David S. Rosner (DR-4214)
Daniel P. Goldberg (DG-6322)
Andrew K. Glenn (AG-9934)
Scott H. Bernstein (SB-8966)
KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800

Attorneys for the Ad Hoc Committee
of Equity Security Holders

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Chapter 11
NORTHWEST AIRLINES CORPORATION, et al.,	:	
	:	Case No. 05-17930 (ALG)
Debtors.	:	
	:	(Jointly Administered)
	:	

REPLY OF THE AD HOC EQUITY COMMITTEE IN FURTHER SUPPORT OF ITS MOTION FOR AN ORDER (A) PURSUANT TO SECTIONS 105(a) AND 107(b) OF THE BANKRUPTCY CODE AND RULE 9018 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE GRANTING LEAVE TO FILE ITS BANKRUPTCY RULE 2019(a) STATEMENT UNDER SEAL, AND (B) GRANTING A TEMPORARY STAY PENDING DETERMINATION OF THIS MOTION

TO: THE HONORABLE ALLAN L. GROPPER,
UNITED STATES BANKRUPTCY JUDGE:

The members of the Ad Hoc Committee of Equity Security Holders (collectively, the "Ad Hoc Committee")[1] hereby submit this reply (the "Reply") to (i) the *Memorandum of Law By Bloomberg News in Support of Intervention and In Opposition to the Ad Hoc Equity Committee's*

[1] The shareholders whom Kasowitz, Benson, Torres & Friedman LLP ("KBT&F") represents are Anchorage Capital Group, L.L.C., Citadel Limited Partnership, Gracie Capital, Greywolf Capital Management LP, Jeremy Hosking, Latigo Partners, L.P., Longacre Management, LLC, Marathon Asset Management (Services) Limited, Mason Capital Management, Owl Creek Asset Management, L.P., Sandell Asset Management Corp., Savannah-Baltimore Capital Management, LLC, Scoggin Capital Management, LP, Seneca Capital, Taconic Capital Advisors LLC, and Talek Investments, LLC.

Request for an Order Sealing its Rule 2019(a) Disclosures [Docket No. 5141] (the "Bloomberg Objection"), (ii) the *Debtors' Objection to Motion of the Ad Hoc Equity Committee for an Order (A) Pursuant to Sections 105(a) and 107(b) of the Bankruptcy Code and Rule 9018 of the Federal Rules of Bankruptcy Procedure Granting Leave to File Its Bankruptcy Rule 2019(a) Statement Under Seal, (B) Limiting the Disclosure Required in Their Rule 2019(a) Statement, and (C) Granting a Temporary Stay Pending Determination of This Motion* [Docket No. 5133] (the "Debtors Objection") [Docket No. 5133], and (iii) the *Objection of the Official Committee of Unsecured Creditors to Ad Hoc Equity Committee's Motion for an Order Granting Leave to File Its Rule 2019(a) Statement Under Seal* [Docket No. 5134] (the "Committee Objection"), and in further support of the *Motion of the Ad Hoc Equity Committee for an Order (A) Pursuant to Sections 105(a) and 107(b) of the Bankruptcy Code and Rule 9018 of the Federal Rules of Bankruptcy Procedure Granting Leave to File Its Bankruptcy Rule 2019(a) Statement Under Seal, and (B) Granting a Temporary Stay Pending Determination of This Motion* [Docket No. 5092] (the "Sealing Motion").

PRELIMINARY STATEMENT

The Ad Hoc Committee members seek to comply with the Court's Rule 2019 order but at the same time protect from disclosure their confidential commercial information. The Objectors -- none of whom are Northwest shareholders but are their adversaries and the media -- argue that the Ad Hoc Committee members' confidential purchase price and timing information is not confidential, and that Rule 2019(a) trumps the Bankruptcy Code Section 107 mandate to maintain the confidentiality of such information. These arguments fail as a matter of fact and law.

