Memorandum at 15.

They further argue that:

> To the extent that Rule 2019 provides the court and the debtor with an understanding of the motives of participants in the process, it is under-inclusive, because it does not require disclosure from all participants, just from *ad hoc* committees. Therefore, if transparency truly allows the court and the debtor to "root out" investors who act in bad faith or to uncover conflicts of interest between committee members and their representatives, then the Rule should apply *equally* to all participants in a bankruptcy case and not just to members of ad hoc committees.

LSTA/SIFMA Memorandum, at 17. To support their point, the LSTA/SIFMA cite some examples of situations where the "wrongdoers" were individual creditors.

The Conference has considered this issue and agrees that Rule 2019 is underinclusive. The solution to this shortcoming is not, however, to abolish a Rule that has important disclosure and prophylactic purposes, but to broaden it to require the disclosure of holdings by individual creditors and equity holders who participate in a reorganization case (regardless of whether they are part of a "group", "consortium" or "committee" or have jointly retained counsel), without requiring the disclosure of the purchase price paid for claims or interests or the time of their acquisition (from which their purchase price may often be derived). Where an individual creditor or equity holder appears in a case to seek relief from the Court or oppose relief sought by others, the Court is entitled to know the nature of the creditor's (or equity holder's) actual economic interest that motivates the creditor's (or equity holder's) position, particularly since much of what comes before the Court involves the exercise of discretion. Such disclosure will reduce the likelihood that a "hidden agenda" stays hidden, and would not be unduly burdensome (about one paragraph of a pleading).

b. Rule 2019 Should Be Amended to Require Public Disclosure By Members of Official Committees as Well as Ad Hoc Committees.

Rule 2019 specifically excludes from its disclosure requirements "a committee appointed pursuant to § 1102 or 1114 of the Code," i.e., official creditors and equity holders committees. Although members of official committees appointed by the United States Trustee are required to make various private disclosures to the U.S. Trustee, that information is not made public; there is no required public disclosure of official committee members' holdings or actual economic interests in the case.

It is quite anomalous, however, to require *no* public disclosure of holdings or changes in holdings from members of *official* committees when such disclosure is required from members of *unofficial* committees. The same considerations that warrant the public disclosure of the actual economic interests of the members of an unofficial committee to the Court and to the creditors or equity holders that the unofficial committee purports to represent apply with equal force to members of official committees. These considerations are reinforced by the fiduciary duties of members of official committees to their constituents, the fact that the views of official committees generally carry greater weight and have more credibility with the Court and others than those of individual stakeholders or unofficial committees, and the fact that professionals employed by official committees are compensated by the estate without any showing of "substantial contribution." *Compare* 11 U.S.C. §§ 503(b)(3)(D), (4), *with id.* §§ 330(a), 503(b)(2). These considerations support disclosure and transparency with respect to the economic interests of members of official committees. Accordingly, the Conference recommends that Rule 2019 be amended to require members of an official committee to file with the court a statement disclosing: (1) all holdings of claims and interests of each member of the committee, in all classes of claims or interests, but not including any holdings on the other side of an ethical wall that has been established with court approval to permit the entity represented on the committee to continue to engage in trading; (2) any changes in their holdings; and (3) a description of the "ethical wall" procedures.

In contrast to its recommendation with respect to *ad hoc* or unofficial committees (or even individual creditors) that purport to speak for a larger group, however, the Conference recommends *against* requiring the *public* disclosure by

members of official committees of the price paid for their holdings or the time of acquisition (from which the price paid might often be determined). This recommendation results from a concern that requiring the disclosure of purchase price information would unduly discourage parties from being willing to serve on official committees, an input received from the U.S. Trustee's Office on this point. This approach to not requiring public disclosure would not affect the ability of the U.S. Trustee to require the private disclosure of such information to the U.S. Trustee as part of its appointment and maintenance in office of official committee members.

This distinction between official committees and unofficial committees with respect to the public disclosure of purchase price and time of acquisition information is warranted by the very different nature of the "appointment" process for such committees. Members of official committees are screened and appointed by the U.S. Trustee's Office (which can require the provision of information on a private basis as a condition of such service). In contrast, there is no judicial or administrative body that performs an analogous screening function for *ad hoc* committees: Members of unofficial committees are self-selected and need not make any disclosure on a private basis to any judicial or administrative body in order to serve on an unofficial committee.

c. Rule 2019 Should Be Amended to Require Disclosure Not Only Regarding "Claims" or "Interests" "Owned" By Committee Members But Also of Derivatives, Option and Participations Giving Rise To Economic Interests In or Against the Debtor.

Rule 2019 requires disclosure only with respect to "claims or interests owned" by the members of a committee. However, in light of the proliferation and use of sophisticated, sometimes complex financial instruments that allow stakeholders to acquire economic interests and exposures without directly purchasing the underlying

claim or equity security, the limited reference to "owned" "claims" and "interests" in Rule 2019 does not comport with current economic reality, and needs to be broadened. Otherwise, the limited disclosure required by Rule 2019 may provide an incomplete or distorted picture of where a committee member's economic interests truly lie. *Cf.* Stephen Lubben, *Credit Derivatives and the Future of Chapter 11, 81 Am. Bankr. L.J.* 405, 427 ("Petitioning creditors should be required to disclose their swap positions as part of the involuntary petition . . . so that courts considering petitions have some awareness if the creditors had incentives to 'jump the gun' with the petition.").

While not involving Rule 2019 (because members of official committees are not required to comply with Rule 2019), the cease and desist order entered in *In re Van D. Greenfield and Blue River Capital LLC*, Administrative Proceeding 3-12098, SEC Release No. 52744 (Nov. 7 2005) (copy attached as Appendix "C") illustrates the shortcomings of a disclosure scheme that is limited to "claims" and "interests" that are "owned." There, Blue River, a broker-dealer owned by Mr. Greenfield, owned less than $7 million in WorldCom unsecured notes when WorldCom filed its chapter 11 case on July 21, 2002. Only July 26, 2002, Greenfield arranged to have a short sale of $400 million in face amount of WorldCom unsecured notes ("Notes") executed in one Blue River proprietary account "as of" July 19, 2002, and a purchase of $400 million in face value of such Notes concurrently executed in another Blue River proprietary account. Then, Greenfield sent a letter to the U.S. Trustee applying for appointment to WorldCom's Official Unsecured Creditors' Committee, representing that Blue River held a $400 million unsecured claim against WorldCom based on the Notes.

The letter did not, however, disclose that Blue River also had a $400 million short position in the Notes in another proprietary account and, thus, no net economic interest in the Notes beyond the original position of less than $7 million. Based on the $400 million "long" position in the Notes (and the failure to disclose the offsetting short position), Blue River was appointed to the Official Committee and Greenfield became its co-chair. The next day, Greenfield directed the cancellation of the short sale and the associated purchase of the Notes, leaving Blue River with its original less than $7 million position in WorldCom debt. Of course, had the "short" position been disclosed, Greenfield would never have been appointed to the Official Committee.

In order to provide complete and meaningful disclosure of economic interests in or relating to the debtor of members of official committees, members of ad hoc committees that portray themselves as speaking for a larger group, and individual stakeholders who purport to speak for a class or group, such committee members and individual stakeholders should be required to disclose not only "claims" or "interests" which they "own," but also any pledge, lien, option, participation, derivative instrument or other right or derivative right that grants the holder thereof an economic interest in a claim or interest that has the same or similar economic effect as if such holder held, acquired, or sold a claim or interest.

d. Rule 2019 Should Be Amended To Limit the Requirement of Disclosing the Time of Acquisition and the Purchase Price of Claims and Interests to Members of Unofficial Committees and Individual Creditors That Purport to be Acting for a Larger Group.

The Conference recommends that Rule 2019 be amended so that any general requirement of public disclosure of purchase price of a claim or interest or the time of acquisition (from which the purchase price can often be derived) should apply

only to (i) members of ad hoc or unofficial committees or groups (however denominated) that claim to be representative of claims or interests similar to those represented on the committee or in the "group," and (ii) individual creditors who purport to represent or speak for a class of claims or interests. The common element in all of these situations is that the party before the Court is purporting to represent the interests of others on a self-selected basis, without having been screened or subject to appointment by any judicial or administrative body. In such a situation, those "others" should have sufficient information to determine whether their interests are actually aligned with those of the parties purporting to speak or act on their behalf.

However, for reasons already summarized in section 2(c), *supra*, the Conference recommends against extending the requirement of *public* disclosure of purchase price and time of acquisition to members of official committees who are appointed (and screened) by the U.S. Trustee. In addition, there appears to be no reason to require stakeholders who do not purport to be acting for or representing the interests of others to disclose what they paid for their claims or interests. Accordingly, Rule 2019 should be amended to eliminate any requirement to disclose the acquisition price of a claim or the time of acquisition for any ad hoc committee or group that does not claim to be representative of claims or interests similar to those represented on the committee or within the group, or to be acting for anyone beyond its own members.

APPENDIX "A"

LEXSEE 122 BR 387

In re OKLAHOMA P.A.C. FIRST LIMITED PARTNERSHIP, an Arizona limited partnership, Debtor. CITY OF LAFAYETTE, COLORADO, and Crossland Mortgage Corporation, Movants, v. OKLAHOMA P.A.C. FIRST LIMITED PARTNERSHIP, an Arizona limited partnership, Respondent

Case No. B-89-8110-PHX-SSC Chapter 11, Adversary No. E

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

122 B.R. 387; 1990 Bankr. LEXIS 2542; 24 Collier Bankr. Cas. 2d (MB) 1057

October 15, 1990, Decided
October 15, 1990, Filed

SUBSEQUENT HISTORY: [**1] Corrected for Publication.

COUNSEL: Peter J. Rathwell, Esq., Donald L. Gaffney, Esq., Patrick E. Hoog, Esq., Eugene F. O'Connor, Esq., Jon S. Musial, Esq., Snell & Wilmer, Phoenix, Arizona, former Attorneys for City of Lafayette Crossland Mortgage Corp.; Attorneys of Record for Kansas City Life Insurance Corp., Valley National Bank and Valley National Mortgage Corporation.

Carolyn J. Johnsen, Esq., Hebert, Schenk, Johnsen & Dake, Phoenix, Arizona, Attorneys for Debtor.

United States Trustee's Office, Phoenix, Arizona.

JUDGES: Sarah Sharer Curley, United States Bankruptcy Judge.

OPINION BY: CURLEY

OPINION

[*388] MEMORANDUM DECISION

PRELIMINARY STATEMENT

SARAH SHARER CURLEY, United States Bankruptcy Judge.

This matter comes before the court upon the request of the above-captioned Debtor, Oklahoma P.A.C. ("Debtor") for a determination to what extent counsel for numerous secured creditors must file a verified statement pursuant to Bankruptcy Rule 2019.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(2)(A). To the extent necessary, this Memorandum Decision shall constitute this Court's findings of fact and conclusions of law.

FACTUAL HISTORY

On August 31, 1989, the Debtor filed its petition under Chapter 11 of the Bankruptcy Code. The Debtor owns real property [**2] with an estimated value of $ 50 million. The assets range from vacant land to land improved with houses. The houses are generating income either under agreements for sale or rental agreements with third parties.

On November 9, 1989, the City of Lafayette, Colorado ("City of Lafayette") filed a Motion for Relief from the Automatic Stay imposed under Section 362 of the Bankruptcy Code. The City of Lafayette initially requested relief under Section 362(d)(1) [1] [*389] for cause, alleging that the Debtor's petition was filed in bad faith. The Debtor filed an objection to the relief requested. On January 30, 1990, Crossland Mortgage Corporation ("Crossland") filed a Motion to Intervene in the adversary proceeding. As part of its proposed joinder in the City of Lafayette's Motion, Crossland raised issues under Section 362(d)(2), [2] alleging that the subject real property of the adversary proceeding, an incomplete shopping center named "Countryside Village" in Lafayette, Colorado, was overencumbered as a result of the indebtedness due and owing the City of Lafayette and Crossland. Crossland also alleged that the subject real property was not necessary for an effective reorganization. Crossland [**3] did not allege which creditor had a superior lien on the property.

1 Section 362(d) (1) provides that:

> (d) On request of a party in interest and after notice and a hear-

ing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; . . . .

2 Section 362(d) (2) provides:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

In the responsive pleading filed by the Debtor on February 13, 1990, objecting [**4] to the intervention, the Debtor moved this Court to determine the compliance of the City of Lafayette, Crossland, three other creditors, and its counsel with Bankruptcy Rule 2019. The same law firm represented not only the City of Lafayette and Crossland, but also Valley National Bank, Kansas City Life Insurance Company and Valley National Mortgage Corp. [3]

3 The Debtor's Motion to Determine Compliance with Bankruptcy Rule 2019 should have been filed as a separate pleading in the administrative file. Because the outcome of the Motion might have had an impact on the ability of counsel to continue to represent the litigants in this adversary proceeding, this Court determined to rule immediately on the Motion to Determine Compliance.

On March 5, 1990, the creditors and their counsel filed a responsive pleading to the Motion to Determine Compliance acknowledging that the same law firm represented the aforesaid five creditors in the bankruptcy proceedings, but stating that Bankruptcy Rule 2019 was not intended to apply [**5] to individual creditors or counsel representing numerous creditors. On March 19, 1990, this Court ruled on the Motion to Determine Compliance with Bankruptcy Rule 2019 that counsel for the five creditors should immediately comply. On March 29, 1989, counsel for the five creditors filed (a) a Verified Statement in an effort to comply with Bankruptcy Rule 2019, (b) a Motion for Reconsideration of this Court's Bench Ruling of March 19, and (c) a form of Order incorporating this Court's Bench Ruling. This Court did not sign the Order presented, and held a hearing on the Motion for Reconsideration on May 9, 1990. The Court rendered its Bench Ruling denying the Motion for Reconsideration. On June 1, 1990 this Court entered an Order concerning the Motion to Determine Compliance and the Motion for Reconsideration. This Memorandum Decision incorporates and amplifies this Court's Bench Rulings on March 19, 1990 on the Motion to Determine Compliance and on May 9, 1990 on the Motion for Reconsideration.

