AKIN GUMP
STRAUSS HAUER & FELD LLP
Attorneys at Law

ABID QURESHI
212.872.8027/fax: 212.872.1002
aqureshi@akingump

January 22, 2010

VIA ELECTRONIC MAIL

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure of the Judicial
Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington D.C. 20544

Re: *Testimony of Abid Qureshi Regarding the Proposed Amendment of Federal Rule of Bankruptcy Procedure 2019*

Dear Mr. McCabe:

Akin Gump Strauss Hauer & Feld LLP ("Akin Gump") appreciates this opportunity to testify on the proposed amendment to Federal Rule of Bankruptcy Procedure 2019. Please find attached a PowerPoint presentation outlining the testimony that I will offer on behalf of Akin Gump at the hearing in New York on February 5, 2010.

Respectfully Submitted,

Abid Qureshi
AKIN GUMP STRAUSS HAUER & FELD LLP
One Bryant Park
New York, NY 10036
Telephone: (212) 872-1000
Facsimile: (212) 872-1002

Encl.

Abid Qureshi

Comment On the Proposed Amendment of Federal Rule of Bankruptcy Procedure 2019

The Advisory Committee on the Bankruptcy Rules
New York City
February 5, 2010

Abid Qureshi

AKIN GUMP
STRAUSS HAUER & FELD LLP

Overview of Presentation

- It is a bedrock principle of bankruptcy law that the price a creditor paid for a claim is legally irrelevant to that creditor's rights throughout the bankruptcy process.

- In its current form, Rule 2019 has been misused as a litigation tactic to seek disclosure of price paid for a claim.

- The proposed amendment of Rule 2019 leaves the door open for such motion practice.

- Such a carve-out is not necessary and should be eliminated from the amended Rule.

Proposed Amended Rule 2019

- The proposed amended Rule 2019 states in pertinent part:

> (b) On motion of a 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)(2)(B) The verified statement shall include . . . if directed by the court, the amount paid for, each disclosable economic interest held in relation to the debtor as of the date the entity was employed, the group or committee was formed . . . ."[1]

1) Proposed Fed. R. Civ. P. 2019(b), (c)(2)(B), *available at,* http://www.uscourts.gov/rules/proposed0809/BK_Rules_Forms_Amendments.pdf.

Amended Rule Leaves Door Open For Disruptive Motion Practice

- The amended Rule expressly invites motion practice concerning the price paid for a claim.
- Why is price paid relevant to anything in a bankruptcy proceeding? It is not.
- Existing law provides for remedies in the event a creditor is acting in bad faith in the bankruptcy process, such as designation of votes or 2004 examinations.[1]
- Thus, given the long-established case law that price paid is irrelevant, there is no need for the carve-out in the amended Rule.
- The carve-out invites the continued use of Rule 2019 as a litigation tactic as exemplified by recent experience in the *Philly News* and *Six Flags* chapter 11 cases.[2]

1) *In re Philadelphia Newspapers*, No. 09-11204 (SR) (Bankr. E.D. Pa.) ("Philly News"); *In re Premier Int'l Holdings Inc.*, No. 09-12019 (CSS) (Bankr. D. Del.) ("Six Flags")
2) *See, e.g., In re DBSD North America, Inc.*, No. 09-13061 (REG), Docket Nos. 546, 597 (Bankr. S.D.N.Y.) (order and decision designating creditor's vote).

Bedrock Bankruptcy Principle: Price Paid for A Claim Irrelevant

- There is over 100 years of case law supporting the proposition that the price paid for a claim is irrelevant in bankruptcy proceedings.
  - *Shropshire, Woodliff & Co. v. Bush*, 204 US 186, 189 (1907) (treatment of a claim attaches to the claim, and not the claimant)
  - *In re Pittsburgh Rys. Co.*, 159 F.2d 630, 632-3 (3d Cir. 1947) ("the prices paid for securities do not affect their participation value in reorganization")
  - *Standard Gas & Elec. Co. v. Deep Rock Oil Corp.*, 117 F.2d 615, 619 (10th Cir. 1941) ("the prices which security holders pay for their securities do not affect the measure of their participation under the plan of reorganization")
  - *In re Lorraine Castle Apts. Bldg. Corp.*, 149 F.2d 55, 58 (7th Cir. 1945) (same)

Philly News and *Six Flags:* Recent Examples of Rule 2019 Misuse

- Two recent examples where the existing Rule 2019 was misused for litigation and leverage purposes having nothing to do with the disclosure purpose of the Rule.

  - *In re Philadelphia Newspapers*, No. 09-11204 (SR) (Bankr. E.D. Pa.) ("Philly News")
    - Akin Gump represents a steering group of prepetition secured lenders (the "Steering Group").

  - *In re Premier Int'l Holdings Inc.*, No. 09-12019 (CSS) (Bankr. D. Del.) ("Six Flags")
    - Akin Gump represents a group of senior noteholders at the operating company level.

Philly News – Background

- Philadelphia Newspapers, LLC is the holding company for the *Philadelphia Inquirer* and the *Philadelphia Daily News*. The Steering Group consists of prepetition secured lenders.

- The case has been highly litigious, and has included efforts by the Debtors to prevent the prepetition secured lenders from credit bidding at a planned auction for the Debtors' assets, which issue is presently before the Third Circuit Court of Appeals.

- The Debtors' 2019 Motion was filed within days of the *Washington Mutual* decision, and specifically requested that Steering Group members be required to disclose the date and purchase price of each acquisition of secured debt.[1]

1) Docket No. 1507 (Dec. 8, 2009); *In re Wash. Mutual Corp.*, No. 08-12229 (MFW), 2009 WL 4363539 (Bankr. D. Del. Dec. 2, 2009).

