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IN THE 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

MEMORANDUM OF LAW BY BLOOMBERG NEWS IN SUPPORT OF INTERVENTION AND IN OPPOSITION TO THE AD HOC EQUITY COMMITTEE'S REQUEST FOR AN ORDER SEALING ITS RULE 2019(A) DISCLOSURES

PRELIMINARY STATEMENT

This motion to intervene is brought by Bloomberg News, a global newsgathering organization, in an effort to ensure that the public has a full and accurate understanding of the events occurring in this Chapter 11 proceeding, including the motivations and interests of the players who seek to control an important public company. The Debtors, Northwest Airlines Corporation, *et al.* ("Debtors" or "Northwest"), employ some 30,000 people, and this proceeding will impact the economic security and well-being of tens of thousands of additional pensioners.

The Debtors also are a major force in both domestic and international air travel markets, serving nearly 250 cities and carrying more than 50 million passengers annually. What happens to Northwest is a matter of significant public interest.

For this reason, Bloomberg News opposes the request for a sealing order made by the Ad Hoc Committee of Equity Security Holders ("Ad Hoc Equity Committee"). That committee purports to represent the interests of hedge funds collectively owning at least 19 million shares of Northwest common stock, yet it seeks to hide from public inspection all Rule 2019(a) disclosures the Court has ordered it to file on behalf of its members. The request should be denied.

Particularly given the public significance of this proceeding, all aspects of it should be open to public scrutiny to the fullest extent possible. Transparency ensures the integrity of the bankruptcy process and, just as important, promotes the appearance of fairness that is essential to public confidence in the operations of our courts as well as our financial markets. A presumption of public access is thus mandated by Section 107 of the Bankruptcy Code and also by the qualified constitutional right of access to judicial proceedings, which extends fully to documents filed in this Court. Under the governing standards, a sealing order may be entered to protect confidential commercial information only if the Court makes findings of fact establishing that its release *would in fact* cause an unfair advantage to competitors, and even then any sealing order must be narrowly tailored to keep from the public only such limited information as is necessary to avoid the demonstrated unfair impact.

These standards should be applied with particular care to the Rule 2019(a) disclosures required to be filed in this case. Rule 2019 exists specifically to promote the integrity and transparency of Bankruptcy Court proceedings, and the need for such transparency is acute here. The role being played in the financing of distressed companies by hedge funds of the type that

comprise the Ad Hoc Equity Committee is an issue of intense public interest and debate. Hedge funds have become major sources of capital for distressed companies and now play a significant role in bankruptcy proceedings such as this one. The nature of the positions being taken by these key financial players, and the potentially conflicting interests they may hold in any given situation, raise the potential for precisely the types of abuse that led to the adoption of Rule 2019 as a procedural device to "help foster fair and equitable plans free from deception and overreaching." Mem. Op. & Order of Feb. 26, 2007, at 6 (Dk. # 5032).

Given the extensive public interest in this proceeding generally, and in the role being played by the hedge fund members of the Ad Hoc Equity Committee in particular, Bloomberg News should be permitted to intervene for the limited purpose of vindicating the public's right of access. Furthermore, the request to seal Rule 2019(a) disclosures should be denied unless and until the Ad Hoc Equity Committee demonstrates a substantial likelihood of concrete harm flowing from public release of those disclosures, something not established by the vague generalizations of its pending motion. Even if the Debtors and their bankers all consent to the hedge funds' request, the Court must make an independent determination, based on findings of fact, that such secrecy is necessary. Main Street, as much as Wall Street, has a vested interest in the outcome of this proceeding.

BACKGROUND

A. Interest of Proposed Intervenor

Bloomberg News, a division of Bloomberg L.P., reports on political, business, financial, and legal events worldwide. Through a real-time electronic desktop system, the Internet, television, books, magazines and radio, Bloomberg provides news, market information, and other data to corporations, news organizations, government regulators, financial and legal

professionals, and millions of individuals around the globe. Bloomberg News has been providing detailed coverage of the Northwest bankruptcy proceedings because of the widespread interest in its outcome and in the financial condition of the airline industry generally.