First, the Ad Hoc Committee wishes to resolve any confusion about the scope of this dispute. In compliance with the Court's order, the Ad Hoc Committee does not object to and will file a verified statement setting forth the names of its members, their addresses, and their individual holdings.[2] The Ad Hoc Committee will update such disclosure with supplemental statements "setting forth any material changes in the facts" as set forth in Rule 2019(a). The Ad Hoc Committee seeks only narrow non-disclosure protection to seal the purchase prices, dates of purchase, and the dates of sales of claims and interests (the "Subject Information") under a mandatory statute that, as a statute, necessarily trumps and overrides a contrary Bankruptcy Rule. Public disclosure of this information, the Ad Hoc Committee submits, would constitute forced disclosure of member's purchase prices, their basis in the Debtors' securities, for no legitimate purpose and will irreparably injure the members. Disclosure of purchase price would disclose this confidential information directly, the dates would disclose them less directly but would still be instantaneously available when matched with public trading prices on a given date. Both would reveal the confidential trading strategies and processes of the members of the Ad Hoc Committee.

Second, there can be little reasonable debate over whether purchase price information is confidential. It is probably the most confidential piece of information regarding the purchase of anything: what was paid. In fact, the Debtors and the Creditors Committee already have agreed that the Subject Information is confidential and proprietary. In the discovery process leading up to the Equity Committee Motion, the Debtors and the Creditors Committee acknowledged in a "Agreement of Confidentiality" that the trading information produced by the Ad Hoc Committee

[2] Rule 2019 does not appear on its face to require the information from "each" member of a committee but rather from the "members" of a committee. However a fair reading of the Court's opinion indicates that that nevertheless is the Court's reading. Accordingly, the "individualized vs. aggregate" issue is one, perhaps, for reconsideration or appeal, but not for the current sealing motion in which, contrary to the Debtors' complaint, the Ad Hoc Committee seeks *protection*, not reconsideration.

is “confidential and/or proprietary” and must be filed under seal; they also acknowledged that the Ad Hoc Committee would not have an adequate remedy at law for disclosure of such information, and agreed that the Ad Hoc Committee would have three days’ notice to protect its information should the Debtors and/or the Creditors Committee seek to disclose it other than under seal. And though they oppose the Ad Hoc Committee's efforts to protect their confidential information, they do not seriously challenge that creditors, shareholders, primary purchasers, secondary purchasers, or other investment funds do not publicly disclose trading information in bankruptcy cases at all; they have cited no cases where such information has been disclosed or called for. The Ad Hoc Committee likewise has found none. No other party in these cases has been forced to disclose this information, though the Court's opinion and order, albeit directed at the Ad Hoc Committee, is equally applicable to the Ad Hoc Committee of Claims Holders, whose Rule 2019 statement reflects aggregated claims information and no pricing or specific timing information. That creditors committee likewise believes that its basis and trading information is confidential.

Moreover, the objectors do not -- because they cannot -- cite authority reversing ordinary rules of the primacy of the Bankruptcy Code over the Bankruptcy Rules. Section 107 of the Bankruptcy Code is mandatory, and nowhere does it provide Rule 2019 as an exception. The Second Circuit’s decision in *Orion Pictures* -- applying Section 107(b) of the Bankruptcy Code -- requires the sealing of the trading information at issue. And, as *Orion Pictures* holds, information is “confidential commercial information,” where, as here, it has been kept confidential and disclosure could put the party seeking protection at a commercial disadvantage. As set forth in accompanying declarations of three members of the Ad Hoc Committee, the members of the Ad Hoc Committee maintain strict confidentiality of trading information, do not

disclose the amounts of their positions, their purchase prices, their trading timing, or other indications of trading strategy and would be severely prejudiced if such information is disclosed.[3] In fact, no one member of the Ad Hoc Committee discloses this information to any other member, only to counsel. Disclosure of purchase price information (divulged directly or inferentially through timing) will put the Ad Hoc Committee at an extreme disadvantage in plan negotiations -- if any proper negotiations occur -- because other constituencies (here, the Ad Hoc Committee's competitors) will be able to determine the Ad Hoc Committee's basis and use that information against the Ad Hoc Committee. Likewise buyers and sellers in the market will have unique information from the Ad Hoc Committee members, not otherwise obtainable, that demonstrates their basis, their holdings, and their gains or losses. The Ad Hoc Committee members -- as typically do all creditors, shareholders, and other market participants -- maintain that information confidentially, so as not to confer an unfair advantage on their competitors.