Philly News – Reasons For Filing 2019 Motion

- The Debtors' stated rationale for the filing of the Motion, which they asked the Court to hear on an expedited basis, was that such disclosure "is essential to the considerations the Debtors must undertake in connection with, among other things, the upcoming auction . . . ."[1]

- The Debtors' General Counsel explained that the trading information was needed by the Debtors because "if people are aware of the . . . value of the collateral, doesn't that impact on what they'd be willing to bid?"[2]

- The Debtors' lead counsel more directly explained that knowing the price at which the debt was trading "could go a long way" to determining whether bids at the auction are "fair".[3]

1) Docket No. 1508, ¶ 8.
2) Hr'g. Tr., 33:14-16 (Dec. 21, 2009).
3) Christopher K. Hepp, *Phila. Newspapers wants data from debt holders*, Dec. 22, 2009, http://www.philly.com/philly/business/79879302.html.

Philly News – Price Unrelated to Fairness of Auction

- The Debtors' stated rationale for filing of the Motion illustrates precisely why the proposed amendment should close the door to motion practice that seeks disclosure of price information.
- The notion that the price a prepetition lender paid for its claim has any relevance whatsoever to the present value of the Debtors' assets (or to whether the outcome of an auction is "fair") is not only mistaken as a matter of basic economics, but is also legally irrelevant.
- It suggests that a Debtor could do precisely that which has for decades been prohibited by the case law: accord treatment to a creditor based not on the face amount of its claim, but instead upon what the creditor paid for its claim.
- The matter has been fully briefed before Judge Raslavich and the parties are awaiting his ruling.

Six Flags - Background

- The Debtors are Six Flags, the theme park operator.
- There are two competing informal noteholder groups that have been very active in the case:

  1) Operating company noteholders; and
  2) Holding company noteholders.

- Akin Gump represents the OpCo noteholders, who are supporting the Debtors' plan of reorganization.
- In connection with plan confirmation discovery, the Official Committee of Unsecured Creditors, which opposes the plan and supports an alternative proposed by the HoldCo noteholder committee, requested price paid and date acquired information. The Court denied the request.
- Just days later, the same information was requested by the Creditors' Committee in a 2019 Motion.

Six Flags – Background, *cont'd*

- Despite the fact that the Six Flags case involves two ad hoc noteholder groups, both active in the case, the Creditors' Committee filed the Motion as against just one of those groups which, not surprisingly, was the group that supported the plan of reorganization that the Creditors' Committee opposed.
- While the OpCo noteholders have been active in the case since the petition date, the Creditors' Committee waited until plan confirmation discovery to make its disclosure request.
- What was the Creditors' Committee's rationale for asking for that type of disclosure?
  - Bad faith?
    - The ad hoc group of OpCo noteholders were not plan proponents.
  - What else could have been their rationale?

Six Flags – Price Paid For Debt Is Irrelevant

- Judge Sontchi, in the 2019 hearing, correctly stated that the pricing information sought in the Motion was irrelevant.

> ". . . [I]f somebody paid ten cents on the dollar off par on debt and a plan is already on the table for fifteen and they're crying bloody murder because they're under water, it would help move the process along if the judge knew they'd already made a fifty percent recovery on a claim. Is that what you're talking about? Because isn't that contrary to the entire concept of common law contracts back 600 years? You buy debt -- even if you buy it at a discount, you still own the debt at its face value."[1]

1) Hr'g. Tr., 36:24-35:9 (Jan. 8, 2010).

Six Flags – Rule 2019 Misused

- At the hearing, Judge Sontchi made clear that the type of motion practice carried out by the Creditors' Committee does not square with the intent of Rule 2019:

> ". . . I'd be very concerned . . . because Rule 2019 is a rule. . . . It's a disclosure rule, an upfront rule. If on the back end we're going to say . . . it's really only applicable if you look . . . on the facts of individual cases based on what the committee has done, I find that completely inconsistent with the whole purpose of a rule like 2019.."[1]

- Judge Sontchi issued a written opinion on January 20, 2010.[2]

1) Hr'g. Tr., 70:3-10 (Jan. 8, 2010).
2) Docket No. 1423 (Jan. 20, 2010).

Six Flags – Rule 2019 Used As a Blatant Litigation Tactic

- In his written opinion, Judge Sontchi recognized that the Creditors' Committee's 2019 Motion was a blatant litigation tactic:

> ". . . [T]he Official Committee, by filing its motion, is clearly engaged in a litigation tactic to apply pressure on it [sic] current adversary, the Informal Committee of SFO Noteholders [OpCo noteholders], as well as attempting to make an 'end run' around a previous ruling denying the Official Committee's request for discovery of the same information. This conclusion is made self-evident by the fact that the Official Committee has not sought application of Rule 2019 to its current ally, the *Ad Hoc* Committee of SFI Noteholders [HoldCo noteholders]."[1]

1) Docket No, 1423, pp. 31-2 (Jan. 20, 2010).

Conclusion

- Over 100 years of case law makes clear that the price paid for a claim is irrelevant in bankruptcy proceedings.
- Rule 2019 disclosure is currently being employed as a means to frustrate the participation of creditors in bankruptcy proceedings.
- In *Philly News*, the price paid is being sought to support the "fairness" of an auction, contrary to well-established law.
- In *Six Flags*, Rule 2019 is being blatantly employed as a litigation tactic and for leverage purposes that have nothing whatsoever to do with disclosure.
- These cases exemplify why the Advisory Committee should amend the Rule to ensure that such abusive motion practice is curtailed. No carve-out is necessary; eliminating the carve-out will not undermine the entirely appropriate disclosure purposes of the proposed Rule.