LEGAL ISSUE

Whether a law firm representing individual creditors must comply with the disclosure provisions of Bankruptcy Rule 2019.

DISCUSSION

As a starting point, this Court notes that [**6] Bankruptcy Rule 2019 provides in pertinent part:

(a) *Data Required.* In a . . . . chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 of the Code, every entity or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement with the clerk setting forth (1) [*390] 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 pertinent facts and circumstances in connection with the employment of the entity . . . .; and (4) with reference to the time of employment of the entity, ... the amounts of claims or interest owned by the entity . . . ., the

> amounts paid therefor, and any sales or other disposition thereof.

The Verified Statement should include a copy of the instrument, if any, by which the entity is empowered to act. If there are any material changes to the facts as stated in the Verified Statement, the entity should file [**7] promptly a supplemental Verified Statement. Bankruptcy Rule 2019(a).

The Rule, on its face, is extremely broad. The Rule provides as an exception to its application, any official Committee of Creditors or interested parties appointed under Section 1102 of the Bankruptcy Code. [4] Therefore, its application must be to *informal* committees of creditors or interested parties. It is not unusual in the Chapter 11 context for these informal committees to be represented by one law firm, with the law firm to have the claims of the creditors or interested parties assigned to it, so that the law firm may act on the parties' behalf.

[**8] If there is a failure to comply with the disclosure provisions of Bankruptcy Rule 2019, the Court may, *inter alia*, refuse to permit the entity acting on behalf of the parties from being heard further in a Chapter 11 case. [5]

4 **11 U.S.C. § 1102**

> Section 1102. Creditors' and equity security holders' committees.
>
> (a) (1) As soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States deems appropriate.
>
> (2) On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.
>
> (b) (1) A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.
>
> (2) A committee of equity security holders appointed under subsection (a) (2) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest amounts of equity securities of the debtor of the kinds represented on such committee.

5 Bankruptcy Rule 2019(b) provides that:

> **(b) Failure To Comply; Effect.** On motion of any party in interest or on its own initiative, the court may (1) determine whether there has been a failure to comply with the provisions of subdivision (a) of this rule or with any other applicable law regulating the activities and personnel of any entity, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that entity, committee, or indenture trustee to be heard further or to intervene in the case; (2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any entity or committee in contemplation or in the course of a case under the Code and grant appropriate relief; and (3) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by an entity or committee who has not complied with this rule or with § 1125(b) of the Code.

[**9] In reviewing the scope of Bankruptcy Rule 2019(a), one commentator has stated:

> Rule 2019 applies only in cases under chapter 9 or chapter 11 of the Bankruptcy Code. The rule is part of the disclosure scheme of the Bankruptcy Code. It is designed to foster the goal of reorganization plans which deal fairly with creditors and which are arrived at openly. Rule 2019 covers entities which act in a fiduciary capacity but which are not otherwise subject to the control of the court. The rule, therefore, specifically excepts from its terms committees ordered organized under section 1102 of the Code. [*391] On the other hand, the Code contemplates that there will be unofficial committees. Any such unofficial committee must comply with Rule 2019 by its terms . . . .
>
> The rule will apply to any entity, including an attorney, who represents more than one creditor or equity interest holder. While a failure to comply with Rule 2019 will not affect the ability of an attorney to prosecute an involuntary chapter 11 petition, the rule must be complied with by such an attorney in order to be heard on behalf of multiple creditors on any other matter. [citations omitted.]

8 *Collier on Bankruptcy* para. 2019.03, [**10] pp. 2019-3 to 2019-5 (15th ed. 1989). Counsel for the five creditors conceded at oral argument on the Motion for Reconsideration that no commentator supported his position.

Moreover, this Court's review of the relevant case law at the time of the initial hearing on the Motion to Determine Compliance and subsequently at the hearing on the Motion for Reconsideration discloses only one published decision that discusses Bankruptcy Rule 2019 and the effect of an attorney who fails to comply therewith.

In the decision of *In re Hudson Shipbuilders, Inc.*, Bankruptcy No. 83-07199-SC, Civil Action No. S84-0757(N) (S.D. Miss. 1985), [6] the District Court determined on appeal the appropriateness of an award of attorneys' fees to a secured creditor of the debtor. One of the issues raised on appeal was whether the secured creditor should be denied recovery of its attorneys' fees because its counsel had represented both the secured creditor and an unsecured creditor in the bankruptcy proceedings, and said attorney had failed to comply with Bankruptcy Rule 2019(a).

6 This is a published decision. Lexis has not yet assigned a specific citation to this older decision.

[**11] In Part III of the Opinion, the Court initially notes that "the property right in an attorney fee vests exclusively in the secured creditor." The Court then adds "thus, as it pertained to [the Secured Creditor], no conflict of interest existed in the case." This misses the point, however. The attorney's representation of a secured and an unsecured creditor in the same case may have impaired that attorney's ability to represent the separate, distinct and frequently adverse interests of the clients on many issues. This impairment could result in the denial of compensation to the attorney from assets of the bankruptcy estate. The District Court then noted that even if a conflict of interest did exist because the attorney represented a secured and unsecured creditor, the trial court was in the most advantageous position to determine whether the award of attorneys' fees should be denied to counsel.

In addressing the Bankruptcy Rule 2019 issue, the District Court assumed that the attorney must comply with the Rule. The only issue on appeal was the appropriate remedy for a failure to comply. Bankruptcy Rule 2019(b) affords the trial court with a great deal of discretion in fashioning the [**12] remedy. The District Court concluded on appeal that even though the trial court found that the attorney represented conflicting interests in the case and that the attorney had not complied with Bankruptcy Rule 2019, the trial court had the discretion nevertheless to award attorneys' fees to counsel.

Although the reasoning of *Hudson Shipbuilders* may be questioned, this Court notes that the decision permits the trial court to determine that a failure to comply with Bankruptcy Rule 2019(a) may result in the imposition of *no sanctions or remedies* under Bankruptcy Rule 2019(b).

The difficulties with the representation by the same firm of the two secured claimants in this adversary proceeding quickly becomes apparent.

If the fair market value of the real property is closer to the value maintained by the City of Lafayette, it may become critical during the course of the Final Hearing, or other hearings before this Court, to determine [*392] whether the City of Lafayette or Crossland has a first lien on Countryside Village. If the priority of the liens does become an issue, one law firm cannot vigorously defend the rights of both creditors. Nor is this point in dispute. Counsel for the secured [**13] creditors conceded that

if this Court found it necessary to explore the priority of the liens, the law firm would be required to withdraw.

Unfortunately, the priority of the liens is very much an issue in this adversary proceeding. If this Court agrees that the value of Countryside Village does not exceed the value of $ 900,000 and Crossland has a first lien on the real property, Crossland becomes an undersecured creditor and the City of Lafayette becomes an unsecured creditor. Being designated an unsecured creditor would impact on the City of Lafayette's ability to receive any postpetition interest or any attorneys' fees in pursuing the vacatur of stay litigation, or to be treated as a secured or undersecured creditor in the Debtor's plan of reorganization. The interests of these two creditors are not aligned in this adversary proceeding. They cannot be represented by the same counsel.

At the initial hearing on the Motion to Determine Compliance with Bankruptcy Rule 2019, this Court indicated that the law firm should comply with the Rule and that a separate law firm should be retained for at least one of the secured creditors. The disclosure provisions of Bankruptcy Rule 2019, therefore, [**14] focused on one remedy; that is, permitting counsel to be heard as to one creditor, but because of the actual or potential conflict of interest, requiring that a second law firm step in and represent the other creditor. On this point, counsel for the secured creditors conceded that out-of-state law firms were already involved, so that it might not be that difficult to have a second law firm step in.

At the oral argument on the Motion for Reconsideration, when this Court stated that it would most likely have to consider the priority of the liens in this adversary, the conflict of interest issue became crystallized. Counsel then requested to withdraw as to both creditors, but still requested that this Court determine the Bankruptcy Rule 2019 issues as to the remaining three creditors that the law firm represented.

The Court's position remains the same as to the remaining three creditors: if the law firm can vigorously represent their interests after full disclosure under Bankruptcy Rule 2019, then it should continue to do so. If it cannot, again after appropriate disclosure under Bankruptcy Rule 2019, this Court may pursue one remedy under Bankruptcy Rule 2019; that is, direct the law [**15] firm to withdraw.

On the Motion for Reconsideration, counsel for the secured creditors argued that this Court should not be involved in the "administration" of the bankruptcy case. However, Bankruptcy Rule 2019 is a disclosure provision, which must necessarily be enforced as any other disclosure provision concerning attorneys or professionals, such as Bankruptcy Rules 2014 and 2016. [7] [*393] Moreover, the Court should also play a role in ensuring that lawyers adhere to certain ethical standards. Bankruptcy Rule 2019 was designed for such a purpose. It is part of the Chapter 11 reorganization process that all matters should be done openly and subject to scrutiny, whether it is the proposal of a plan of reorganization, representation of the debtor, or representation of numerous creditors -- secured or unsecured.

7 **Rule 2014. Employment of Professional Persons.**

> **(a) Application for and Order of Employment.** An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327 or § 1103 of the Code shall be made only on application of the trustee or committee, stating the specific facts showing the necessity for employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants.
>
> **(b) Services Rendered by Member or Associate of Firm of Attorneys or Accountants.** If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses.

(a) Application for Compensation or Reimbursement. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity.

(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file with the court within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed within 15 days after any payment or agreement not previously disclosed.

[**16] Counsel advances another argument on the Motion for Reconsideration. It urges that Bankruptcy Rule 2019 is somehow in contravention of Section 1109(b) of the Bankruptcy Code. This argument is misplaced. Section 1109(b) provides in pertinent part:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

Counsel argues that Bankruptcy Rule 2019 somehow abridges the creditors' right to be heard, and must, therefore, be of no force and effect pursuant to 28 U.S.C. § 2075. [8] However, this Court has not denied the right of any creditor to be heard. It has simply indicated that based upon the disclosures under Bankruptcy Rule 2019 and the proceedings before this Court, counsel may be unable to represent all of the creditors. Although this Court ordered counsel to comply with the Rule within a limited period of time and withdraw from representing at least one of the creditors in this adversary proceeding because the law firm could not aggressively represent the interests of both creditors [**17] in this adversary, this Court could have ordered more drastic measures. There has been no authority provided by counsel to the contrary.

8 **28 U.S.C. § 2075 provides that:**

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs,

> pleadings, and motions, and the practice and procedure in cases under Title 11.
>
> Such rules shall not abridge, enlarge, or modify any substantive rights.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

Finally, this Court notes that it rendered its decision on the Motion for Reconsideration in a Bench Ruling on May 9, 1990. A Motion for Reconsideration is not specifically contemplated by the Federal Rules. Such Motions, however, have been [*394] treated as Motions under *F.R. Civ. P.* 59(e) to alter or amend an order or judgment. *In re Curry* [**18] *and Sorensen, Inc.*, 57 Bankr. 824, 827 (Bankr. 9th Cir. 1986). However, there are only three grounds which may be asserted for such a motion:

> (1.) manifest error of fact;
>
> (2.) manifest error of law; or
>
> (3.) newly discovered evidence.

6A J. Moore, J. Lucas & G. Grother, *Moore's Federal Practice* para. 59.07 (2d ed. 1989); *Brown v. Wright*, 588 F.2d 708 (9th Cir. 1978). Much of the argument set forth in the Motion for Reconsideration was already considered and determined by this Court at the March 19, 1990 Hearing on the Motion to Determine Compliance. Counsel has included additional arguments in its Motion for Reconsideration. They have been considered and rejected by this Court in this Memorandum Decision. However, a Motion for Reconsideration should not address additional arguments. This Court should also note that it can find no error of fact or law in its prior Bench Ruling on the Motion to Determine Compliance with Bankruptcy Rule 2019.

APPENDIX "B"

LEXSEE 321 BR 147

BARON & BUDD, P.C., et al., APPELLANT, v. UNSECURED ASBESTOS CLAIMANTS COMMITTEE, et al., APPELLEE. v. CONGOLEUM CORPORATION, DEBTOR.

Civ. A. No. 04-5633 (SRC), 04-5634 (SRC), 04-5635 (SRC), 04-5636 (SRC)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

321 B.R. 147; 2005 U.S. Dist. LEXIS 2864; 61 Fed. R. Serv. 3d (Callaghan) 42; 53 Collier Bankr. Cas. 2d (MB) 1159

February 25, 2005, Decided
February 25, 2005, Filed

DISPOSITION: Affirmed; appeals were dismissed.

COUNSEL: [**1] For BARON & BUDD, P.C., FOSTER & SEAR, L.L.P., MCCURDY & MCCURDY, L.L.P., MOTLEY RICE, L.L.C., PROVOST & UMPHREY, L.L.P., BRAYTON PURCELL, SILBER PEARLMAN, L.L.P., Appellants: BRUCE HUGH LEVITT, LEVITT & SLAFKES, PC, SOUTH ORANGE, NJ.

For CAMPBELL, CHERRY, HARRISON, DAVIS & DOVE, P.C. Appellant: TIMOTHY P. DUGGAN, STARK & STARK, PRINCETON, NJ.

For UNSECURED ASBESTOS CLAIMANTS COMMITTEE, Appellee: NANCY ISAACSON, GOLDSTEIN LEM & ISAACSON, PC, SPRINGFIELD, NJ.

For TRAVELERS CASUALTY AND SURETY COMPANY, Appellee: STEPHEN V. FALANGA, CONNELL FOLEY, LLP, ROSELAND, NJ.

For ST. PAUL FIRE AND MARINE INSURANCE CO., Appellee: STEFANO V. CALOGERO, CUYLER BURK LLP, PARSIPPANY CORPORATE CENTER, PARSIPPANY, NJ.

For CENTURY INDEMNITY COMPANY, ACE AMERICAN INSURANCE COMPANY, ACE PROPERTY & CASUALTY INSURANCE COMPANY, Appellees: MARTIN FREDERICK SIEGAL, SIEGAL & NAPIERKOWSKI, CHERRY HILL, NJ; BARBARA MARIA ALMEIDA, O'MELVENY AND MYERS L.L.P., NEW YORK, NY.