There can be no purpose, other than to prejudice a shareholder, to obtain purchase price information. It bears on nothing in the Bankruptcy Code, affects in no way a shareholder's recovery or its ability to pursue any of its rights. Disclosure to the shareholder's counterparty, however, discloses the one piece of information that skews all further negotiations, sales, or acquisitions; the Court should not force any eventual seller (or exchanger under a plan) to disclose to its competitor what it paid, in violation of a controlling statute to the contrary, solely because the shareholder sought to act *collectively*, not as a *fiduciary or representative*, to pursue its rights.

---

[3] *See* Declaration of Stephan J. Blauner in Support of Motion to Seal (the "Blauner Decl."); Declaration of Daniel Krueger in Support of Motion to Seal (the "Krueger Decl."); Declaration of Neale X. Trangucci in Support of Motion to Seal (the "Trangucci Decl.").

The Objectors argue that the purported disclosure policies underlying Rule 2019 somehow preclude any claim of confidentiality over trading information and somehow override *Code* Section 107 (when the reverse is true). No such policy applies here. As the Debtors and Creditors Committee acknowledge, Rule 2019 "cover[s] entities *which act in a fiduciary capacity* but which are not otherwise subject to the control of the court."[4] It would be for those for whom the fiduciary acts to seek disclosure, not an adversary. And here the members of the Ad Hoc Committee are not fiduciaries to other shareholders. Ironically, the Ad Hoc Committee originally sought to have appointed a fiduciary *official* committee of equity security holders, but the Debtors and Creditors Committee staunchly opposed such efforts. Rule 2019's disclosure, then, is to protect the members of the Ad Hoc Committee itself. It simply cannot be that a protective rule can be used to extract confidential commercial information. The truth is that, in eventual plan negotiations or even plan litigation, the Debtors and Creditors Committee are the Ad Hoc Committee's counterparties or adversaries. And, in discovery, the Ad Hoc Committee already gave them the information *confidentially* (without conceding relevance). Thus, besides the media, which incorrectly and remarkably seek to raise the Ad Hoc Committee's purchase price information to a Constitutional level, the only proponents of public disclosure of the Ad Hoc Committee members' confidential information are those that seek negotiation and litigation advantage.[5] No shareholder has asked for this information to be disclosed. They recognize that it is confidential and has no effect on shareholder rights. Whereas, the disclosure of this information will give the Ad Hoc Committee members' competitors, counterparties, and adversaries an unfair advantage and will be used only for an improper purpose. Again, there is

---

[4] *In re CF Holdings Corp.*, 145 B.R. 124, 126 (Bankr. D. Conn. 1992) (emphasis added).

[5] The Second Circuit's *Orion Pictures* decision holds that Section 107(b) is a Congressional exception to the broad common law rights relied upon by Bloomberg News.

no distinction between the vintage or the per-share price in shareholder entitlement. But disclosing that information -- literally telling a buyer what the seller paid -- irreparably injures the seller, here the Ad Hoc Committee members.

There are broader concerns as well. Shareholders' and creditors' ability to rely on the protection of their confidential commercial information is absolutely critical to necessary collective activity in the bankruptcy process. Undoubtedly, the bankruptcy process would not benefit from the proliferation of counsel each representing a single entity as the price of maintaining their business secrets. There is no doubt that purchase price and timing information is secret, confidential commercial information. There also is no doubt, as the Court wrote, that collective action by shareholders and creditors in *ad hoc* committees benefits bankruptcies, whether by providing liquidity, funding, alternative restructuring, or simply organizing groups with whom plans may be negotiated. Accordingly, secondary market participants are critical both to the efficiency of the capital markets and to the proper functioning and proper reorganization of debtors. *Northwest* is a case in point. It may be, as the Ad Hoc Committee contends, that Northwest is much more valuable than it says, that its plan may not be confirmed for several legal and factual reasons, and that shareholders should receive substantial distributions. Absent participation by shareholders who can work collectively to share costs to bring issues to the Court's attention, that value may never be realized. Should it be realized or realizable, a negotiation with the Ad Hoc Committee is a good starting point to gaining overall consensual confirmation.

