UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| In re | : | |
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| NORTHWEST AIRLINES CORPORATION, *et al.*, | : | Case No. ___________ |
| | : | |
| Debtors. | : | |

**THE AD HOC COMMITTEE OF EQUITY SECURITY HOLDERS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL**

The Members of the Ad Hoc Committee of Equity Security Holders for Northwest Airlines, Inc. (the "Ad Hoc Committee") submit this memorandum of law in support of their alternative motion for leave to appeal, pursuant to 28 U.S.C. § 158(a) and Federal Rules of Bankruptcy Procedure Rule 8003, that certain March 9, 2007 order denying their motion to seal certain aspects of the Ad Hoc Committee's Bankruptcy Rule 2019 statement.

## STATEMENT OF ISSUE ON APPEAL

Whether the bankruptcy court erred by denying the Ad Hoc Committee's motion to file under seal certain information in a Bankruptcy Rule 2019 Statement, where the bankruptcy court based its decision on the incorrect conclusions that (i) the Ad Hoc Committee members have what amount to fiduciary duties to represent all stockholders, (ii) Bankruptcy Rule 2019 supersedes Bankruptcy Code § 107(b), and (iii) the information at issue is not confidential commercial information.

## PRELIMINARY STATEMENT

The bankruptcy court below has ordered the Ad Hoc Committee to disclose publicly by way of a Bankruptcy Rule 2019 statement certain confidential commercial information, and has

refused to allow such a filing to be made under seal in accordance with Bankruptcy Code § 107(b). More specifically, the bankruptcy court ordered the Ad Hoc Committee to disclose to the world detailed trading data, including all individual purchases and sales of any interest in the Debtors (whether it be stock, bonds, claims or any other interest), including purchase and sales prices. The Ad Hoc Committee hereby seeks to appeal the decision refusing to allow the filing to be made under seal. As an initial matter, the order at issue is a final order within the meaning of 28 U.S.C. § 158(a)(1). Likewise, the order satisfies the collateral order doctrine also making the decision appealable now. Nevertheless, the cases vacillate between characterizing such an appeal under the collateral order doctrine as one of right or one requiring leave. Accordingly, and so as to avoid any doubt as to the validity of the appeal, the Ad Hoc Committee also seeks leave in addition to having filed its notice of appeal as of right.

The collateral order doctrine requires that the order at issue conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and effectively would be unreviewable if the appeal were to wait until the conclusion of the case. Here, each element is satisfied easily. As to the first, the contested matter was all about whether the Ad Hoc Committee could file portions of its Rule 2019 statement under seal, and the bankruptcy court's March 9, 2007 decision resolved that matter entirely. Likewise, whether the Ad Hoc Committee's trading data is protected from public dissemination is important, but it is completely separate from the merits of the underlying bankruptcy case. As to the final element, if there is no appeal and the Ad Hoc Committee is forced to disclose the information at issue now, the issue will be rendered moot because the harm sought to be avoided by the appeal (public disclosure) will already have occurred.

Lastly, and independent of anything else, the appeal should be heard now, even if only on a purely discretionary basis under 28 U.S.C. § 1292(b). Such appeals require a showing that the order (1) involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. Here, the Ad Hoc Committee can make such a showing.

## STATEMENT OF FACTS

### A. Background

The members of the Ad Hoc Committee came together on December 26, 2006 so as to share costs in an effort to pursue their rights in this bankruptcy case because the Debtors appeared to have abandoned all stockholders by stating at the outset and continuing to maintain that stockholders would receive nothing in the bankruptcy and their shares would be cancelled. To that end, the members of the Ad Hoc Committee each retained Kasowitz, Benson, Torres & Friedman LLP ("Kasowitz Benson") to represent their individual interests. Likewise, and as is customary in bankruptcy cases, the members styled themselves as an "ad hoc committee." In light of its engagement as a representative of the members, on January 16, 2007, Kasowitz Benson filed an initial verified disclosure statement pursuant to Bankruptcy Rule 2019, and thereafter filed amended statements as the circumstances warranted (collectively, the "2019 Statement"). (Declaration of Daniel P. Goldberg, dated March 14, 2007 ("Goldberg Decl.") at Ex. A-C)

### B. The 2019 Agreement And Subsequent 2019 Objection

Shortly thereafter, the Debtors claimed the 2019 Statement was deficient, demanded further information regarding holdings of Ad Hoc Committee members, and threatened to seek a court order denying the Ad Hoc Committee any ability to be heard in the case, including on a

pending motion seeking the formation of an "official" equity committee. (Goldberg Decl. at Ex. A, D) After extended negotiations, the Ad Hoc Committee advised the Debtors that it planned to file a motion affirmatively establishing the sufficiency of the 2019 Statement. Counsel then reached agreement on the terms for disclosure and confidentiality and memorialized that agreement via email. (Goldberg Decl. at Ex. A, E)