For MT. MCKINLEY INSURANCE COMPANY FORMERLY KNOWN AS GIBRALTAR CASUALTY COMPANY, EVEREST REINSURANCE COMPANY FORMERLY KNOWN AS PRUDENTIAL REINSURANCE COMPANY, Appellees: KEVIN M. HAAS, COZEN O'CONNOR, NEWARK, NJ.

JUDGES: CHESLER, [**2] District Judge.

OPINION BY: Stanley R. Chesler

OPINION

[*153] **MEMORANDUM OPINION**

CHESLER, District Judge

Before the Court is an appeal by the law firms of Baron & Budd, P.C. ("Baron & Budd"), Campbell, Cherry, Harrison, Davis & Dove, P.C. ("Campbell Cherry"), Foster & Sear, L.L.P. ("Foster & Sear"), McCurdy & McCurdy, L.L.P. ("McCurdy & McCurdy"), Motley Rice, L.L.C. ("Motley Rice") and Provost & Umphrey, L.L.P. ("Provost & Umphrey") (collectively the "Appellants"). On appeal are the bankruptcy court's September 2, 2004 Order Requiring Compliance with Bankruptcy Rule 2019 and Granting Other Relief (Bankr. Dkt. No. 1153) (the "Rule 2019 Compliance Order") and three other Orders of the bankruptcy court, filed on October 5 and 6, 2004. The three other orders are: (1) Order Denying Motion or Application for the Entry of an Order Reconsidering Order Requiring Compliance with Bankruptcy Rule 2019 and Other Relief (dated October 6, 2004) (Bankr. Dkt. No. 1341) (the "Order Denying Campbell & Cherry Motion to Amend"); (2) Order Denying Motion to Amend Order Requiring Compliance with Bankruptcy Rule 2019 and

Granting Other Relief filed by Motley Rice (dated October 5, 2004) (Bankr. Dkt. No. 1343) [**3] (the "Order Denying Motley Rice Motion to Amend"); (3) Order Denying Motion to Amend Order Requiring Compliance with Bankruptcy Rule 2019 and Granting Other Relief filed [*154] by Baron & Budd and Silber Pearlman (dated October 6, 2004) (Bankr. Dkt. No. 1344) (the "Order Denying Baron & Budd Motion to Amend").

Movants in the bankruptcy court, and now opposing this appeal, are Century Indemnity Company & ACE American Insurance Company ("Century") and Travelers Casualty and Surety Company & St. Paul Fire and Marine Insurance Company ("Travelers") (collectively the "Appellees" or "Insurers").

BACKGROUND AND PROCEDURAL HISTORY

Appellants represent multiple tort-victim creditors in this Chapter 11 bankruptcy case pending before Judge Ferguson. Appellees are the issuers of liability insurance policies to the Debtors. The Insurers are currently engaged in state court coverage litigation with the Debtors over the extent of coverage their policies provide for asbestos related claims. See Motion to Compel the Law Firm of Motley Rice, L.L.C. to Comply with its Obligation under Federal Rule of Bankruptcy Procedure 2019 (filed on July 6, 2004) (Bankr. Dkt. [**4] No. 922) ("Century Rule 2019 Motion") at 5 ("The coverage action involving essentially the same parties is pending in the Superior Court of New Jersey, Law Division, Middlesex County, and is captioned Congoleum Corporation v. ACE American Insurance Company et al. (Docket No. M ID-L8908-01).").

On July 6, 2004, Travelers filed a Motion Pursuant to Fed. R. Bankr. P. 2019 and 11 U.S.C. § 105 for an Order (a) Determining that Certain Asbestos Claimants Counsel Have Failed to Comply with Rule 2019 and Barring those Certain Counsel from Being Heard in this Case; (b) Invalidating any Authority or Acceptances Given, Procured, or Received by those Certain Non-Complying Counsel in Support of the Debtor's Proposed Plan; and/or (c) For Other Appropriate Relief (filed on July 6, 2004) (Bankr. Dkt. No. 919) ("Travelers' Rule 2019 Motion"). On July 7, 2004, Century filed an additional motion seeking similar relief. See Century Rule 2019 Motion.

Judge Ferguson heard oral argument on July 26, 2004 and issued an oral ruling on the record granting, in substantive part, the Rule 2019 Motions. Then, on September 2, 2004, Judge Ferguson [**5] entered the Rule 2019 Compliance Order, calling on all noncomplying Plaintiff firms to file Rule 2019 statements within ten days. The Order was specifically directed at the four firms who opposed the Rule 2019 motions--Motley Rice, Baron & Budd, Silber Perlman, and Provost & Umphrey--and provided, in relevant part, that:

> Rule 2019 Statement[s] . . . shall include . . . (d) a list and detailed explanation of any type of co-counsel, consultant or fee-sharing relationships and arrangements whatsoever, in connection with this bankruptcy case or claims against any of the Debtors, and attachment of copies of any documents that were signed in conjunction with creating that relationship or arrangement . . .

Rule 2019 Compliance Order at 3.

A Motion for Reconsideration of the Rule 2019 Compliance Order, pursuant to Fed. R. Civ. P. 59 and Fed. R. Bankr. P. 9023, was filed by Campbell Cherry on September 13, 2004 and, on the same day, separate Motions to Amend were filed by Motley Rice, and by Baron & Budd, Provost & Umphrey, and Silber Pearlman. On September 28, 2004, Foster & Sear, McCurdy & McCurdy [**6] and Campbell Cherry filed joinders to the Baron & Budd Motion to Amend. Together with these motions, Appellants filed applications under Fed. R. Civ. P. 62(b) and Fed. R. Bankr. P. 7062 seeking to stay the Rule 2019 Compliance Order pending a hearing [*155] on the motion. Judge Ferguson denied the stay application and, on October 5, 2004, in three separate orders, denied the Rule 59 Motions. On October 15, 2004, a slightly different group of firms than the four that opposed the Rule 2019 Compliance Order, sought to stay the Order pending its appeal, and appeal of each of the three orders denying the Rule 59 Motions. On October 25, 2004, after additional briefing and oral argument, Judge Ferguson denied this second stay application.

Appellants purport to have already complied with their disclosure obligations under Rule 2019: Baron & Budd, Campbell Cherry, Motley Rice and Provost Umphrey have each filed Rule 2019 Statements which provide information about the creditors they represent in this bankruptcy case. Thus, on October 15, 2004, appellant firms filed four separate notices of appeal, one appealing from the Rule [**7] 2019 Compliance Order and three appealing from Judge Ferguson's three October Orders denying the firms' Rule 59 Motions (Bankr. Dkt. Nos. 1373, 1374, 1375). On November 19, 2004, Appellants filed a motion requesting this Court to stay the Rule 2019 Compliance Order pending decision of this appeal. That request was denied, after full briefing and oral argument, on December 20, 2004.

BASIS OF APPELLATE JURISDICTION

Jurisdiction of the district courts over appeals from orders of bankruptcy courts is governed by 28 U.S.C. § 158(a), which provides that "the district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees . . . ." 28 U.S.C. § 158(a). Appellees argue that the bankruptcy court's Rule 2019 and Rule 59 Orders do not satisfy the § 158 "finality" requirement.

It is well settled in the Third Circuit, however, that "considerations unique to bankruptcy appeals have led us consistently in those cases to construe finality in a more pragmatic, functional sense than with the typical appeal," which generally requires an order to "dispose of all issues as to all parties to [**8] the case" before such an order can be considered final. See, e.g., In re Profl Ins. Mgmt., 285 F.3d 268, 279 (3d Cir. 2002). The rationale behind the Third Circuit's pragmatic interpretation of finality stresses the protracted nature of bankruptcy proceedings; the large number of involved parties with varied claims; and the fact that delay in resolving discrete claims until after final approval of a reorganization would waste time and resources, particularly if the appeal resulted in reversal of a bankruptcy court order necessitating re-appraisal of the entire plan. Id. (citing In re White Beauty View, 841 F.2d 524, 526 (3d Cir. 1988)).

Moreover, even an order that is not final under § 158(a) may be appealable under the collateral order doctrine established in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949). The Third Circuit has applied Cohen to provide

> a narrow exception to the general rule permitting appellate review only of final orders. An appeal of a nonfinal order will lie if (1) the order from which the appellant appeals conclusively determines the disputed question; (2) the order resolves an important [**9] issue that is completely separate from the merits of the dispute; and (3) the order is effectively unreviewable on appeal from a final judgment. . . . To this end, as a doctrinal matter, orders that meet the three prongs described above are deemed to be "final decisions" within the meaning of the statute.

[*156] Petroleos Mexicanos Refinacion v. M/T KING A (EX-TBILISI), 377 F.3d 329, 334 (3d Cir. 2004).

In this case, the Court is satisfied that jurisdiction is proper either as an appeal of a final order under § 158(a) or, in the alternative, under the collateral order doctrine. Pragmatically speaking, because the information sought in the Rule 2019 Compliance Order bears on plan confirmation procedures and, allegedly, the overall fairness of the plan, review of the order is most practical at this juncture, before Creditors vote on the plan.

But even if review were not appropriate under the practical approach inProfl Ins. Mgmt, it is appropriate under the collateral order doctrine. First, insofar as the Rule 2019 Compliance Order compels Appellants to disclose information which is argued to be confidential and proprietary, once such disclosures are made, there [**10] can be no remedy for the pecuniary, competitive injuries that will allegedly result--in other words, if the Order is not reviewed at this juncture then there can be no meaningful appellate review. Second, Judge Ferguson's Orders conclusively determine the disputed question, as evidenced by the fact that the Judge denied Appellants' requests for reconsideration, amendment and a stay. The issues raised in the Rule 2019 Motions and Order were discrete and no effect or impact of those decisions would change as a result of the bankruptcy court's final confirmation of the reorganization plan. Finally, the importance of the issues raised on appeal is evident from the entirety of the merits discussion below.

Appellees argue, that "while there appear to be no reported cases addressing the finality of rulings under Rule 2019(a), courts have consistently found that orders governing analogous types of disclosure . . . are interlocutory and not subject to appeal as of right." Memorandum of Law in Opposition to Appeal, Travelers & St. Paul ("Travelers' Opp. Mem.") at 8. Yet, even if the Rule 2019 Compliance Order is treated as interlocutory, pursuant to 28 U.S.C. § 158(a)(3) [**11] the district court has jurisdiction, at the court's discretion, to hear appeals from interlocutory orders and decrees entered by the bankruptcy court.

Section 158 is, however, silent as to the standard courts should apply in determining when an interlocutory appeal should be granted. Faced with this issue, a number of courts have recognized that 28 U.S.C. § 1292(b), which provides the standard for such appeals from district court interlocutory orders, applies to appeals from bankruptcy courts as well. See, e.g., In re Neshaminy Office Bldg. Assocs., 81 B.R. 301, 302 (Bankr. E.D. Pa. 1987) (citing In re Bertoli, 58 B.R. 992, 995 (Bankr. D.N.J. 1986); In re Johns-Manville Corporation, 39 B.R. 234, 236 (Bankr. S.D.N.Y. 1984)). Thus, the general rule that applies here, as with § 1292(b), is that interlocutory appeals are allowed when three requirements are satisfied: (1) a controlling question of law is involved; (2) the question is one where there is substantial ground for difference of opinion; and (3) an immediate appeal would materially advance the ultimate termination of the litigation. See 10 Collier [**12] on Bankruptcy P 8003.03 (15th rev. ed. 2004) ("Collier on Bankruptcy"). "The

controlling question [of law] need not be directly related to the substance of the controversy between the parties. It may involve an order transferring or refusing to transfer an action, a stay of the action . . ., *or even discovery.*" Id. (emphasis added) (citing 19 Moore's Federal Practice, §203.31[3] (Matthew Bender 3d ed.)).

In this case, all three standards are met. The first and second standards are met [*157] because the permissible scope of the bankruptcy court's construction of Fed. R. Bankr. P. 2019 is plainly a controlling question of law about which there is substantial ground for difference of opinion-principally, because precedent bearing on the matter is relatively thin. Next, "the courts have tended to make the 'controlling question' requirement the same as the requirement that its determination 'may materially advance the ultimate termination of the litigation.'" See id. But even if considered independently, it is clear that the proper filing of Rule 2019 disclosures, which are intended, *inter alia,* to ensure "complete [**13] disclosure during the business reorganization process," is essential to final confirmation of the Reorganization Plan ("the Plan") such that the third requirement is met. See In re CF Holding Corp., 145 B.R. 124, 126 (Bankr. D. Conn. 1992). This issue is, therefore, suitable for interlocutory appeal.

For any or all of the above reasons--as a final order, under the collateral order doctrine, or, as an appropriate issue for interlocutory review--this Court has appellate jurisdiction over the bankruptcy court's Rule 2019 Orders.

STANDARD OF REVIEW

The proper standard of review to be applied by a district court when reviewing a ruling of a bankruptcy court is determined by the nature of the issues presented on appeal. Legal conclusions of the bankruptcy court are subject to *de novo* or plenary review by the district court. Donaldson v. Bernstein, 104 F.3d 547, 551 (3d Cir. 1997); Chemetron Corp. v. Jones, 72 F.3d 341, 345 (3d Cir. 1995). The factual determinations of the bankruptcy court are not to be set aside unless "clearly erroneous." See Fed. R. Bankr. P. 8013; Chemetron, 72 F.3d at 345; [**14] In re Indian Plans Assocs., Ltd., 61 F.3d 197, 203 (3d Cir. 1995). On review of the factual findings of a bankruptcy court, a district court must "give due regard to the opportunity of that court to judge, first-hand, the credibility of the witnesses." Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc., 57 F.3d 1215, 1223 (3d Cir. 1995). Where a matter presents mixed questions of law and fact, it is appropriate to apply the relevant standard to each component of the issue. Chemetron, 72 F.3d at 345.

DISCUSSION

I. Insurers' Standing

Appellants argue that Insurers lack standing to participate generally in the Debtors' reorganization and that, accordingly, the Insurers had no standing to bring the Rule 2019 Compliance Motions or to litigate this appeal. Brief of Appellants in Support of Appeal ("Appellants' Supp. Mem.") at 36. In response, Appellees argue that because Rule 2019 disclosure bears directly on plan confirmation, standing to raise issues in the confirmation process is appropriate and must include standing to raise issues with respect to Rule 2019 disclosure.