The Court's decision requiring a Rule 2019 filing by the Ad Hoc Committee here has received wide attention in the markets and the media (as Bloomberg News's intervention demonstrates) and has been called a "shock wave" (Dow Jones, March 2, 2007) in the press and

marketplace. Failure to permit ordinary sealing protection to a shareholder's decidedly confidential commercial information, under a statute that requires it and that primes a rule even if contrary, in a process in which the Court has the power to mold relief and issue protection to preserve his jurisdiction and the process, not only irreparably harms those who, by joining the Ad Hoc Committee, have merely sought to share expenses and act together in two instances, but will harm this and other bankruptcy cases in general.

For all of the reasons set forth herein, the Ad Hoc Committee respectfully submits that the Sealing Motion should be granted.

ARGUMENT

A. The Subject Information is Confidential Commercial Information And Constitutes Trade Secrets.

1. Section 107(b) requires a court to "protect an entity with respect to a trade secret or confidential research, development or commercial information." 11 U.S.C. § 107(b)(1). Section 107(b) is drafted in the disjunctive to protect "trade secrets, confidential research, development, *or* commercial information." *Id*. (emphasis added). Thus, the confidential research, development, or commercial information need not rise to the level of a trade secret to be entitled to protection under Section 107(b).

2. Courts have generally defined commercial information as any information that would give a competitor an unfair advantage. *See Video Software Dealers Ass'n v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27-28 (2d Cir. 1994) (hereinafter, "*Orion Pictures*"); *see also In re Handy Andy Home Improvement Ctrs.*, 199 B.R. 376, 381 (Bankr. N.D. Ill. 1996). Commercial information also includes information relating to the

buying and selling of securities on the open market. *See In re Lomas Fin. Corp.*, 1991 U.S. Dist. LEXIS 1589, * 5 (S.D.N.Y. Feb. 11, 1991); *see also Lehman v. Dow Jones & Co.*, 783 F.2d 285, 297 (2d Cir. 1986).[6]

3. The Creditors Committee and Bloomberg News argues that the Ad Hoc Committee must demonstrate "an extraordinary circumstance or a compelling need" to obtain a sealing order covering the Subject Information. *See* Committee Obj. ¶ 14 (citing *Orion Pictures Corp.*, 21 F.3d at 26); Bloomberg News Obj. at 12; *see also* Debtors Obj. ¶ 37 (arguing that the Second Circuit required a "compelling need"). The Objectors' selective quotation of *Orion Pictures* is blatantly inaccurate. The Second Circuit held in *Orion Pictures* that:

> *In most cases*, a judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need. . . . *In the bankruptcy area, however, Congress has established a special rule for trade secrets and confidential research, development, and commercial information.* As explained in Senate Report No. 989, § 107(b) "permits the court, on its own motion, and requires the court, on the request of a party in interest, to protect trade secrets, confidential research, development, or commercial information." S. Rep. No. 989, supra, P 107.01, at 107-2. *Thus, if the information fits any of the specified categories, the court is required to protect a requesting interested party and has no discretion to deny the application.*

Orion Pictures, 21 F.3d at 26 (emphasis added). Thus, *Orion Pictures* requires sealing of among other things, "trade secrets" or "commercial information." The Second Circuit held that

---

[6] The Debtors incorrectly claim that *Lehman v. Dow Jones & Co.*, 783 F.2d 285, 297 (2d Cir. 1986) holds that securities trading information cannot be trade secrets as a matter of law. Debtors Obj. ¶ 36. First, *Lehman* holds that such information is confidential commercial information. *Lehman*, 783 F.2d at 297. Second, the Debtors cite only to a quote in *Lehman* to the Restatement of Torts, which is plainly *dicta*. Third, the quote in *Lehman* states only that "security investments made or contemplated" cannot be trade secrets. It is no secret that the Ad Hoc Committee has invested in the Debtors' securities. The trading strategy and patterns for maximizing the value of these investments is a trade secret, and the pricing and timing of trading are confidential confirmation information. *See* Blauner Decl. ¶ 2; Krueger Decl. ¶ 2; Trangucci Decl. ¶ 2.

“commercial information” is information that would cause "an unfair advantage to competitors by providing them information as to the commercial operations of the [party seeking protection]." *Id*. at 27; *In re Global Crossing, Ltd.*, 295 B.R. 720, 725 (Bankr. S.D.N.Y. 2003) (holding that the purpose behind Section 107 and Bankruptcy Rule 9018 is to protect "business entities from disclosure of information that could reasonably be expected to cause the entity commercial injury."). No showing of an extraordinary circumstance or compelling need is required.