B. Background of this Motion

The Ad Hoc Equity Committee, represented by the law firm Kasowitz, Benson, Torres & Friedman LLP ("KBT&F"), first appeared in these bankruptcy proceedings on January 11, 2007, more than two years after the Debtors petitioned for Chapter 11 relief. The Committee is comprised of seventeen hedge fund managers who purport to control at least 19 million shares of Northwest common stock and to hold claims against the Debtors that total at least $264 million. One of the members of the Ad Hoc Equity Committee, Owl Creek Asset Management, L.P. ("Owl Creek"), is believed to be the third-largest Northwest shareholder, owning slightly more than five percent of all outstanding common stock, according to the Schedule 13D report that it filed with the Securities & Exchange Commission on January 29, 2007. *See* http://sec.gov/Archives/edgar/data/1178254/000090266407000178/0000902664-07-000178.txt (last visited Mar. 5, 2007). According to the Schedule 13D report, Owl Creek began acquiring its stake in Northwest on November 15, 2006, when U.S. Airways set off a flurry of trading in airline stocks by announcing its intent to acquire Delta Air Lines out of bankruptcy. The Debtors have alleged, on information and belief, that other members of the Ad Hoc Equity Committee likewise assumed equity positions in Northwest following the U.S. Airways announcement, based on speculation about the potential for wide-scale consolidation in the airline industry.

On February 9, 2007, the Debtors filed a motion that sought, among other things, to require the Ad Hoc Equity Committee to comply with the disclosure mandate of Bankruptcy Rule 2019(a). By order dated February 26, 2007, this Court compelled the Ad Hoc Equity

Committee to "comply with Bankruptcy Rule 2019 and file an amended statement within three business days," *i.e.*, by not later than March 1, 2007. Mem. Op. & Order of Feb. 26, 2007, at 7. The Court found that the Rule 2019(a) statement filed by KBT&F on behalf of the Ad Hoc Equity Committee was "insufficient on its face" because it failed to disclose "the amounts of claims or interests owned by members of the committee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof." *Id.* at 4.

In response, on Thursday, March 1, 2007, the Ad Hoc Equity Committee filed the pending motion for an order that would permit it to file the Rule 2019(a) disclosures under seal. Later that day, the Court temporarily stayed its February 26 order requiring the Ad Hoc Equity Committee to file the Rule 2019 statement by March 1 and issued an Order to Show Cause why the request to seal should not be granted. The show cause order set a hearing on the motion for March 7, 2007, and required that any responses or objections to the motion be filed by not later than 4:00 p.m. on March 5, 2007. In the interest of preserving openness in these proceedings and in furtherance of the public's First Amendment and statutory rights of access to bankruptcy records such as the Rule 2019(a) disclosures at issue, Bloomberg News has moved to intervene in this case for the purpose of opposing the Ad Hoc Equity Committee's sealing motion.

C. Relief Requested by the Ad Hoc Equity Committee

By seeking to shield from public view its legally mandated disclosure statements, the Ad Hoc Equity Committee requests an extraordinary form of relief that, if granted, would effectively negate the very purpose for which Rule 2019 was enacted—to curb "perceived abuses by unofficial committees" operating under a cloak of secrecy. *See* Mem. Op. & Order of Feb. 26, 2007, at 6. While it is true that both the Bankruptcy Code, through Section 107(b), and First Amendment jurisprudence recognize that compelling reasons may exist for sealing all or part of

certain judicial records, it is equally true that the justification for a sealing order cannot be based on the mere *ipse dixit* of the party requesting it and the acquiescence of other participants in the proceeding. As shown below, it is for the Court—not litigants—to make the determination of when the public may be kept in the dark.

The Ad Hoc Equity Committee's motion for sealing recites a litany of allegedly irreparable damages that theoretically might flow from public disclosure of its members' holdings relating to Northwest at various times over the past 40 months. Without offering any supportive evidence whatsoever, the Ad Hoc Equity Committee asserts that divulging this information in a publicly accessible court filing will (1) allow "other investors . . . [to] exploit the Subject Information by copying or at least learning the trading strategies of the Ad Hoc Equity Committee members and otherwise gain[] commercial advantage"; (2) "impact the secondary trading market" by limiting "market liquidity for equity and claims trading" and "reduc[ing] the prices that those who seek to monetize their claims and equity interests would receive"; and (3) "chill if not extinguish the formation and important activities [of] unofficial committees." *See* Mot. at ¶¶ 22-29 (Dk. # 5092). In conclusory fashion, it characterizes the information that Rule 2019(a) requires be disclosed as "trade secrets" and "confidential commercial information," *id.* at ¶¶ 18-21, and urges the Court to interpret those terms and Section 107(b) in a manner that would *require* sealing of Rule 2019(a) disclosures whenever a request to do so is filed.