Standing to raise issues [**15] before the bankruptcy court, and the question of whether appellees are indeed "parties in interest" under 11 U.S.C. § 1109(b), are questions of law which are reviewed *de novo.* See ACLU-NJ v. Township of Wall, 246 F.3d 258, 261 (3d Cir. 2001);In re Caldor, Inc., 2000 U.S. Dist. LEXIS 5865, 2000 WL 546465, *3 (Bankr. S.D.N.Y. 2000) (rev'd on other grounds).

Standing, a constitutional requirement, is a "threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). Hence, a defect in [*158] standing cannot be waived; it must be raised, either by the parties or by the court, whenever it becomes apparent, even on appeal. Belitskus v. Pizzingrilli, 343 F.3d 632, 639 (3d Cir. 2003) (citing Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 255, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994)).

Pursuant to § 1109(b), "a party in interest . . . may appear and be heard on *any issue* in a case under this chapter." 11 U.S.C. § 1109(b) (emphasis added). While it is clear that party-in-interest status is not determined for all purposes at the [**16] outset of the reorganization proceeding, see In re Pub. Serv. Co. of New Hampshire, 88 B.R. 546, 554 (Bankr. D.N.H. 1988), the basic test governing the right to be heard remains the same for all issues that may arise in the course of a case: "The test to determine whether an entity is a party in interest is 'whether the prospective party in interest has a sufficient stake in the outcome of the proceeding so as to require representation.'" In re Torrez, 132 B.R. 924, 934 (Bankr. E.D. Ca. 1991) (quoting Public Serv. Co., 88 B.R. at 551). Generally speaking, a "sufficient stake" to be considered a party-in-interest can be a pecuniary interest that is directly or adversely affected. See, e.g., Davis v. Cox, 356 F.3d 76, 93 (1st Cir. 2004) (holding that party who has suffered pecuniarily from bankruptcy court order is a "person aggrieved" for the purpose of appeal).

As Judge Ferguson noted, it is generally accurate to characterize a determination of standing before the bankruptcy court as a two part inquiry. Transcript of April 19,

2004 Bankruptcy Hearing ("April 19 Bankr. Trans.") at 66. First, the party seeking standing [**17] must establish that it is a party-in-interest under § 1109(b). Id. Second, the party seeking standing must satisfy minimum constitutional requirements. Id. In addition, Judge Ferguson correctly noted that there is substantial overlap between the two inquiries. Id. at 67. As Collier on Bankruptcy explains:

> The doctrine of standing embraces two inquiries of relevance in the context of section 1109(b). First, it considers whether the participation of any particular party comports with the limitations of the case or controversy requirement of Article III of the Constitution. Second, it considers, as a matter "of self restraint," whether the interests of a party seeking to participate lie within the "zone of interests" protected by the particular statute or legal rule implicated in the given proceeding.

7 Collier on Bankruptcy P 1109.04[4].

In the first instance, Judge Ferguson ruled that "the insurers are parties-in-interest [under 11 U.S.C. § 1109] with standing to raise issues with regard to plan confirmation." Transcript of Nov. 15, 2004 Bankruptcy Court Hearing ("Nov. 15 Bankr. Trans.") at 28; Transcript of July 26, 2004 Bankruptcy [**18] Court Hearing ("July 26 Bankr. Trans.") at 54-55; see also Transcript of June 7, 2004 Bankruptcy Court Hearing ("June 7 Bankr. Trans.") at 61-68 (articulating a number of reasons why the revised Plan is not "insurance neutral" and why insurers have standing to participate in the plan process); accord Transcript of April 21, 2004 Bankruptcy Court Hearing ("April 21 Bankr. Trans.") at 69-75.

As a general matter, Judge Ferguson noted that parties with potential responsibility to pay claims against debtors regularly have standing to participate in bankruptcy cases. June 7 Bankr. Trans. at 67-68 (citing In re Peter Del Grande Corp., 138 B.R. 458, 459 (Bankr. D.N.J. 1992); In re Berkshire Foods, Inc., 302 B.R. 587, 588-90 (Bankr. N.D. Ill. 2003); Marcus Hook Dev. Park, Inc., 153 B.R. 693, 700 (Bankr. W.D. Penn. 1993)). In this case, Insurers' [*159] standing is appropriate with respect to plan confirmation, at minimum, because the plan is not insurance neutral: The principal source of funding for the Plan Trust (and distributions to asbestos claimants) is insurance proceeds. [1]

1 As Judge Ferguson reasoned,

> we have a threatened injury to the insurers' legal, that is contractual, and financial interests as a result of the proposed Chapter 11 plan. Also a favorable decision, such as amendment of the plan or denial of confirmation could redress that injury. . . .
>
> Accordingly, and based largely on the breadth of the language in the plan and the broad scope of 1109, the court finds that the insurers meet both Section 1109 and the general Constitutional standards to have standing to be heard with regard to all issues pertinent to plan confirmation.

April 19 Bankr. Trans. at 74. Judge Ferguson limited this ruling to "the plan in its current form." In response, the Plan was revised and presented to the court as "insurance neutral," and it was then argued that, in its new form, Insurers should no longer have standing with respect to confirmation.

[**19] In a hearing on June 7, 2004, Judge Ferguson reviewed a revised Plan and reiterated several, more detailed, independent grounds upon which the Insurers maintained standing with respect to plan confirmation. See June 7 Bankr. Trans. at 61-67. Among the many reasons proffered by Judge Ferguson, is the fact that Section 11.6 of the Plan (the version at issue on June 7, 2004) impacts the rights of Insurers by limiting any contribution claim to an offset claim against the Plan Trust (rather than, as Insurers point out, a claim against a settling insurer). [2] See June 7 Bankr. Trans. at 66. But even more important than any specific provisions of the *current* plan, is the fact that Plan language bearing on the interplay between the bankruptcy case and the insurance coverage litigation has changed several times since Judge Ferguson's June 7 ruling on Insurers' standing--and, as a practical matter, the Plan is subject to change in ways that impact the Insurers at any time.

2 Other sections of the Plan discussed by Judge Ferguson which implicate the interests of the Appellees are § 7.2, which potentially changes the party with whom Insurers would have to litigate against in personal injury claims and § 4.1(j), which states that

> each holder of an Unsecured Asbestos Personal injury Claim shall be deemed to have assigned to the Plan Trust, and the Plan Trustee shall be deemed such holder's sole attorney in fact, as may be appropriate, to prosecute, at the Plan Trustee's discretion . . . any Direct Action.

Reorganization Plan § 4.1(j). As Judge Ferguson noted, § 4.1(j) arguably implicates New Jersey law which prohibits the assignability of prejudgment tort claims, as well as 11 U.S.C. § 524(g) and § 1129--all issues which Insurers, as the principal source of funding for the Plan Trust, should have standing to explore.

[**20] Neither Appellants nor any other party has appealed Judge Ferguson's April or June decisions finding that Insurers are parties-in-interest and have standing with respect to plan confirmation. As discussed above, standing is a jurisdictional requirement which remains open to review at all stages of the litigation. Appellants' arguments that "the Plan does nothing to directly affect the liability of the Debtors' insurers" and that the "insurers are peripheral parties because insurance coverage issues will be resolved in another case and another forum," however, are conclusory and fail to address the aforementioned reasons why the Plan does, directly and indirectly, affect the Insurers' interests in ways that are not coextensive with their ability to participate in coverage litigation. See Appellants' Supp. Mem. at 39, 41.

For the above reasons, it is clear to the Court that Appellees are parties-in-interest under § 1109(b) with respect to plan confirmation, and for the very same reasons, they are also parties-in-interest with [*160] respect to Rule 2019 disclosure. As Judge Ferguson found, the information sought in the Rule 2019 Compliance Order "is vitally important . . . for the confirmation [**21] because it may have a direct bearing on both good faith and the fairness of the plan's classification system." July 26 Bankr. Trans. at 54-55. That the Insurers' stake in plan confirmation includes a stake in the fundamental fairness of the Plan cannot be seriously challenged--the question is whether Rule 2019 compliance bears on the fundamental fairness of the Plan.

Because the Court agrees with Judge Ferguson's reasoning--based on the facts before the bankruptcy court--that the information sought in the Rule 2019 disclosures, does indeed bear on the overall fairness of this Plan, it is clear that Insurers have standing to raise these Rule 2019 compliance issues. See Appellee Century's Opp. Mem. at 3-5, 11-24 for a recitation of the pertinent facts before the bankruptcy court in consideration of Century's Rule 2019 Motion. Of particular relevance, is evidence that the Motley Rice and Weitz & Luxenberg firms, which together purport to "speak for" over 75 percent of all asbestos claimants against Congoleum, may not in fact "represent" individual claimants in the traditional sense of an attorney-client relationship, but rather, they represent other attorneys who, in turn, represent [**22] individual claimants. See July 6 Svirsky Decl., Ex. A (July 24, 2003 Rice Dep.) at 46-47, 405-06 (Bankr. Dkt. No. 922); Id. Ex. B (June 16, 2004 Rice Dep.) at 171 (Bankr. Dkt. No. 922). [3] The totality of the facts before the bankruptcy court suggest the opportunity for abuse of fee sharing relationships, involving attorneys in connection with the prepetition process, to the end of conferring preferential security interests on Appellants' clients. To the extent that these relationships are inextricable from the overall fairness of the reorganization plan, the Insurers are parties-in-interest under § 1109 with respect to Rule 2019 disclosure. [4]

3 Joseph Rice, Esq., a principal at the Motley Rice firm who is integrally involved with this Chapter 11 proceeding, when asked whether he has "literally undertaken to represent another law firm rather than the asbestos claimants," testified that "I have arrangements where I'm a consultant to law firms," id., and that "there are firms that I have a relationship with that all I do is negotiate on behalf of their law firms with various defendants, and subject to their ultimate review of the claim." July 6 Svirsky Decl., Ex. A (July 24, 2003 Rice Dep.) at 59-60 (Bankr. Dkt. No. 922). Mr. Rice implies that his association with other Plaintiff's firms is that of "co-counsel" or "joint counsel." Id. at 57-58.

[**23]

4 Appellants' reliance on In Re Combustion Engineering, which sets forth the standard for appellate standing, is inapposite. Appellants' Reply Mem. at 4. In that case, the Third Circuit distinguishes the "restrictive approach to bankruptcy appellate standing," characterized by application of the "persons aggrieved" standard, "with the broad right of participation in the early stages of a bankruptcy proceeding," during which "§1109(b) has been construed to create a broad right of participation in Chapter 11 cases." In Re Combustion Eng'g, 391 F.3d 190, 214 n.21 (3d Cir. 2004). The "persons aggrieved" standard does not apply to parties such as Appellee Insurers, who seek to defend a favorable ruling on appeal--these parties need not meet standing requirements.

Of course, as discussed above, minimum constitutional and prudential requirements of standing still apply

to parties-in-interest in a bankruptcy case. [5] The [*161] doctrine of Article III standing requires federal courts to make sure concrete legal issues are presented by a plaintiff with a particularized injury in fact [**24] traceable to the conduct of the defendant which is likely to be redressed by the relief sought. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). In this case, it is clear that Insurers had constitutional standing to bring the Rule 2019 Motion. They alleged an injury in fact: It is the unfairness of a plan which binds them contractually and which directly impacts their financial interests, unfairness which is traceable to conflicts of interest among Creditors' counsel, allegedly arising from fee sharing and co-counsel relationships and their bearing on the Plan's classification system. The alleged injury is redressable by the bankruptcy court through a favorable decision, such as amendment of the Plan or denial of confirmation, which would be made possible after review of the Rule 2019 disclosure sought. Insurers have thus met the requirements for Article III standing to raise the issues covered in the Rule 2019 Compliance Order before the bankruptcy court.

5 Although the bankruptcy court is not an Article III court, its jurisdiction is similarly limited by the constitutional standing requirements. In re Amoskeag Bank Shares, Inc., 239 B.R. 653, 657 (Bankr. D.N.H. 1998) (citing In re Kilen, 129 B.R. 538, 542 (Bankr. N.D. Ill. 1991). This conclusion follows from the fact that the district court has original jurisdiction in cases arising under Title 11, but may refer these cases to the bankruptcy court. Id. (citing 28 U.S.C. §§ 157, 1334). The district court cannot delegate a case to the bankruptcy court which the district court itself cannot hear. Id.

[**25] Appellants argue further, however, that prudential limitations on standing should bar Insurers from bringing their Rule 2019 Motion. Appellants' Supp. Mem. at 40. Apart from its minimum constitutional mandate, the Supreme Court recognizes other limits ". . . on the class of persons who may invoke the courts' decisional remedial powers." Warth v. Seldin, 422 U.S. 490, 499, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). These prudential limitations are self-imposed rules of judicial restraint which militate against standing, they principally concern whether the litigant: (1) asserts the rights and interests of a third party and not his or her own, (2) presents a claim arguably falling outside the zone of interests protected by the specific law invoked, or (3) advances abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative branches. Benjamin v. Aroostook Medical Ctr., Inc., 57 F.3d 101, 104 (1st Cir. 1995).

Here, Appellants argue that Insurers have leveled a generalized grievance against pre-packaged bankruptcies under 11 U.S.C. § 524(g). Appellants' Supp. Mem. at 42. Yet, the [**26] concern of Insurers with the fairness of a plan that bears a substantial financial impact on them cannot be considered a grievance that "is shared in substantially equal measure by all or a large class of citizens." Warth v. Seldin, 422 U.S. 490, 499, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). Surely, the mere fact that Insurers' Rule 2019 Motion was raised in the context of a pre-packaged bankruptcy does not mean that the Motion concerns the Chapter 11 reorganization process as a whole, rather than the specific, unlawful practices alleged therein. If the Court agreed with Appellants' assertion, then any motion, on any issue, in any bankruptcy case, could be described as a generalized grievance against something.