4. Moreover, despite the Debtors' arguments to the contrary, *Orion Pictures* supports sealing of the Subject Information. In *Orion Pictures*, 21 F.3d at 25-26, the Second Circuit permitted Orion Pictures to seal all documents relating to its promotional agreement with McDonald's Corporation involving the distribution of video cassettes of the movie “Dances With Wolves.” The appellant's members had bought some 500,000 copies of the movie from Orion Pictures at $72 per copy, $64 more per copy than McDonald's was selling them for as part of its promotion agreement with the debtor. The video dealers then sought full access to the documents between Orion Pictures and McDonald's. The bankruptcy court reviewed the documents *in camera* and determined that they constituted confidential commercial information because the licensing agreement and other documents involving McDonald's "renders very likely a direct and adverse impairment to Orion's ability to negotiate favorable promotional agreements . . . , thereby giving Orion's competitors an unfair advantage." *Id*. at 28. The District Court and Second Circuit affirmed. *Id*. at 25.

5. Here, just like in *Orion Pictures*, providing the Subject Information will have a "direct and adverse impairment" on the ability of members of the Ad Hoc Committee to negotiate favorable terms when trading their claims and interests on the secondary markets, and

thereby give their competitors -- the other constituencies in this case -- an unfair advantage. *See* Blauner Decl. ¶¶ 4-6 ("It is beyond argument that our bargaining position would be impaired and our counterparties would gain an unfair advantage if they knew the purchase price of the portfolio assets."); *see also* Krueger Decl. ¶¶ 5-6; Trangucci Decl. ¶¶ 5-6.

6. Moreover, the Subject Information constitutes trade secrets. A trade secret is "any formula, *pattern*, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 406-07 (1993) (quoting RESTATEMENT OF TORTS § 757, cmt. b (1979)) (emphasis added); *see also Softel, Inc. v. Dragon Med. & Scientific Communications, Inc*., 118 F.3d 955, 968 (2d Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998) ("[A] trade secret is 'any formula, *pattern*, device or compilation of information which is used in one's business, and which gives [the owner] an opportunity to obtain an advantage over competitors who do not know or use it'") (quoting RESTATEMENT OF TORTS § 757 cmt. b (1939)) (emphasis added). Here, the dissemination of the Subject Information would give a view into trading strategies that are a trade secret of each individual institution. *See* Blauner Decl. ¶ 2; Krueger Decl. ¶ 2; Trangucci Decl. ¶ 2.[7] The members of the Ad Hoc Committee do not make Coca-Cola, they invest in securities. Their trade secret "process" is not a secret recipe, it is their trading strategy. In any event, as in *Orion Pictures*, the Court need not find the information to be a trade secret if, as is here, the information is confidential commercial information.

7. The Objectors' pleadings are devoid of any facts suggesting that the Subject Information is not confidential commercial information or trade secrets. In fact, the undisputed

[7] Bloomberg News cites *In re Food Mgmt.* LLC, No. 04-22880, 2007 WL 458222 (Bankr. S.D.N.Y. Feb. 13, 2007), for the proposition that Rule 2019 was enacted to remove the "'mystery' surrounding the organized activities of interested parties in a bankruptcy." Bloomberg News Obj. at 11. *Food Mgmt.* involved a dispute over whether an adversary proceeding complaint involved scandalous and defamatory matter. It had nothing to do with Rule 2019 or the proprietary interests of trading information.

facts prove otherwise. To the best of the Ad Hoc Committee's knowledge, no party in any Chapter 11 case has ever been forced to disclose publicly the trading information that the Objectors seek to disclose via Rule 2019 or otherwise. The Objectors cite no such cases despite the fact that the Debtors' counsel and other parties have represented numerous ad hoc committees or participated in cases involving ad hoc committees. This is because bankruptcy participants keep this information strictly confidential. *See generally* Blauner Decl.; Krueger Decl.; Trangucci Decl. In recent Congressional hearings, representatives of the U.S. Government have acknowledged that the trading strategies of investment funds are confidential commercial information. Robert K. Steel, Undersecretary of the Treasury, recently acknowledged, within the last week, that "[t]here are certain strategies and positions which are sensitive propriety information that [fund] managers should not be expected to disclose." *Remarks by Robert K. Steel, Undersecretary of the Treasury for Domestic Financing* (as released by the Department of Treasury), Feb. 27, 2007 (favoring risk management and due diligence over forced disclosure and regulation (a true and correct copy is annexed hereto as Exhibit A).