Bloomberg News, of course, is keenly aware of the importance to business enterprises of trade secrets and confidential commercial information, and it does not wish to compel disclosure of any genuine trade secrets. But, at the same time, due consideration must be given to the weighty policy considerations that justify making public the type of information required by Rule 2019(a). The Ad Hoc Equity Committee, it is respectfully submitted, has failed to meet the

substantial burden the law imposes on it as a precondition for withholding these judicial records from public scrutiny.

ARGUMENT

I.
BLOOMBERG NEWS SHOULD BE PERMITTED TO INTERVENE

It is black-letter law that under Rule 24(b) of the Federal Rules of Civil Procedure and Bankruptcy Rule 2018(a), Bloomberg News should be permitted to intervene as an "interested entity" for the limited purpose of enforcing the public's right of access. Rule 2018(a) specifically contemplates such intervention in a Bankruptcy case, authorizing "[p]ermissive intervention . . . [by] any interested entity . . . with respect to any specified matter". FED. R. BANKR. P. 2018(a).

In seeking to enforce access rights, the press acts as a proxy for the general public. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (press brings to bear "the beneficial effects of public scrutiny upon the administration of justice"). Federal courts thus routinely permit intervention by news organizations in bankruptcy proceedings to challenge protective orders or requests to file materials under seal. *See, e.g., In re Alterra Healthcare Corp.*, 353 B.R. 66, 71 (Bankr. D. Del. 2006) (Rule 2018 motion is "proper procedural mechanism" for press to challenge sealing of documents); *In re Symington*, 209 B.R. 678, 690 (Bankr. D. Md. 1997) (recognizing press "standing to intervene in bankruptcy proceedings for the purpose of moving to dissolve court-issued protective orders"); *In re Found. for New Era Philanthropy*, No. 95-13729F, 1995 WL 478841, at *1 (Bankr. E.D. Pa. May 18, 1995) (permitting press intervention to oppose motion by debtor to file list of creditors under seal); *In re Astri Inv. Mgmt. & Sec. Corp.* ("*Astri Investment*"), 88 B.R. 730, 732 (D. Md. 1988) (permitting newspaper to challenge order denying public access to creditors' meeting).

The requirement under Rule 2018(a) that a proposed intervenor show "cause" for intervention is easily satisfied here. Because the sealing order being sought by the Ad Hoc Equity Committee would prevent neither the Debtors nor the Creditors Committee from gaining access to its Rule 2019 disclosures, no party to the proceeding has the same interest as Bloomberg News in protecting the free flow of information to the public and, more specifically, assuring transparency in this case. Permitting intervention by Bloomberg News will not delay or prejudice any party; indeed, Bloomberg News is promptly filing its request to intervene and its objections to the sealing motion within the timeframe set by the Order to Show Cause of March 1, 2007.

Moreover, as demonstrated below, the relief requested by the Ad Hoc Equity Committee would impair fundamental rights of third parties, including Bloomberg News. All apart from Rule 2018(a), therefore, due process also requires that Bloomberg News be given an opportunity to be heard in defense of its rights. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) ("representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'") (citation omitted).

II.
THE COURT SHOULD NOT SEAL THE RULE 2019(A) DISCLOSURES

The public has a qualified right, protected by Section 107 of the Bankruptcy Act and the First Amendment, to inspect the Rule 2019(a) disclosures of the Ad Hoc Equity Committee. While these rights are qualified, not absolute, the right of public access to Rule 2019(a) disclosures can properly be overcome only when the party seeking secrecy demonstrates that sealing is essential to protect against *actual* harm, and any sealing order entered by the court is narrowly tailored to protect against that harm.