Appellants' additional assertion that Insurers are outside the zone of interests of Rule 2019, see Appellants' Supp. Mem. at 42, is similarly unconvincing. Insofar as Rule 2019 seeks to ensure "complete disclosure during the business reorganization process," and insofar as the Insurers' motion is based on equitable grounds related to the intrinsic fairness of the reorganization plan, the Insurers have brought themselves [*162] "within the zone of interests which the Bankruptcy Act seeks to protect [**27] and to regulate" See CF Holding Corp., 145 B.R. at 126. See also In re Colony Hill Assocs., 111 F.3d 269, 273 (2d Cir. 1997) (finding that unsuccessful bidder had standing to challenge "intrinsic fairness" of bankruptcy sale and good faith status of purchaser); In re Harwald Co., 497 F.2d 443, 444 (7th Cir. 1974) (noting that unsuccessful bidders may challenge sale "on equitable grounds related to the intrinsic structure of the sale"); In re Time Sales Fin. Corp., 445 F.2d 385 (3rd Cir. 1971) (supporting same proposition by implication).

For all of the above reasons, Insurers have standing to raise the issues with respect to Rule 2019 compliance that are the subject of the bankruptcy court's Rule 2019 Compliance Order. The balance of this Opinion will consider the merits of the appeal.

II. Jurisdiction of the Bankruptcy Court to Issue the Rule 2019 Compliance Order

Appellants contend that the Rule 2019 Compliance Order was not within the subject matter jurisdiction of the bankruptcy court. The question of subject matter jurisdiction is reviewed *de novo*. In re Wolverine Radio, Co., 930 F.2d 1132, 1138 (6th Cir. 1991); [**28] In re Castlerock Properties, 781 F.2d 159, 161 (9th Cir. 1986).

The bankruptcy court's jurisdiction over matters involving nondebtors is delineated in 28 U.S.C. § 1334. Section 1334 enumerates four types of matters over which the bankruptcy courts have jurisdiction: "(1) cases under title 11, (2) proceeding[s] arising under title 11, (3) proceedings arising in a case under title 11, and (4) proceedings related to a case under title 11." In re Combustion Eng'g, Inc., 391 F.3d 190, 225-226 (3d Cir. 2004).

"Cases under title 11, proceedings arising under title 11, and proceedings arising in a case under title 11 are referred to as 'core' proceedings; whereas proceedings 'related to' a case under title 11 are referred to as 'non-core' proceedings." Id. "Proceedings 'related to' a title 11 case include . . . suits between third parties that conceivably may have an effect on the bankruptcy estate." Id. (citing Celotex Corp. v. Edwards, 514 U.S. 300, 308 n.5, 131 L. Ed. 2d 403, 115 S. Ct. 1493 (1995)). "'Cases under Title 11,' as used in 28 U.S.C. § 1334(a), 'refers merely to the bankruptcy petition itself.'" Id. [**29] (citations omitted). "The term 'proceeding,' on the other hand, as used in 28 U.S.C. § 1334(b), refers 'to the steps within the 'case' and to any subaction within the case that may raise a disputed or litigated matter.'" Id. (citations omitted) "Put differently, 'anything that occurs within a case is a proceeding,' including all 'controversies, adversary proceedings, contested matters, suits, actions or disputes.'" Id. (citations omitted).

Appellants argue that the bankruptcy court lacks "related to" jurisdiction over fee arrangements-contracts between tort claimants, claimants' counsel, and any co-counsel referring law firms-which arose outside the context of these bankruptcy proceedings, namely, in the context of personal injury actions in states all around the country. In this case, however, the core question with respect to subject matter jurisdiction is whether construction of Rule 2019 is within the bankruptcy court's "arising under" jurisdiction. It is well settled that construction and application of Rule 2019 is within the "core" jurisdiction of the bankruptcy court because it involves the "administration of the estate" which is an explicitly [**30] enumerated proceeding under 28 U.S.C. §157(b)(2)(A). [*163] See In re Lambright, 125 B.R. 733, 733 (Bankr. N.D. Tex. 1991) (holding that "the application . . . and the construction of the Bankruptcy Code raise[s] core matters over which the bankruptcy court has jurisdiction"); see also Sterling Optical Corp., 302 B.R. 792, 801 (Bankr. S.D.N.Y. 2003) ("A claim 'arises in' bankruptcy if, by its very nature, the claim can only be brought in a bankruptcy action, because it has no existence outside of bankruptcy. . . . Matters involving the enforcement or construction of a bankruptcy court order are in this category.") (citation omitted).

The problem with Appellants' argument is that, even if the court lacks "related to" jurisdiction over the substance of fee sharing and co-counsel arrangements, to the extent that these contracts were leveraged, or in any way affected the rights of Creditors in this bankruptcy, the bankruptcy court has "arising under" jurisdiction to order relevant disclosure. The fact that the fee sharing and co-counsel relationships at issue are the fruits of contracts between nondebtors, an issue much belabored by [**31] Appellants, is beside the point: Under circumstances where fee sharing and referral relationships have potentially affected the priority of creditors in the bankruptcy, these relationships can have a serious impact upon the handling of the estate. A case in point, the Third Circuit's recent decision In re Combustion Engineering stresses the importance of "good faith" in the context of Chapter 11 reorganizations:

> As a condition of plan confirmation, a debtor must propose a plan of reorganization "in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Courts and commentators have recognized the good faith requirement provides an additional check on a debtor's intentional impairment of claims. . . . Although the Code does not define "good faith" in the context of § 1129(a)(3), we have stated that "for purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code."

391 F.3d at 246-247 (citing, *inter alia,* In re PWS Holding Corp., 228 F.3d 224, 242 [**32] (3d Cir. 2000))..

Regulation of professional responsibility with respect to creditors' or debtors' counsel, moreover, is squarely within the purview of the bankruptcy court regardless of whether third party, nondebtors are involved. [6] See, e.g., In re Imperial "400" In re Imperial "400" Nat., Inc., 481 F.2d 41, 55 (3d Cir. 1973) ("It is apparent that the same concerns which are embodied in the Code of Professional Responsibility are also present in the statutory scheme governing corporate reorganizations under the Bankruptcy laws."); Galam v. Carmel, 249 F.3d 832, 838 (9th Cir. 2001) (attorney appearing in federal court is an officer of the court, and that court must judge the attorney's conduct); In re Berger McGill, Inc., 242 B.R. 413, 418 (Bankr. S.D. Ohio 1999) (applying state ethics rules with respect to [*164] conflicts of interest); In re Soulisak, 227 B.R. 77, 80 (Bankr. E.D. Va. 1998) (citing 1 Collier on Bankruptcy P 8.02[2]) (When appearing before the bankruptcy courts attorneys are bound by the

state codes and rules imposed by the state bar associations and the highest courts of the states where they practice.); In re Printing Dimensions, Inc., 153 B.R. 715 (Bankr. D. Md. 1993) [**33] ("The District Court applies the Rules of Professional Conduct as they have been adopted by the Maryland Court of Appeals."); In re Doors and More, Inc., 127 B.R. 1001, 1002 n.2 (Bankr. E.D. Mich. 1991) (applying state ethics rules with respect to attorney's fees). "Not only are state ethical laws imposed upon professionals in the bankruptcy context, but the Bankruptcy Code and Federal Rules of Bankruptcy Procedure contain specific references and directives imposing additional ethical obligations upon attorneys and other professionals." 8 Collier on Bankruptcy P 8.02.

> 6 The bankruptcy court's jurisdiction with respect to professional responsibility even extends as far as non-attorney, third party professionals, who are required to adhere to ethical obligations imposed not only under federal law but under any incorporated ethical standards found in state law. 8 Collier on Bankruptcy P 8.01[4][a]. Attorneys appearing before the bankruptcy court are ultimately responsible for the ethical obligations of these third parties insofar as they have filed applications on behalf of parties seeking approval for for the hire and payment of these non-attorney professionals--*i.e.,* accountants, investment bankers or even auctioneers. Id.

[**34] At oral argument, Appellants stressed that the referral arrangements and other contracts covered by the Rule 2019 Compliance Order are governed by the laws and subject to the ethical codes of a panoply of states other than New Jersey. For this reason, they suggest, the bankruptcy court cannot have subject matter jurisdiction to order disclosure of these relationships. Again, Appellants argument is beside the point: While these facts may raise choice of law issues, they do not abrogate the power of the bankruptcy court to consider professional responsibility issues that fall within its "arising under" jurisdiction. As Judge Ferguson noted in rejecting Appellants' Motions for Reconsideration: To cast a ballot in a bankruptcy case is to appear before the bankruptcy court, thus even the "non bankruptcy counsel, who have not appeared in a representational capacity," but who submitted ballots on behalf of their clients, have appeared in this bankruptcy case. See Bankr. Trans. Oct. 5, 2004 at 7. [7]

> 7 In her July 26 decision on this issue, Judge Ferguson reasoned that
>
> > [members of the Pre-Petition Committee, who have not participated in the bankruptcy case since the pre-petition stage] intend to submit ballots in favor of the plan on behalf of their clients. And the fact that these master ballots may have been drafted before the commencement of the case does not change the fact that to cast a ballot is to participate in the case and become subject to the requirements of 2019. To hold otherwise would undermine one of the purposes of Rule 2019, that is, to monitor the committees that are not appointed under Section 1102 or 1114.
>
> July 26 Bankr. Trans. at 51.

[**35] Skirting the issue of professional responsibility, Appellants draw the Court's attention to In re Johns-Manville Corp., 68 B.R. 618, 632 (Bankr. S.D.N.Y. 1986). In that case, Judge Lifland held that the terms of a contingency fee arrangement between an individual asbestos claimant and his or her attorney were not subject to the approval of the bankruptcy court to satisfy the plan confirmation requirement of 11 U.S.C. §1129(a)(4). Johns-Manville reasons that

> the objectors here seek to raise a putative controversy between third parties . . . which does not effect the administration of the Debtor's estate. The fee arrangement between a claimant and his or her attorney is immaterial to these reorganization proceedings. As such, these objections raise collateral disputes which this court is not empowered to rule upon.

68 B.R. at 632 (citing In re Paso Del Norte Oil Co., 755 F.2d 421 (5th Cir. 1985); In re Shirley Duke Assocs., 611 F.2d 15 (2d Cir. 1979); First State Bank & Trust Co. v. [*165] Sand Springs State Bank of Oklahoma, 528 F.2d 350 (10th Cir. 1976)).

Unlike [**36] Johns-Manville, where the disputed fee arrangement may have violated rules of professional responsibility but otherwise had no bearing on the overall fairness of the plan, in this case, questions of professional responsibility qualify as "pertinent facts and circumstances in connection with the employment [of counsel]," because they "may have a direct bearing on both good faith and the fairness of the plan's classification system." Fed. R. Bankr. P. 2019(a); July 26 Bankr.

Trans. at 54-55. Besides this fact, the Third Circuit has taken a position emphasizing different values than Judge Lifland: In Combustion Engineering, the court affirmed its commitment to enforce the "good faith" requirement in § 1129, which is the same section (different subpart) at issue in Johns-Manville. See Combustion Eng'g, 391 F.3d at 246-247.

For all of the above reasons, in this case, the particular issues of professional responsibility which the Rule 2019 Compliance Order seeks to address are inextricably intertwined with the overall fairness of the Plan and therefore are within the core subject matter jurisdiction of the bankruptcy court.

[**37] **III. The Permissible Scope of Rule 2019 Orders**

Having resolved the question of subject matter jurisdiction, the next issue on appeal is the permissible scope of the bankruptcy court's Rule 2019 Compliance Order. Rule 2019 requires, in relevant part, that

> every entity or committee representing more than one creditor . . . unless otherwise directed by the court . . . shall file a verified statement setting forth . . . (3) *a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee,* 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; . . . . The statement shall include a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders. . . .

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

Collier on Bankruptcy describes the purpose of Rule 2019 as follows:

> The need [in Chapters 9 and 11] for policing creditor groups and those [**38] who act on their behalf is greater than under other relief chapters. *The rule is part of the disclosure scheme of the Bankruptcy Code and is designed to foster the goal of reorganization plans which deal fairly with creditors and which are arrived at openly.*

9 Collier on Bankruptcy P 2019.01 (emphasis added) (citing 13A Collier on Bankruptcy P 10-211.04).

Other courts have described Rule 2019 as a "disclosure provision" designed to ensure that lawyers involved in the Chapter 11 reorganization process adhere to certain ethical standards and approach all reorganization related matters openly and subject to the scrutiny of the court. See, e.g., In re the Muralo Co. Inc., 295 B.R. 512, 524 (Bankr. D.N.J. 2003) (Rule 2019 "is designed to foster the goal of reorganization plans which deal fairly with creditors and which are arrived at openly."); In re Oklahoma P.A.C., 122 B.R. 387, 392-393 (Bankr. D. Ariz. 1990) (same); CF Holding, 145 B.R. at 126 (The "purpose of Rule 2019 is to further the Bankruptcy Code's goal of complete disclosure during the business reorganization process."); In re F&C Int'l, Inc., 1994 Bankr. LEXIS 274, [**39] *8 [*166] (Bankr. S.D. Ohio 1994) (Absent compliance with Rule 2019, there is a danger that "parties purporting to act on another's behalf may not be authorized to do so and may receive distributions to which they are not entitled.").

In furtherance of the point, Appellee Century cites the words of then future Supreme Court Justice William O. Douglas, speaking for an SEC committee in 1937, for the proposition that

> Rule 2019 is designed to ensure that "the inside group" does not manipulate a pre-petition committee to "secure a dominant position in the reorganization" and capture "the emoluments of control." Where, as here, the "nondisclosure" of Rule 2019 information affects the solicitation and voting methods, Justice Douglas cautioned that it "must be controlled, so that [stakeholders] may be assured of an honest and complete portrayal of all material facts."