Within days of the 2019 agreement, the Debtors reneged, and in a discovery-related motion, the Debtors cross-moved for an order declaring that the 2019 Statement was deficient, and requested that the court "refuse to further hear the Ad Hoc Committee and strike the Ad Hoc Committee's request for the appointment of an official committee of equity security holders, and the discovery requests in connection therewith." (Goldberg Decl. Ex. F) Likewise, the Debtors asked the bankruptcy court to require additional disclosures, including, as relevant here, purchase and sales price information for all stock, debt and claims purchased or sold by each member of the Ad Hoc Committee concerning the Debtors. (Goldberg Decl. Ex. F)

### C. The Bankruptcy Court's Decisions On Rule 2019 & Sealing

On February 26, 2007, the bankruptcy court granted the Debtors' motion, and ordered the members of the Ad Hoc Committee to file an unprecedented Rule 2019 statement disclosing, among other things, the specific purchase and sales price information addressed above. (Goldberg Decl. at Ex. G) Certain members of the Ad Hoc Committee have sought reconsideration, so currently there is no appeal from that decision. (Goldberg Decl. ¶ 3, Ex. H)

Nevertheless, the Ad Hoc Committee moved to file under seal only those portions of the now-required 2019 statement reflecting the purchase and sale price information required by the bankruptcy court. The motion was opposed by the Debtors, the Official Creditors Committee, and by Bloomberg News, who intervened. On March 9, 2007, the bankruptcy court denied the

Ad Hoc Committee's motion, and directed each member to file the disclosures within three business days. On March 12, 2007, the bankruptcy court stayed that decision pending a hearing on the Ad Hoc Committee's motion for a stay pending appeal, currently scheduled to be heard on March 15, 2007.

In requiring the public disclosure, the bankruptcy court stated that Bankruptcy Rule 2019 "requires unofficial committees that play a significant public rule in reorganization proceedings and enjoy a level of credibility an influence consonant with group status to file a statement concerning certain information." It then held that, "[b]y acting as a group, the members of this shareholders' Committee subordinated to the requirements of Rule 2019 their interest in keeping private the prices at which they individually purchased or sold the Debtor's securities." (Goldberg Decl. at Ex. I) The court went on to state that, "[t]his is not unfair because their negotiating decisions as a Committee should be based on the interests of the entire shareholders' group, not their individual financial advantage."

The court further explained that "Rule 2019 is based on the premise that other shareholders have a right to information as to Committee member purchases and sales so that they make an informed decision whether this Committee will represent their interests or whether they should consider forming a more broadly-based committee of their own." The court cited concerns about "divided loyalties" and that members of Committee may choose to sell their holdings and "leave a group without a representative" as facts in support of its order.

## ARGUMENT

## I.

## LEAVE TO APPEAL, TO THE EXTENT REQUIRED, SHOULD BE GRANTED UNDER THE COLLATERAL ORDER DOCTRINE

The collateral order doctrine requires a showing that the order at issue: (i) conclusively determines the disputed question, (ii) resolves an important issue completely separate from the merits of the action, and (iii) would be effectively unreviewable on appeal from a final judgment. Sec. & Exch. Comm'n v. TheStreet.com, 273 F.3d 222, 228 (2d Cir. 2001) ("TheStreet.com"). Here, the order at issue satisfies each element handily.

Initially, various courts have concluded in circumstances similar to those present here that a party ordered to make disclosures of what it contends to be confidential commercial information or trade secrets may appeal as of right either as a final order under 28 U.S.C. § 158(a)(1) or under the collateral order doctrine. See TheStreet.com 273 F.3d at 228. (holding that the Circuit Court had jurisdiction under the collateral order doctrine to review the District Court's order unsealing certain confidential testimony); Fed. Trade Comm'n v. Standard Fin. Mgt. Corp., 830 F.2d 404, 407 (1st Cir. 1987) ("Standard Fin. Mgt. Corp") ("[t]o our way of thinking the release order is a 'final' -- if collateral-- one within the meaning of our jurisprudence" where unsealing of sworn personal financial statements was ordered); Baron & Budd, P.C. v. Unsecured Asbestos Claimants Comm.., 321 B.R. 147, 156 (D.N..J. 2005) (order compelling disclosure under Rule 2019 "information which is argued to be confidential and proprietary" was alternately final order under 158(a), reviewable collateral order or order upon which discretionary leave should be granted); c.f., Certain Underwriters at Lloyds v. Future Asbestos Claim Representative (In re Kaiser Aluminum Corp.), 327 B.R. 554, 558 (D. Del. 2005) ("under the pragmatic application of the finality concept used in bankruptcy appeals it has

jurisdiction to review the [orders altering requirements for 2019 Disclosures and allowing them to be filed under seal] as final orders").