8. Because the Ad Hoc Committee has established that the Subject Information is confidential commercial information, it must be sealed pursuant to Section 107(b) of the Bankruptcy Code.

B. <u>The First Amendment And The Common Law Do Not Override Section 107(b)</u>.

9. Bloomberg News wrongly argues that the First Amendment and a common law right of access trump the Ad Hoc Committee's need to seal proprietary trading information. Bloomberg Obj. at 9. Beside the obvious answer that a shareholder's basis in stock is not a Constitutional matter, the First Amendment and the federal common law simply are not relevant to the Court's inquiry. Congress has provided by statute that access to court files may be

restricted to protect private interests such as those at stake here notwithstanding the First Amendment and any federal common law. *See, e.g., Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Gloval Corp.)*, 422 F.3d 1, 8 (1st Cir. 2005) (cited in Bloomberg Obj. at 11) ("Because § 107 speaks directly to the question of public access, however, it supplants the common law for purposes of determining public access to papers filed in a bankruptcy case") (citing *United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must speak directly to the questions addressed by common law") (internal quotation marks omitted)); *In re Alterra Healthcare Corp.*, 353 B.R. 66, 75 (Bankr. D. Del. 2006) (stating that "the Court will not analyze the issue under federal common law" and that [b]ecause Congress has provided a specific provision which deals with the right to access public records in bankruptcy proceedings, the Court should not encroach upon the province of Congress") (citing *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) (where a legislatively enacted regulatory scheme speaks "directly to a question," courts should not supplement or modify the scheme by reference to federal common law)); *Phar-Mor, Inc. v. Defendants Named Under Seal (In re Phar-Mor, Inc.)*, 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995) (rejecting newspaper's argument that Section 107(b) is "in direct conflict with the First Amendment" and stating that "issues concerning public disclosure of documents in bankruptcy cases should be resolved under § 107," not under the common law).

10. The Second Circuit and other courts have squarely rejected the argument that the presumption of a public right to access under Section 107(a) requires compelling reasons, balancing of interests or even good cause.[8] *See, e.g., Orion Pictures*, 21 F.3d at 27-28 ("When Congress addressed the secrecy problem in § 107(b) of the Bankruptcy Code it imposed no

[8] Bloomberg Obj. at 9-12; Committee Obj. ¶ 14.

requirement to show 'good cause' as a condition to sealing confidential commercial information"); *Phar-Mor, Inc. v. Defendants Named Under Seal (In re Phar-Mor, Inc.),* 191 B.R. at 679 ("In other areas of the law, courts have relied on showings of 'compelling reasons,' or balancing the interests of privacy and the public right to know, when reviewing a request for judicial non-disclosure . . . The mandatory language of § 107(b) negates the need for such inquiries."). "Thus, if the information fits any of the specified categories, the court *is required to protect a requesting interested party and has no discretion to deny the application*." *Orion Pictures*, 21 F.3d at 27 (emphasis added).

C. Section 107(b) Of The Bankruptcy Code Trumps Rule 2019.

11. The Objectors argue that the Ad Hoc Committee cannot "evade" the requirements of Rule 2019(a) by sealing the Subject Information. The Objectors have it wrong. First, regardless of the number and ferocity of the Debtors' *ad hominem* attacks, the Ad Hoc Committee is seeking a means to comply with the Court's order and to protect is confidential information. Second, as a matter of law, Section 107(b) trumps any obligation that the Ad Hoc Committee has to disclose any of the Subject Information pursuant to Rule 2019. The Federal Bankruptcy *Code* and other federal statutes override the Federal Rules of Bankruptcy *Procedure*. As aptly stated by the Third Circuit Court of Appeals:

> When Congress accorded the Supreme Court authority to promulgate the Bankruptcy Rules, it stated "[s]uch rules shall not abridge, enlarge, or modify any substantive right" . . . . Thus, "[a]s a general matter, the Code defines the creation, alteration or elimination of substantive rights but the Bankruptcy Rules define *the process* by which these privileges may be effected."