Appellee Century Opp. Mem. at 29 (citing Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part I: Strategy and Techniques of Protective and Reorganization Committees (1937) at 876-7, 898; also citing Leiman v. Guttman, 336 U.S. 1, 6-7, 93 L. Ed. 453, 69 S. Ct. 371 (1949)). [**40]

In this case, the challenged elements of Judge Ferguson's Rule 2019 Order require Appellants to include "a list and detailed explanation of any type of co-counsel, consultant or fee sharing relationships and arrangements whatsoever, in connection with this bankruptcy case," and require the "attachment of copies of any documents

that were signed in conjunction with creating that relationship or arrangement." Rule 2019 Compliance Order at 3. Judge Ferguson described the factual basis for ordering these disclosures as "unprecedented," and found, *inter alia,* that many of the creditors "have never seen a copy of the disclosure statement and, for all the court knows, have absolutely no idea how their claim will be treated under the plan." July 26 Bankr. Trans. at 53-54; see also, supra, Section I, pp. 11-12 discussing, in detail, the relevant facts before the bankruptcy court. This Court has been offered no reason to find error in Judge Ferguson's factual findings.

As a matter of law, Appellants argue that Judge Ferguson's Rule 2019 Compliance Order "went far beyond the scope of Rule 2019 and exceeded the limited purpose served by Rule 2019." Appellants' Supp. Mem. at 13. More [**41] specifically, they argue that the sole purpose of Rule 2019 is to ensure that entities claiming to represent multiple creditors possess the requisite authorization; that Rule 2019 limits the bankruptcy court to an examination of the "representation provision" of specified retention agreements; and that the bankruptcy court's "'unprecedented' extension of Rule 2019" is inconsistent with "the more restrained approach adopted by other bankruptcy courts in this circuit." Id. at 13, 17, 19.

These arguments, however strenuous, are untenable. Section 105(a) of the Bankruptcy Code gives the court the power to "issue any order . . . that is necessary or appropriate to carry out the provisions of this title [and to] make any determination necessary or appropriate to enforce or implement court orders or rules. . . ." 11 U.S.C. § 105(a); In re Dennis, 230 B.R. 244, 256 (Bankr. D.N.J. 1999). Discretionary matters, particularly a bankruptcy court's exercise of discretion under § 105(a), are reviewable on appeal only under the customary abuse of discretion standard. See In re Hechinger Inv. Co. of Delaware, 298 F.3d 219, 224, 228 (3d Cir. 2002) [**42] (reviewing bankruptcy court's exercise of its § 105(a) powers under [*167] abuse of discretion standard and finding, in that case, no abuse of discretion); In re Cybridge Corp., 312 B.R. 262, 273 (Bankr. D.N.J. 2004) (same).

Here, the Court is satisfied with Judge Ferguson's determination that fee sharing, co-counsel and referral relationships (and the potential conflicts of interest that may arise therefrom) are indeed "pertinent facts and circumstances in connection with the employment of the entity." Fed. R. Bankr. P. 2019(a). The precise nature of these relationships falls well within the literal language of the Rule as well as the Judge's discretion to apply the rule in these circumstances.

Insofar as the core purpose of Rule 2019 is to ensure that reorganization plans deal fairly with all creditors and are arrived at openly, a characterization advanced in Appellants' Reply Mem. at 5, Judge Ferguson's application of the Rule echos the concerns of the Third Circuit in Combustion Engineering: Discussing the role of § 1126(e), and remanding the issue to the district court for further consideration, Combustion Engineering explained [**43] that

> Section 1126(e) is often used to monitor the conduct of creditors who seek to gain an untoward advantage over others in the bankruptcy process. In interpreting the predecessor provision to § 1126(e), § 203 of the Bankruptcy Act, the Supreme Court noted: . . . "Bad faith was to be attributed to claimants who opposed a plan for a time until they were 'bought off'; those who 'refused to vote in favor of a plan unless . . . given some particular preferential advantage.' . . . The Supreme Court concluded § 203 was meant to apply to creditors "whose selfish purpose was to obstruct a fair and feasible reorganization in the hope that someone would pay them more than the ratable equivalent of their proportionate part of the bankrupt assets."

391 F.3d at 247, n.68 (citing Young v. Higbee Co., 324 U.S. 204, 211 n.10, 89 L. Ed. 890, 65 S. Ct. 594 (1945); and also citing Revision of the Bankruptcy Act: Hearings Before the Committee on the Judiciary of the House of Representatives, 75th Cong., 1st Sess. on H.R. 6439, Serial 9, at 180-82)) (other citations omitted). See also Clarke v. Rogers, 228 U.S. 534, 57 L. Ed. 953, 33 S. Ct. 587 (1913) ("Equality between creditors is necessarily [**44] the ultimate aim of the bankruptcy law, and to obtain it we must regard the essential nature of transactions[.]").

As Combustion Engineering further emphasizes: "Only after analyzing the totality of circumstances surrounding a reorganization plan can the court exercise the 'informed, independent judgment' which is an essential prerequisite for confirmation of a plan." 391 F.3d at 242 n.55 (citing Am. United Mut. Life Ins. Co. v. Avon Park, 311 U.S. 138, 85 L. Ed. 91, 61 S. Ct. 157 (1940)). "Where such investigation discloses the existence of unfair dealing, a breach of fiduciary obligations, profiting from a trust, [or] special benefits for the reorganizers . . . the court has ample power to adjust the remedy to meet the need." Id. In short, Combustion Engineering supports Judge Ferguson's application of Rule 2019 to prevent conflicts of interest among Creditors' counsel from undermining the fairness of the Plan, bringing to bear the

values of good faith and fairness in the reorganization process that pervade the bankruptcy code.

Finally, Appellants propose that even if Judge Ferguson's Order is found to be within the constraints of Rule 2019(a), it goes too far [**45] in terms of its "sanctions for non-compliance," which are enumerated in Rule 2019(b). In particular, Appellants take issue with the ordered disclosure of [*168] whole documents creating fee sharing or co-counsel relationships, taking the position that only the "representation provisions" of such documents are delineated in 2019(b) and that nothing further is relevant.

As discussed in detail above, however, questions of good faith and professional responsibility are highly pertinent areas for disclosure in the context of this reorganization. Indeed, Rule 2019(b) presents itself as a particularly appropriate source of authority for the Rule 2019 Compliance Order since it specifically provides that "the court may (1) determine whether there has been a failure to comply with the provisions of [2019](a) . . . *or with any other applicable law regulating the activities and personnel of any entity* . . . . or any other impropriety in connection with any solicitation."

Rule 2019(b) states, further, that the bankruptcy court may examine "any representation provision," but also, more broadly, "any claim or interest acquired by any entity or committee in contemplation or in the course of a case [**46] under the Code and [the court may] grant appropriate relief." The Third Circuit has read similar rules broadly in cases such as this one, where the entire solicitation and voting process was conducted through a small group of law firms who collectively represent hundreds of thousands of individual claimants. See Combustion Eng'g, 391 F.3d at 245 n.66 ("Where the voting process is managed almost entirely by proxy, it is reasonable to require a valid power of attorney for each ballot" even where Rule 2019(c) only requires a power of attorney for each firm.). Appellants' crabbed interpretation of 2019(b) is at odds with purpose and text of Rule 2019 as a whole and the tenor of Combustion Engineering, each of which supports the extent of Judge Ferguson's Order.

There is simply no reason why Rule 2019, which seeks to ensure openness and good faith participation at a relatively early stage of a reorganization, should be construed more narrowly than the later stage provisions at issue in Combustion Engineering, *e.g.*, §§ 1126(e) and 1129(a)(3). In this case, Rule 2019 was applied consistently with its language and its purpose to assure equality of distribution [**47] among creditors, to root out conflicts of interest, and to secure overall fairness of the Plan. For these reasons, Judge Ferguson's construction and application of Rules 2019(a) and (b) was well within her discretion. Indeed, it is precisely the decision which this Court would have made if the issue had been presented to it in the first instance.

IV. Disclosure of "Confidential Information"

Appellants argue that the bankruptcy court erred in ordering the disclosure of proprietary and confidential information without in camera review. Appellants' Supp. Mem. at 23. When the issue was before Judge Ferguson she held that the Rule 2019 Compliance Order does not implicate any of Appellants' privileged or confidential information. Oct 5. Bankr. Trans. at 11-12.

The Third Circuit has ruled that "in the absence of unusual circumstances, the fact of a retainer, the identity of the client, the conditions of employment and the amount of the fee do not come within the privilege of the attorney-client relationship." In re Semel, 411 F.2d 195, 197 (3d Cir. 1969) (citations omitted). But Appellants cite Smith v. Bic Corp., 869 F.2d 194, 199 (3d Cir. 1989) [**48] for the proposition that "private entities' proprietary and confidential information may be withheld where 'good cause' exists and the information [*169] sought is considered irrelevant for dissemination."

While Appellants may believe the information sought in the Rule 2019 Compliance Order is "irrelevant," the better part of this opinion explains why that is not the case. Not only are there strong policy and statutory reasons why the fee arrangements between attorneys practicing before the bankruptcy courts cannot be privileged, see, *e.g.*, In re Michaelson, 511 F.2d 882, 888-89 (9th Cir. 1975), there is ample evidence in this particular case, that suggests these facts are relevant, and indeed, critical. See, e.g., Appellee Century Opp. Mem. at 4 (citing Rule 2019 disclosures to date-by firms not appealing Judge Ferguson's Order-which reveal that some attorneys with an inventory of claims in this bankruptcy share as much as one third of their fees with members of the prepetition committee, who are also Appellants in this case); see also Bowling v. Pfizer, Inc., 102 F.3d 777, 781 n.3 (6th Cir. 1996) (noting that, in that case, "[fee] agreements [**49] are only 'irrelevant' because the settlement has already been approved" and that "these agreements should certainly raise questions at the settlement approval stage [because of]. . . . the risk that counsel has in some way been 'bought off' and provided with a significant incentive to not represent the class's interest . . . .").

Appellants' request for in camera review, moreover, must be considered against the backdrop of 11 U.S.C. § 107, which mandates that "paper[s] filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination." See also In re Hemple, 295 B.R. 200, 202 (Bankr. D. Vt. 2003) (holding that §

107 applies with equal force to a settlement agreement involving a nondebtor because there is no public policy reason for keeping such records confidential).

In this case, Appellants' claims are decidedly uncompelling, particularly in light of the fact, noted by Judge Ferguson, that "so many of the other parties in this case have already complied with this Court's Order it's difficult to imagine a significant competitive disadvantage brought about by merely disclosing a referral fee. [**50] " Oct 5 Bankr. Trans. at 11-12. Section 107(b)'s limited exception to §107(a) for "trade secret[s] or confidential research, development, or commercial information" cannot apply in circumstances, such as these, in which the Appellants have not met their burden of showing any reason why their referral fee arrangements qualify for special treatment.

CONCLUSION

For the above reasons, all four appeals of Judge Ferguson's Rule 2019 Compliance Order and subsequent Orders denying amendment and reconsideration are dismissed. All four Orders of the bankruptcy court are affirmed in an Order accompanying this Opinion and dated the same.

Stanley R. Chesler, U.S.D.J.

Dated: February 25, 2005.

APPENDIX "C"

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITES EXCHANGE ACT OF 1934
Release No. 52744 / November 7, 2005

ADMINISTRATIVE PROCEEDING
File No. 3-12098

In the Matter of **VAN D. GREENFIELD and** **BLUE RIVER CAPITAL LLC,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted (i) pursuant to Sections 15(b)(6) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Van D. Greenfield ("Greenfield"); and (ii) pursuant to Sections 15(b)(4) and 21C of the Exchange Act against Blue River Capital LLC ("Blue River") (Greenfield and Blue River hereinafter are referred to together as "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement ("Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

Respondents

1. Greenfield, age 60, is a U.S. citizen who resides in New York, New York. Greenfield is Blue River's principal and he is a registered representative and a registered general securities principal. During the relevant period, Greenfield was Blue River's manager and compliance officer and had discretion over Blue River's investments.

2. Blue River is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act and a member of the National Association of Securities Dealers, Inc. ("NASD"). Blue River is located in the same building as Greenfield's residence, a townhouse in New York, New York. Blue River operated from the ground floor and basement of the building. During the relevant period, Blue River's only members were Greenfield and a family trust established and funded by Greenfield in 1984 and it employed two full time traders and one assistant trader. Blue River ceased operations as a broker-dealer in November 2004. It has not engaged in any securities transactions since November 2004 except to liquidate existing securities positions.

Other Relevant Persons

3. John Edwin Reybold, age 65, is a U.S citizen who resides in Bronx, New York. Reybold has been associated with Blue River since 1988 and he became Blue River's principal securities trader in 1995.

Blue River had Access to Material, Nonpublic Information While Greenfield Served as Blue River's Representative on Official Bankruptcy Committees and on an Informal Bondholders' Committee.

4. On October 31, 2001, Blue River became a member of the informal bondholders' committee of Globalstar, L.P., a distressed telecommunications company, and Greenfield signed a confidentiality agreement with Globalstar, L.P. Globalstar, L.P. was traded publicly through its then general partner, Globalstar Telecommunications, Ltd. (together with Globalstar, L.P., "Globalstar"), a public company whose common stock was registered pursuant to Section 12(g) of the Exchange Act. On February 15, 2002, Globalstar, L.P. filed for protection under Chapter 11 of the U.S. Bankruptcy Code, and on March 6, 2002, Blue River was appointed to Globalstar, L.P.'s official unsecured creditors' committee by the office of the U.S. Trustee. Greenfield was Blue River's representative on the committee.

5. On June 25, 2002, Adelphia Communications Corporation ("Adelphia"), a public company whose stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act, filed for protection under Chapter 11 of the Bankruptcy Code. On July 31, 2002,

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[1] The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

Blue River was appointed to Adelphia's official equity holders' committee by the office of the U.S. Trustee, and Greenfield became co-chair of the equity holders' committee.

6. On July 21, 2002, WorldCom, Inc. ("WorldCom"), a public company whose common stock and series B preferred stock were registered with the Commission pursuant to Section 12(g) of the Exchange Act, filed the largest bankruptcy case in U.S. history under Chapter 11 of the Bankruptcy Code. On July 29, 2002, Blue River was appointed to WorldCom's official unsecured creditors' committee by the office of the U.S. Trustee, and Greenfield became co-chair of the unsecured creditors' committee.

7. As a member of the official committees in the Globalstar, L.P., Adelphia and WorldCom bankruptcy cases, Greenfield was bound to maintain the confidentiality of information he obtained as a committee member. As a member of the respective committees, Greenfield also owed a fiduciary duty of loyalty to Globalstar, L.P.'s and WorldCom's unsecured creditors, and to Adelphia's equity holders.