A. The Public Has a Qualified Right of Access to Rule 2019(a) Disclosures

A public right of access plainly attaches to Rule 2019(a) disclosures. Section 107(a) of the Bankruptcy Code itself directs that *any* "paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." 11 U.S.C. § 107(a). The "policy of open inspection" embraced in Section 107 "evidences congress's strong desire to preserve the public's right of access to judicial records in bankruptcy proceedings." *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) ("*Orion*").

This statutory access right, however, is not the only right at issue. Courts in this Circuit have long recognized that both a First Amendment and common law right of public access extend to judicial documents in civil proceedings. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 & n.4 (2d Cir. 2006) (both constitutional and common law access rights attach to documents filed in support of summary judgment in a civil lawsuit); *United States v. Suarez*, 880 F.2d 626, 631 (2d Cir. 1989) (public has a qualified First Amendment right of access to judicial documents.); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (First Amendment right of access extends to documents filed in connection with judicial proceedings). These rights of access extend with full force to documents filed in connection with Bankruptcy proceedings. *See Orion*, 21 F.3d at 26 (noting strong presumption of access to bankruptcy records "rooted in the public's [F]irst [A]mendment right to know about the administration of justice").[1]

[1] The Second Circuit also had observed that there are "purely practical" reasons for avoiding the sealing of bankruptcy court records: "Mechanical and logistical problems of sealing the files, finding extra space in the vault, satisfying all the handling requirements, plus the related direct and indirect costs, impose substantial burdens on the clerk's office and on a judge's staff" and thus provide further justification "for open access to court records in the bankruptcy court." *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994).

There can be no serious dispute that the constitutional right of access extends to Rule 2019(a) disclosures.[2] This conclusion is readily confirmed by applying the two-part "experience and logic" test used to determine where the First Amendment right attaches. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92 (2d Cir. 2004). The experience prong of the analysis considers whether such records historically have been available to the public. *Id.* Even when "there is no long 'tradition of accessibility'" to a particular type of court filing, however, the "experience" prong may be satisfied by the "history of openness" of judicial records generally. *Suarez*, 880 F.2d at 631 (granting access to Criminal Justice Act forms); *see also Hartford Courant*, 380 F.3d at 92-93. The logic prong of the test asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter.*, 478 U.S. at 8.

Courts that have considered the First Amendment right of access to disclosures made in bankruptcy proceedings have consistently concluded that historical practice supports the existence of such a right. In *Astri Investment*, for example, the court noted that "'[w]e take our bankruptcy system from England,'" and found "no indication that the general openness of criminal and civil proceedings in English legal practice was dispensed with in connection with bankruptcy matters." *See* 88 B.R. at 736-37 (citation omitted); *see also In re Alterra Healthcare Corp.*, 353 B.R. at 74 (settlement agreements between creditors and bankrupt debtors "have historically been open to the press and general public").

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[2] Unlike a constitutional right, a right under the common law must give way to legislative commands that speak directly to the issue. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981). Thus, in light of Section 107, the Court need not decide the extent to which the common law right of access otherwise would extend to Rule 2019 disclosures. Nonetheless, Rule 2019 disclosures are plainly "'relevant to the performance of the judicial function'" or otherwise "'useful in the judicial process,'" and therefore would satisfy the definition of a "judicial document" that is subject to the common law access right. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 115 (2d Cir. 2006) (citation omitted).

The logic prong is equally satisfied because public access to Rule 2019 disclosures undeniably plays "a significant positive role in the functioning of the particular process in question." *Press-Enter.*, 478 U.S. at 8. Indeed, with regard to Rule 2019, the "particular process in question" is *public disclosure*. As the Debtors stressed earlier in this proceeding, without proper Rule 2019 disclosures, "[t]he Ad Hoc Committee remains a mystery to the Debtors and to all the other constituencies in the Debtors' cases, yet it seeks to make an impact at this late stage of the Debtors' reorganization." (Dk. # 4817 at ¶ 47.) Rule 2019 serves to remove any such "mystery" surrounding the organized activities of interested parties in a bankruptcy, and thereby promotes "integrity and transparency [in] bankruptcy court proceedings." *See In re Food Mgmt. Group*, ___ B.R. ___, No. 04-22880, 2007 WL 458022, at *6 (Bankr. S.D.N.Y. Feb. 13, 2007) (Glenn, J.).