Branchburg Plaza Assocs., L.P. v. Fesq (In re Fesq), 153 F.3d 113 (3d Cir. 1998) (emphasis added), *cert. denied*, 526 U.S. 1018 (1999); *see also* 28 U.S.C. § 2075; *Smart World Techs., LLC v. Juno Online Servs. (In re Smart World Techs., LLC),* 423 F.3d 166, 181 (2d Cir. 2005) (stating

that "[w]here a conflict between a Rule and a statutory provision exists, of course, the Rules Enabling Act requires that we apply the statutory provision"). Accordingly "[a]ny conflict between the Bankruptcy Code and the Bankruptcy Rules *must be settled in favor of the Code*." *United States v. Towers (In re Pacific Atl. Trading Co.)*, 33 F.3d 1064, 1066 (9th Cir. 1994) (holding that "if the IRS's claim is 'allowed' according to the Code, Rule 3002(c) cannot 'disallow' it") (emphasis added); *see also American Law Ctr. PC, v. Stanley (In re Jastrem)*, 253 F.3d 438, 441-42 (9th Cir. 2001) (resolving inconsistency in favor of Bankruptcy Code and discharging pre-petition fees); *Fesq*, 153 F.3d 113 (holding that that the extent Rule 60 of the Federal Rules of Civil Procedure conflicts with Section 1330(a) of the Bankruptcy Code, any inconsistency is resolved in favor of the statute); *In re Damach, Inc.*, 235 B.R. 727, 732 (Bankr. D. Conn. 1999) ("Adopting the debtor's interpretation that either Fed. R. Bankr.P. 9006(b) or Fed. R. Civ. P. 60(b) should be construed in such a way as to modify the substantive rights and obligations under Bankruptcy Code § 365(d)(4) would not only be contrary to the plain language of such rules, but would be unenforceable as exceeding the power delegated to the Supreme Court under the respective rules-enabling acts"); *In re Bruzzese*, 214 B.R. 444, 449 (Bankr. E.D.N.Y. 1997) ("It is a cardinal rule of construction that when a Rule impermissibly restricts, is inconsistent with, or contradicts the provisions of the Bankruptcy Code, the Rule is invalid").

12. Thus, Bankruptcy Rule 2019 cannot be used to abridge the Ad Hoc Committee's statutory right to seal the Subject Information.

D. <u>Public Disclosure Will Not Promote Any Policy Interest</u>.

13. The Objectors mistakenly argue that Bankruptcy Rule 2019's "underlying purpose would be defeated if the Ad Hoc Committee is permitted to file its 2019 Statement under seal." Committee Obj. ¶ 9; *see also* Debtors Obj. ¶ 31; Bloomberg Objection at 11. In so doing, they misstate the facts and the law.

14. The objectors ignore authority that Bankruptcy Rule 2019(a) is intended to "cover entities which act in a fiduciary capacity but which are not otherwise subject to the control of the court." *In re CF Holdings Corp.*, 145 B.R. 124, 126 (Bankr. D. Conn. 1992) (Committee Obj. ¶ 9; Debtors Obj. ¶ 31); *see also In re Oklahoma P.A.C. First Ltd. Partnership*, 122 B.R. 387, 390-91 (Bankr. D. Ariz. 1990) (Debtors Obj. ¶ 31) (Bankruptcy Rule 2019(a) is intended to "cover entities which act in a fiduciary capacity but which are not otherwise subject to the control of the court"); *In re Ionosphere Clubs*, 101 B.R. 844, 852 (Bankr. S.D.N.Y. 1989) (Consumers Union, a nonprofit organization, purported to act as an agent on behalf of a population of 100,000 ticket holders, but only received authorization to act from eight); *9 Collier on Bankruptcy* ¶ 2019.02 (15th ed. rev. 2006) ("Entities including unofficial committees *that assume the representation of a group* must be subject to some control because they are fiduciaries to those they purport to represent.") (emphasis added) (citing *Young v. Higbee Co.*, 324 U.S. 204 (1945)).[9] The Debtors also are mistaken when stating that the "committee . . . is purporting to act collectively on behalf of a class of securities holders." Debtors Obj. ¶ 33. Here, the Ad Hoc Committee is not a fiduciary to any constituency and does not purport to have assumed the representation of any group.