8. Soon after their appointments, the official committees in the WorldCom and Adelphia bankruptcy cases sought and obtained court orders that established a safe harbor for committee members who traded in securities of those issuers. The orders provided that any committee member who was in the business of trading securities for others or for its own account could continue to trade in the respective issuer's securities without violating its fiduciary duties as a committee member to the respective committee's constituents provided that it established an effective information barrier between the member's representative on the committee and the member's trading personnel. To be eligible for the safe harbor, the orders required any committee member who wished to trade in the respective issuer's securities to file with the respective courts an affidavit attesting to compliance with the information barrier procedures prior to any trading. The Adelphia motion stated specifically that Blue River was not seeking to trade any Adelphia securities pursuant to the motion at that time. Neither Blue River nor Greenfield ever filed an affidavit of compliance in the WorldCom or Adelphia bankruptcy cases and therefore they were ineligible for the protection of the safe harbor.

9. While serving on the Globalstar, L.P. informal bondholders' committee and official bankruptcy committee, and on the Adelphia and WorldCom official bankruptcy committees, Greenfield obtained access to material, nonpublic information concerning those issuers.

10. While serving on the Globalstar, L.P. informal bondholders' committee, Greenfield received a copy of a proposed memorandum of understanding between Globalstar, L.P. and the informal committee that included the basic terms of Globalstar, L.P.'s proposed restructuring, including the probable elimination of all equity interests in Globalstar. After the proposed restructuring terms were disclosed publicly by Globalstar, L.P. on November 12, 2001, the market value of Globalstar Telecommunications, Ltd. stock dropped from 65 cents per share to 26 cents per share. Over the approximately two years Greenfield served on the official Globalstar, L.P. creditors' committee, Greenfield on occasion had access to the terms of proposed offers by third parties to purchase Globalstar, L.P.'s assets before the terms of those offers were disclosed publicly.

11. While serving as co-chair of Adelphia's equity holders' committee, Greenfield had access to information prepared by Adelphia concerning Adelphia's operations and in one instance the company's view of a long term business plan and estimated reorganization values.

12. While serving as co-chair of WorldCom's creditors' committee, Greenfield had access to information prepared by WorldCom concerning WorldCom's valuations and operations. Greenfield participated in confidential negotiations among various constituencies over the allocation and distribution of WorldCom's reorganization value and he was intimately involved in the search for a new CEO for WorldCom. As co-chair of the committee, Greenfield also had occasion to interact personally with WorldCom's CEO and other influential persons that had dealings with WorldCom. In June 2003, Greenfield applied for membership on the Board of Directors of reorganized MCI, Inc., the surviving entity that was to emerge from WorldCom's bankruptcy, but he was not appointed to the Board.

Blue River did not Have Any Written Procedures to Prevent the Misuse of Material, Nonpublic Information Obtained by Greenfield.

13. Blue River's supervisory and compliance procedures manual required that Greenfield, as manager, implement measures to prevent the dissemination of material, nonpublic information in his possession and, if necessary, restrict persons associated with Blue River from trading in the securities of issuers for which he possessed such information.

14. The only measures Blue River took occurred when Greenfield became Blue River's representative on the Globalstar, Adelphia and WorldCom committees, respectively. Those measures were: (1) Greenfield told Reybold to take over the trading in the securities of those issuers; (2) Greenfield told the Blue River staff that he would have no role in trading decisions while he was serving on the committees; and (3) in the case of WorldCom only, Greenfield also circulated a one page memorandum to his staff advising them that he would not be involved in trading decisions and that due to the small size of the firm there should be no discussion or mention of WorldCom in the office. Nevertheless, Greenfield also requested that his staff inform Greenfield of all public information they became aware of regarding Globalstar, Adelphia and WorldCom.

15. Greenfield maintained a small office adjacent to Blue River's trading room. The trading room consisted of four desks placed back to back in a converted dining room on the ground floor of the townhouse. Communication between Greenfield and Blue River's traders was generally informal and face-to-face or by telephone. While serving on the respective committees, Greenfield would frequently walk through the trading room and ask Reybold or other employees for the current market quotes for Adelphia and WorldCom securities. On one or more occasions, Greenfield and Reybold together met personally with a securities analyst who covered Globalstar securities and talked to the analyst about his evaluation of Globalstar, L.P.'s satellite technology. Greenfield also received daily Blue River profit and loss reports prepared by Reybold that reflected Blue River's trading activity in Globalstar, Adelphia and WorldCom securities.

16. Blue River did not have any written guidelines or procedures in place to prevent the misuse by Reybold or Blue River of material, nonpublic information obtained by Greenfield while

he served on the committees and it did not restrict Blue River's trading in Globalstar, Adelphia or WorldCom securities during the period when Greenfield was in possession of material, nonpublic information about these companies. No person at Blue River monitored for compliance purposes any aspect of Blue River's trading in Globalstar, Adelphia or WorldCom securities or reviewed Reybold's trade tickets for transactions in the securities of those issuers. Reybold continued to trade actively in Globalstar, Adelphia and WorldCom securities in Blue River's proprietary accounts while Greenfield, who was Blue River's compliance officer and principal owner, served on the Globalstar, Adelphia and WorldCom committees.

17. Blue River realized a net profit of $167,309 from trades in Globalstar securities, $664,241 from trades in Adelphia securities, and $424,290 from trades in WorldCom securities during the time that Greenfield served on the respective committees of those issuers.

Blue River Obtained Membership on WorldCom's Creditors' Committee by Misrepresenting Its Holdings in WorldCom Securities to the Office of the U.S. Trustee and Thereby also Indirectly Misrepresented Its Holdings to the Public.

18. WorldCom filed for bankruptcy protection on July 21, 2002 (the "Petition Date"). On the Petition Date, Blue River owned only $6 million in face value of WorldCom unsecured 7.5% notes due 2011 (the "Notes") and $500,000 in face amount of WorldCom 6.25% Notes due 2003.

19. On July 25, 2002, Greenfield directed Reybold to execute a short sale of $400,000 in face value of the Notes in one Blue River proprietary account and a purchase of $400,000 in face value of the Notes in another Blue River proprietary account and to book both trades as having been made "as of" July 19, 2002, the last business day before the Petition Date. In fact, Blue River had not traded any WorldCom securities on July 19, 2002.

20. On July 26, 2002, Greenfield directed Reybold to cancel the prior day's trades and to execute, "as of" July 19, 2002, a short sale of $400 million in face value of the Notes in one Blue River proprietary account and a purchase of $400 million in face value of the Notes in a another Blue River proprietary account. Blue River's account statements for the month of July 2002 prepared by Blue River's clearing firm reflect the short sale in one Blue River proprietary account and the purchase in a separate Blue River proprietary account.

21. Also on July 26, Greenfield sent a letter to the U.S. Trustee for the Second Circuit requesting that Blue River be appointed to WorldCom's official unsecured creditors' committee. On a questionnaire attached to his letter, Greenfield represented that Blue River held a $400 million unsecured claim against WorldCom based upon the Notes. The letter did not disclose that Blue River had no net economic interest in the notes because it also held a $400 million short position in the Notes, that the transaction in the Notes had not yet settled, or that the purchase had occurred after the Petition Date but was backdated to a date prior to the Petition Date. A $400 million unsecured claim would have put Blue River among the top 20 unsecured creditors of WorldCom as disclosed in WorldCom's schedule of the 50 largest unsecured claims against it that was filed on the Petition Date.

22. On July 29, 2002, the U.S. Trustee for the Second Circuit appointed Blue River to WorldCom's official unsecured creditors' committee and Greenfield became co-chair of the committee. On or about July 30, 2002, Greenfield directed Reybold to cancel the $400 million short sale and associated purchase of the Notes, leaving Blue River only with its original $6.5 million position in WorldCom debt. The $6.5 million face value claim was much smaller than the smallest unsecured claim listed by WorldCom in the schedule of the 50 largest unsecured claims against it, which exceeded $100 million.

Reybold was not Registered With the NASD.

23. During the entire time that Reybold was employed as Blue River's principal securities trader he was not registered with the NASD. Greenfield knew since at least 1995 that Reybold was not registered with the NASD but took no steps to remedy that deficiency.

IV.

Conclusions

Sections 15(b)(7) and 15(f) of the Exchange Act and Rule 15b7-1.

24. Section 15(f) of the Exchange Act provides that "every registered broker or dealer shall establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such broker's or dealer's business, to prevent the misuse in violation of this title, or the rules or regulations thereunder, of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer."

25. Greenfield's membership on the committees gave him direct access to material, nonpublic information concerning Globalstar, Adelphia and WorldCom. The only steps Blue River took to prevent the misuse of such information were Greenfield's oral directive to Reybold to take over Blue River's trading in the securities of those issuers and the circulation of the one page memorandum regarding WorldCom. These steps were inadequate to guard against the potential misuse of material, nonpublic information in light of the conflicts of interest arising from Greenfield's serving as Blue River's representative on the committees at the same time that he was also Blue River's compliance officer, principal owner, and general securities principal. *In re Guy P. Wyser-Pratte, Wyser-Pratte Management Co., Inc., and Wyser-Pratte and Co., Inc.*, Exch. Act Rel. 44283 (May 9, 2001). The potential for misuse of such information was exacerbated by the physical proximity of Greenfield to Blue River's traders and the informal nature of communications between Greenfield and his employees.

26. Accordingly, Blue River willfully violated Section 15(f) of the Exchange Act and Greenfield willfully aided and abetted and caused Blue River's violation.

27. Rule 15b7-1, promulgated under Section 15(b)(7) of the Exchange Act, provides that "no registered broker or dealer shall effect any transaction in, or induce the purchase of, any security unless any natural person associated with such broker or dealer who effects or is involved in effecting such transaction is registered or approved in accordance with the standards of training, experience, competence, and other qualification standards . . . established by the rules of any

national securities exchange or national securities association of which such broker or dealer is a member."

28. Reybold had been Blue River's principal securities trader from at least 1995, and Greenfield knew that Reybold was not registered with the NASD as required by NASD Rule 1031.

29. Accordingly, Blue River willfully violated Section 15(b)(7) of the Exchange Act and Rule 15b7-1 thereunder, and Greenfield willfully aided and abetted and caused Blue River's violations.

Section 10(b) of the Exchange Act and Rule 10b-5.

30. Section 10(b) of the Exchange Act proscribes the use of any deceptive device in connection with the purchase or sale of securities in contravention of rules prescribed by the Commission. Rule 10b-5 under the Exchange Act makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

31. Greenfield caused Blue River to enter into the $400 million backdated short sale and purchase of the Notes between two separate Blue River proprietary accounts in order to misrepresent to the office of the U.S. Trustee his true holdings in WorldCom securities to help him gain membership on WorldCom's creditors' committee. The creditors' committee was statutorily charged with participating in the formulation of a reorganization plan that would affect WorldCom's distributions to equity and debt securities holders and other creditors. 11 U.S.C. § 1103(c).

32. As co-chair of the committee, and at a time that Blue River owned WorldCom debt securities, Greenfield played a significant role in negotiating with various WorldCom constituencies over the allocation of WorldCom's reorganization value among WorldCom securities holders and other creditors. Greenfield also obtained the personal benefit of access to influential persons in the American business world and the possibility of becoming a member of reorganized WorldCom's Board of Directors, both benefits that he would not likely have obtained had he not been appointed to WorldCom's creditors' committee.

33. Greenfield used a deceptive device, and engaged in a series of acts, practices, or courses of business, which operated as a fraud or deceit on the U.S. Trustee in connection with the purchase or sale of a security. Greenfield entered into a purchase and simultaneous short sale of the same amount of Notes, leaving Blue River with no net economic interest in the Notes. Greenfield backdated the purchase to a date prior to the Petition Date and caused Blue River to cancel the trades immediately after he was appointed to the WorldCom creditors' committee. Greenfield also knowingly misrepresented to the U.S. Trustee that Blue River owned $400 million

in face value of the Notes, when in fact this interest was offset by the short position in another Blue River proprietary account.

34. Because the long position in one proprietary account was offset by a short position in another proprietary account, Blue River had only a $6.5 million face value claim against WorldCom. Had the U.S. Trustee known that Blue River's claim was $6.5 million and not $400 million, it is unlikely that Blue River would have been appointed to WorldCom's creditors' committee. By obtaining membership on WorldCom's creditors' committee, Greenfield indirectly misrepresented to all WorldCom constituencies and the public the magnitude of his holdings in WorldCom securities and thereby gained undue influence in WorldCom's reorganization proceedings. Greenfield's actions also could have had the effect of depriving another legitimate creditor from obtaining a seat on WorldCom's creditors' committee.

35. Section 10(b) "does not confine its coverage to deception of a purchaser or seller of securities . . . ; rather, the statute reaches any deceptive device used 'in connection with the purchase or sale of any security.'" *U.S. v. O'Hagan*, 521 U.S. 642, 651 (1997). *See also SEC v. Zandford*, 535 U.S. 813, 820 (2002) (section 10(b) "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes"). The "in connection with" requirement can be satisfied when a fraud or deceit is "practiced on one person, with resultant harm to another person or group of persons." *U.S v. O'Hagan*, 521 U.S. at 656.

36. A misrepresentation concerning the extent of one's ownership of a class of securities may form the basis for a Section 10(b) violation. *SEC v. Bilzerian*, 29 F.3d 689 (D.C. Cir. 1994); *SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587 (S.D.N.Y. 1993), *aff'd*, 16 F.3d 520 (2d Cir. 1994); *In re Basic Capital Management, Inc. et al*, Exch. Act Rel. No. 46538 (September 24, 2002). Here, all of the acts, practices, or courses of business which operated as a fraud or deceit on the U.S. Trustee were connected to a series of securities transactions: the purchase and simultaneous short sale were securities transactions, and the backdating concerned those transactions. In addition, the misrepresentations made to the U.S. Trustee about the value of Blue River's holdings were directly tied to the purchase and short sale of the Notes.

37. Accordingly, Blue River and Greenfield willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Greenfield willfully aided and abetted and caused Blue River's violations.