A. The Bankruptcy Court's March 9 Order Conclusively Determined Whether The Trading Data At Issue Should Be Filed Under Seal In Accordance With Bankruptcy Code § 107(b)

The bankruptcy court's refusal to seal conclusively determined the issue in the bankruptcy, as there are no further proceedings on the issue. As the First Circuit held, "un-sealing is 'finished'- rather than "unfinished" - business," in part because "[t]he order is complete in and of itself" and "there is no 'plain prospect that the trial court may itself alter the challenged ruling.'" Standard Fin. Mgt. Corp., 830 F.2d at 407; see also, TheStreet.com, 273 F.3d at 228 (order unsealing testimony "'conclusively determined' the question of whether or not the Confidential Testimony would be disclosed").

B. The Sealing Or Public Disclosure Of The Ad Hoc Committee's Trading Data Is Very Important, But Most Definitely Separate From The Merits Of The Bankruptcy Case

The Ad Hoc Committee also easily satisfies the second factor of the collateral order doctrine. Orders are separable when they are "discrete and no effect or impact of those decisions would change as a result of the bankruptcy courts' final confirmation of the reorganization plan." Baron & Budd, P.C., 321 B.R. at 156. Further, a bankruptcy order compelling certain documents to be disclosed -- and refusing statutory protection of confidentiality -- already has been held to be separable sufficient to satisfy this element. See Standard Fin. Mgt. Corp, 830 F.2d at 407 ("[t]he issue (whether or not the [order publicly releasing allegedly confidential information]) is easily separable from the ongoing liquidation proceedings") Here, nothing the bankruptcy court may do in the future concerning confirmation of the Debtors' plan of reorganization or otherwise

will impact or be impacted by the decision refusing confidentiality protection to certain portions of the Ad Hoc Committee's Rule 2019 statement.

### C. Absent An Appeal Now, The Order Requiring Public Disclosure Would Not Be Reviewable As A Practical Matter

In Federal Trade Commission, the First Circuit found this factor to be particularly compelling with regard to a order which unsealed personal financial statements of a party in interest. The court held that because public disclosure of information was implicated, "[t]he privacy right to which the appellant lay claim must be vindicated now, or it will be forever lost; ...to refuse to hear the appeal would be to force a party to let the cat out of the bag, without any effective way of recapturing if the [lower] court's directive was ultimately found to be erroneous." Similarly, here, absent an immediate appeal, the Ad Hoc Committee will be forced to disclose publicly the very information it seeks to protect from that very disclosure by way of this appeal. In that circumstance, there would be no way to recapture that cat.

## II.

## LEAVE TO APPEAL SHOULD BE GRANTED EVEN AS A PURELY DISCRETIONARY MATTER

Separate and apart from an appeal as of right or under the collateral order doctrine, this Court should exercise its discretion to grant leave to appeal under 28 U.S.C. § 1292(b). Such appeals require a showing that the order: (1) "'involves a controlling question of law,'" (2) as to "which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Young v. Paramount Comm'ns Inc. (In Re Wingspread Corp.), 186 B.R. 803, 806 (S.D.N.Y. 1995).

Here, as to the first two elements (controlling question of law subject to difference of opinion), the bankruptcy court held, among other things, that Bankruptcy Rule 2019 essentially

"trumps" Bankruptcy Code § 107(b), and the members of the Ad Hoc Committee represent and essentially must answer to all stockholders. No other court has so ruled, and those conclusions are contrary to settled principles of law, though the precise issue addressed by the bankruptcy court does not appear to have arisen previously.

Moreover, a "[c]ontrolling question of law need not be directly related to the substance of the controversy between the parties." See Baron & Budd, P.C., 321 B.R. at 156 (orders requiring 2019 disclosure presented a controlling issue of law regarding the "permissible scope of the Bankruptcy court's construction of [Rule 2019]" about which there is substantial ground for difference of opinion "principally, because precedent bearing on the matter is relatively thin").

Finally, the resolution of these issues on appeal at this juncture will materially advance the termination of this dispute by establishing the scope of the Ad Hoc Committee members' rights, as parties in interest, to participate in the litigation through joint counsel, without having to make a "Hobson's choice" between active participation in the bankruptcy and protection of their commercial interests.

## CONCLUSION

For the foregoing reasons, leave to appeal should be granted, to the extent the appeal is not permitted as of right.

Dated: New York, New York
March 14, 2007

KASOWITZ, BENSON, TORRES
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