15. Finally, *Certain Underwriters at Lloyds v. Future Asbestos Claim Representative (In re Kaiser Aluminum Corp.)*, 327 B.R. 554, 560 (D. Del. 2005) ("*Kaiser Aluinum*") amply supports this Court entering an order restricting access to the Subject Information. *See* Debtors Obj. ¶ 26, n.4; Creditors Committee Obj. ¶ 10; Bloomberg News Obj. at 17). In *Kaiser*

---

[9] The Debtors' authorities on Rule 2019(a) are completely inapposite. *See* Debtors Obj. ¶ 31. This is not a case of an "informal committee[] . . . represented by one law firm, with the law firm [having] the claims of the creditors or interested parties *assigned to it*, so that the law firm may act on the parties behalf," *In re Oklahoma P.A.C.*, 122 B.R. at 390 (emphasis added) (Debtors Obj. ¶ 31) or a case of a law firm hiding its fee arrangement from the court. S*ee Baron & Budd, P.C. v. Unsecured Asbestos Claimants Comm*., 321 B.R. 147, 167(D.N.J. 2005) (Debtors Obj. ¶ 27). The Ad Hoc Committee's engagement letter with KBT&F has been disclosed in this Court.

Aluminum, 327 B.R. at 560, the district court affirmed the bankruptcy court's holding that Bankruptcy Rule 2019(a) statements would not be put on the electronic docket and that all parties seeking to inspect the documents would have to file a motion seeking such relief to ensure that such "information is not misused." This is the functional equivalent of a sealing order. The Objectors' argument that *Kaiser Aluminum* does not apply exalts form over substance.

16. The Debtors argue that Section 13D of the Securities and Exchange Act of 1934 somehow trumps the Ad Hoc Committee's right to maintain the confidentiality of the Subject Information. Debtors Obj. ¶¶ 34, 40. The Debtors argument presumes that a small exception to confidentiality somehow swallows the nearly uniform practice that such information remain confidential within investment funds. As the Debtors note, Section 13D has been enacted by Congress to "investors who acquire 5% of a class of registered equity securities must file a Schedule 13D." Debtors Obj. ¶ 34. Merely because one party, such as Owl Creek, voluntarily chooses to own 5% of a debtor's common stock (or otherwise chooses to disclose its ownership or trading) does not mean that the underlying information does not remain confidential, proprietary and trade secret information for the rest of the universe of investment funds. Indeed, many investment funds choose not to cross the 5% ownership threshold to ensure that trading information remains confidential. *See* Blauner Decl.; Trangucci Decl. Moreover, Section 13D does not require disclosure of the trading in bonds or other claims, and Owl Creek has not disclosed such information. *See* Krueger Decl. ¶ 4. Moreover, even if one entity decides for whatever reason to waive its own confidentiality, that does not waive it for others.

17. Requiring public disclosure of the Subject Information under Rule 2019 certainly will chill group participation of investment funds in bankruptcy cases because groups will be at a

significant competitive disadvantage in virtually every bankruptcy case. The purposes of forming an ad hoc committee -- sharing expenses and hiring common professionals -- should be applauded, not punished. But that is precisely what the Debtors and Creditors Committee seek to do via their interpretation of Rule 2019. *See* Creditors Committee Obj. ¶ 13 ("If the members of the Ad Hoc Committee do not wish to disclose the information required by Rule 2019, they are free to simply resign from the Ad Hoc Equity Committee and pursue any remedies available to them as an individual interest holder.").

18. The Ad Hoc Committee respectfully submits that the Court should reject their efforts.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, and those set forth in its Motion, the Ad Hoc Committee respectfully requests that this Court enter an order, substantially in the form annexed to the Sealing Motion as Exhibit B granting the relief requested in the Motion and such other or further relief as is just.

Dated: New York, New York
March 6, 2007

By: /s/ David S. Rosner
David S. Rosner (DR-4214)
Daniel P. Goldberg (DG-6322)
Andrew K. Glenn (AG-9934)
Scott H. Bernstein (SB-8966)
KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800