Section 17(a) of the Exchange Act and Rule 17a-3

38. Blue River also violated the Exchange Act's books and record keeping provisions. Blue River's blotters and trade tickets concerning the short sale and purchase of the $400 million in face value of WorldCom Notes incorrectly reflected that the transactions occurred on July 19, 2002, when, in fact, Blue River did not execute any trades in WorldCom securities on that date.

39. Section 17(a) of the Exchange Act and Rule 17a-3 thereunder provide that "every broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934, as amended, shall make and keep current . . . books and records relating to its business."

40. Accordingly, Blue River willfully violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder, and Greenfield willfully aided and abetted and caused Blue River's violations.

Undertakings

41. Blue River has voluntarily filed with the Commission a Form BDW seeking a full withdrawal from registration with the Commission, all Self-Regulatory Organizations and all jurisdictions. Blue River also filed with the Commission notification, pursuant to Exchange Act Rule 15b6-1(b), that it consents to delay the date the Form BDW becomes effective for purposes of the Order until immediately after the Commission institutes the Order. Blue River further undertakes to:

a. Not withdraw its Form BDW; and

b. Provide to the Commission, with fifteen (15) days after the date of the entry of the Order, an affidavit from an authorized agent of Blue River that Blue River has not conducted any business as a broker-dealer after November 30, 2004.

42. Greenfield shall provide to the Commission, within thirty (30) days after the end of the six (6) month suspension period described below, an affidavit that he has complied fully with the sanctions described in Section V. below.

In determining whether to accept the Offers, the Commission has considered these undertakings.

V.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanction agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 15(b)(4), 15(b)(6), 21B, and 21C of the Exchange Act, it is hereby ORDERED that:

A. Blue River cease and desist from committing or causing any violations and any future violations of Sections 10(b), 15(b)(7), 15(f), and 17(a) of the Exchange Act and Rules 10b-5, 15b7-1, and 17a-3 thereunder;

B. Greenfield cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and from causing any violations and any future violations of Sections 15(b)(7), 15(f), and 17(a) of the Exchange Act and Rules 15b7-1 and 17a-3 thereunder;

C. Greenfield and Blue River are censured;

D. Greenfield be, and hereby is, suspended from association with any broker or dealer for a period of six months, effective on the second Monday following the entry of this Order;

E. Greenfield and Blue River shall together pay a civil money penalty in the amount of $150,000 to the United States Treasury within three (3) days of entry of this Order. Such payment by Greenfield and Blue River, who are jointly and severally liable for the penalty amount, shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Greenfield and Blue River as Respondents in these proceedings and the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Alistaire Bambach, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Room 4300, New York, New York 10281-1022; and

F. Blue River shall comply with the undertakings enumerated in Section IV.41. above and Greenfield shall comply with the undertakings enumerated in Section IV.42. above.

By the Commission.

Jonathan G. Katz
Secretary

APPENDIX "C"

Rule 2019. Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases

(a) ~~DEFINITION. In this rule,~~ DEFINITIONS. In this rule the following terms have the meanings indicated:

(1) "agent" means an entity, other than an indenture trustee, that is an agent for one or more other entities under an agreement pursuant to which such other entity or entities have extended credit.

(2) "disclosable economic interest" means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right that grants the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest.

(3) "represent" or "represents" means, when used with reference to the relationship between two entities, that one entity appears for the other to seek or oppose the granting of relief on behalf, and in the name, of the other.

(b) DISCLOSURE BY ENTITIES, GROUPS, COMMITTEES, INDENTURE TRUSTEES, AND OTHER PARTIES IN INTEREST.

(1) In a chapter 9 or 11 case~~,~~:

(A) every ~~entity,~~ group~~,~~ or committee that consists of ~~or represents more than one creditor or equity security holder and.~~ multiple creditors or

equity security holders that are acting in concert to advance their common interests, and that are not solely affiliates or insiders of each other;

(B) every entity that represents multiple creditors or equity security holders that are acting in concert to advance their common interests in connection with such representation, and that are not solely affiliates or insiders of each other;

(C) unless the court directs otherwise, every agent that seeks or opposes the granting of relief or takes any position before the court with respect to a request for, or opposition to, the granting of relief; and

(D) unless the court directs otherwise, every indenture trustee,

shall file a verified statement setting forth the information specified in subdivision (c) of this rule. ~~On~~

(2) In every chapter 9 or 11 case, on motion of a ~~partv~~party in interest, or on its own motion, the court may ~~also~~ require disclosure of some or all of the information specified in subdivision (c)(2) by an entity that seeks or opposes the granting of relief.

(c) INFORMATION REQUIRED. The verified statement shall include:

(1) the pertinent facts and circumstances concerning:

(A) the employment of the entity or indenture trustee, including the name of each entity at whose instance the employment was arranged; or

(B) in the case of a group or committee, other than a committee appointed pursuant to §§ 1102 or 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group or committee was formed or for whom the group or committee has agreed to act;

(2) if not disclosed under subdivision (c)(l), with respect to the entity~~ or~~, indenture trustee, or agent and with respect to each member of the group or committee:

(A) name and address;

(B) the nature and amount of~~, and~~ each disclosable economic interest held in relation to the debtor by the entity described in subdivision (b)(1)(B), each member of the group or committee described in subdivision (b)(1)(A), the agent described in subdivision (b)(1)(C), or the indenture trustee as of the date such entity was employed, such group or committee was formed, or such indenture trustee or agent appeared in the case;

(C) if directed by the court, with respect to:

(i) an entity of the type described in subdivision (b)(l)(B);

(ii) an entity that seeks or opposes the granting of relief that claims to act on behalf or in the interests of any other entity;

(iii) each member of a group or committee that claims to act on behalf or in the interests of an entity other than the members of the group or committee; and

(iv) an agent of the type described in subdivision (b)(1)(C) or an indenture trustee,

the date of acquisition and the amount paid for, each disclosable economic interest held in relation to the debtor as of the date the entity was employeddescribed in subdivision (b)(1)(B) was employed by more than one creditor or equity security holder, the entity described in subdivision (c)(2)(C)(ii) first sought or opposed the granting of relief, the group or committee described in subdivision (c)(2)(C)(iii) was formed, or the agent described in subdivision (b)(1)(C) or the indenture trustee appeared in the case; and

(CD) the date when eachperiod of time during which the disclosable economic interest wasinterests were acquired, unless acquired more than one year before the petition was filed;

(3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security holder represented by the entity, described in subdivision (b)(1)(B) or the group, or committee described in subdivision (b)(1)(A), other than a creditor or equity security holder represented by an agent, indenture trustee, or a committee appointed pursuant to §§ 1102 or 1114 of the Code, or by the indenture trustee:

(A) name and address;

(B) the nature and amount of~~, and~~ each disclosable economic interest held by the creditor or equity holder in relation to the debtor as of the date of the statement;

(C) if directed by the court, with respect to any creditor or equity security holder that claims to act on behalf or in the interests of any entity other than such creditor or equity security holder, the date of acquisition and the amount paid for~~.~~ each disclosable economic interest held in relation to the debtor as of the date of the statement; and

(~~C~~D) the ~~date each~~period of time during which the disclosable economic ~~interest was~~interests were acquired, unless acquired more than one year before the petition was filed; and

(4) a copy of the instrument, if any, authorizing the entity, group, committee, or indenture trustee to act on behalf of creditors or equity security holders.

(d) SUPPLEMENTAL STATEMENTS. A supplemental verified statement shall be filed monthly, or as the court otherwise orders, setting forth any material change in facts contained in a statement previously filed under this rule, including information about any acquisition, sale, or other disposition of a disclosable economic interest by the entity, members of the group or committee, or the indenture trustee.

(e) DETERMINATION ON OF FAILURE TO COMPLY; SANCTIONS

(1) On motion of any party in interest, or on its own motion, the court may determine:

(A) whether there has been any failure to comply with the provisions of this rule;

(B) whether there has been any failure to comply with any other applicable law relating the activities and personnel of any entity, group, committee, or indenture trustee; or

(C) whether there has been any impropriety in connection with any solicitation.

(2) In making a determination under subdivision (e) (1), the court may examine:

(A) any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, deed of trust, or authorization to act as a representative; and

(B) any disclosable economic interest acquired by any entity-,

group, committee, or indenture trustee in contemplation of or in the course of a case.

(3) If, under subdivision (e)(l), the court determines that a failure to comply or an impropriety has occurred, it may:

(A) refuse to permit the entity, group, committee, or indenture trustee to be heard or to intervene in the case;

(B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by the entity, group, committee, or indenture trustee; or

(C) grant other appropriate relief.

COMMITTEE NOTE

The rule is substantially amended to expand the scope of its coverage and the content of its disclosure requirements. Stylistic and organizational changes are also made in order to provide greater clarity. Because the rule no longer applies only to representatives of creditors and equity security holders, the title of the rule has been changed to reflect its broadened focus on disclosure of financial information in chapter 9 and chapter 11 cases.

Subdivision (a). The content of subdivision (a) is new~~. It sets forth a~~ and sets forth three definitions. The first is the definition of an "agent," which is intended to include any entity that is identified as an "agent" for one or more other entities under an agreement pursuant to which such other entity or entities have extended credit to the debtor, regardless of the precise duties imposed on the entity identified as an "agent." The definition is intended to include any entity that is identified as an agent bank in a credit agreement, but it is not limited to such entities. The second is the definition of the term ~~a~~ "disclosable economic interest," which is used in subdivisions (c)(2), (c)(3), (d), and (e). The definition of the term is intended to be sufficiently broad to cover any

economic interest that could affect the legal and strategic positions a stakeholder takes in a chapter 9 or chapter 11 case. A disclosable economic interest extends beyond claims and interests owned by a stakeholder. The third is the definition of "represent" or "represents," which is intended to limit the ambiguity in the term by providing that one entity will be deemed to represent another entity only if the first entity appears in court on behalf of the second entity to seek or oppose the granting of relief on behalf and in the name of the second entity. Thus, for example, an attorney who is retained and consulted by a creditor or equity security holder but does not appear in court to seek or oppose the granting of relief for that creditor or equity security holder will not be deemed to "represent" the creditor or equity security holder for purposes of the rule. An agent bank or indenture trustee will not ordinarily be deemed to "represent" holders of claims under the applicable credit agreement or indenture, simply by virtue of its capacity as agent bank or indenture trustee, because agent banks and indenture trustees do not ordinarily appear to seek or oppose the granting of relief in the name of holders of claims under the applicable documents.

Subdivision (b). Subdivision (b) specifies who is covered by the rule's disclosure requirements. In addition to an entity or committee that represents more than one creditor or equity security holder, the amendment extends the rule's coverage to committees that consist of more than one creditor or equity security holder. It also applies to a group of creditors or equity security holders that act in concert to advance common interests (except when the group consists exclusively of affiliates or insiders of each other), even if the group does not call itself a committee. The rule continues to apply to indenture trustees, unless the court directs otherwise. It also applies to an agent bank or other creditor agent that seeks or opposes the granting of relief, or takes any position before the court with respect to a request for, or opposition to, the granting of relief, unless the court directs otherwise.

As amended, the rule authorizes a court, on motion of a party in interest or sua sponte, to require disclosure of some or all of the information specified in subdivision (c)(2) by any other entity that seeks or opposes the granting of relief. Although the rule does not automatically require disclosure by parties that act individually and on their own behalf, it allows for such disclosure when a court believes that knowledge of the party's economic stake in the debtor will assist it in evaluating that party's arguments.

Subdivision (c). Subdivision (c) sets forth the information that must be included in a verified statement required to be filed under this rule. Subdivision (c)(1) continues to require disclosure concerning the employment of an entity or indenture trustee and the formation of a committee or group, other than an official committee.

Subdivision (c)(2) specifies information that must be disclosed with respect to the entity, indenture trustee, agent, and each member of the committee and group filing the statement. In the case of a committee or group, the information about the nature and amount of a disclosable economic interest must be specifically provided on a member-by-member basis, and not in the aggregate. The ~~date of acquisition of each~~period of time during which the disclosable economic ~~interest~~interests were acquired must also be ~~specifically~~ provided, except for ~~a~~ disclosable economic ~~interest~~interests acquired more than a year before the filing of the petition. ~~The amendment leaves to the court's discretion whether~~That period of time will generally run from the date the first disclosable economic interest was acquired until the date the last disclosable economic interest was acquired. The amendment does not, however, require the disclosure of the specific date on which each disclosable economic interest was acquired, but allows the court in its discretion to require the disclosure of such information and of the amount paid for each disclosable economic interest~~.~~ with respect to (i) an entity that represents more

than one creditor or equity security holder; (ii) an entity that seeks or opposes the granting of relief and claims to act on behalf or in the interest of any other entity; (iii) each member of a group or committee that claims to act on behalf or in the interests of any entity other than the members of the group or committee; (iv) an indenture trustee; (v) an agent. The rule is not intended to limit any power that the court might otherwise have to order the disclosure of such information.

Subdivision (c)(3) specifies information that must be disclosed with respect to creditors or equity security holders that are represented by an entity, group, or committee~~,~~ ~~or indenture trustee~~. This provision does not apply with respect to those represented by agents, indenture trustees, or official committees. The information required to be disclosed under subdivision (c)(3) parallels that required to be disclosed under (c)(2). The amendment also clarifies that under (c)(3) the nature and amount of each disclosable economic interest of represented creditors and shareholders must be stated as of the date of the verified statement.

Subdivision (c)(4) requires the attachment of any instrument authorizing the filer of the verified statement to act on behalf of creditors or equity security holders.

Subdivision (d). Subdivision (d) requires the monthly filing of a supplemental statement if there are material changes in facts contained in an earlier filed verified statement. The required supplementation is not cumulative; changes already disclosed need not be repeated. Supplemental statements may be filed on a different schedule if the court directs.

Subdivision (e). Subdivision (e) addresses the court's authority to determine whether there has been a violation of this rule, any solicitation requirement, or other applicable law, and to impose a sanction for any violation. It also specifies some of the

information the court may examine in making its determination. The sanction set forth in subparagraph (3)(B) may now be imposed not only for a failure to comply with this rule or § 1125(b) of the Code, but also for a violation of other applicable law.