There can be no doubt about the importance of the Rule 2019 disclosures to the public's understanding of the motives and interests of those involved in this proceeding. Without public access to those disclosures, the very purpose of Rule 2019 would be frustrated.[3] As Judge Glenn recognized, in an opinion issued just three weeks ago, the policy in favor of public access "is at its zenith when issues concerning the integrity and transparency of bankruptcy court proceedings are involved," which are the very focus of Rule 2019(a) disclosure statements. *Id.* at *6; *see also In re Gitto Global Corp.*, 422 F.3d 1, 7 (1st Cir. 2005) (unrestricted access to bankruptcy records "'fosters confidence among creditors regarding the fairness of the bankruptcy system'") (quoting *In re Crawford*, 194 F.3d 954, 960 (9th Cir. 1999)).

[3] Indeed, were the Court to deny public access to disclosures under Rule 2019(a), it would, as a practical matter, cut off the rights conferred by Rule 2019(b). That rule permits "any party in interest" to move, *inter alia*, for an examination by the court of various relevant activities of an "entity or committee representing more than one creditor or equity security holder" and/or its compliance with applicable laws. *See* FED. R. BANKR. P. 2019(a) & (b). Effective exercise of the rights conferred by Rule 2019(b) necessarily requires access to the disclosures mandated by Rule 2019(a).

In short, both the historical practice governing bankruptcy records and the policies behind Rule 2019(a) disclosures confirm that a qualified constitutional right of access exists, above and beyond the statutory rights conferred in Section 107.[4]

B. The Ad Hoc Equity Committee Must Bear A Heavy Burden to Overcome the Right of Access

Both the statutory right of access and the First Amendment right are qualified, not absolute. Section 107(b) allows confidential commercial information and trade secrets to be sealed when a party demonstrates that disclosure necessarily *would cause* "'an unfair advantage to competitors.'" *Orion*, 21 F.3d at 27 (quoting *In re Itel Corp.*, 17 B.R. 942, 944 (B.A.P. 9th Cir. 1982)). The First Amendment right may similarly be restricted, but only when (1) it is demonstrated that a countervailing, transcendent interest requires sealing and (2) the restriction on access is narrowly tailored to the minimum necessary to effectively avoid the prejudice it is intended to prevent. *See Globe Newspapers*, 457 U.S. at 606-10; *Press-Enter.*, 478 U.S. at 14. Before the press and public may be divested of their constitutional right of access, the court must make "'on the record findings . . . demonstrating that [sealing] is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Lugosch*, 435 F.3d at 120 (citation omitted); *see also In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) ("Broad and general findings by the trial court . . . are not sufficient to justify closure.").

A court may seal Rule 2019(a) disclosures only under "compelling or extraordinary circumstances," *Orion*, 21 F.3d at 27—namely circumstances that fall within the narrow exceptions identified in Sections 107(b) and (c). To obtain a sealing order in this case, then, the

[4] The provisions of Section 107, of course, cannot supersede a constitutional right. *See In re New York Times Co.*, 828 F.2d 110, 115 (2d Cir. 1987) ("[W]here a qualified First Amendment right of access exists, it is not enough simply to cite [a statute that authorizes sealing]. Obviously, a statute cannot override a constitutional right.").

Ad Hoc Equity Committee must demonstrate *first*, that the disclosures would in fact reveal trade secrets or confidential commercial information in a manner that would cause an unfair advantage for competitors, *see* 11 U.S.C. § 107(b), and *second*, that the specific protective measures requested comport with constitutional requirements (*i.e.*, that the sealing order is supported by evidence demonstrating its compelling necessity and is narrowly tailored to serve that interest).

Indeed, these obligations should be strictly enforced against the Ad Hoc Equity Committee, given the substantial public interest favoring disclosure in this case. As the Court already has recognized, such unofficial committees can exercise outsized influence over the resolution of bankruptcy proceedings. Unofficial committees "play an important role in reorganization cases" because the members of such committees "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." *See* Mem. Op. & Order of Feb. 26, 2007, at 5.

It was precisely because of "perceived abuses by unofficial committees in equity receiverships and other corporate reorganizations" that the predecessor to Bankruptcy Rule 2019 was conceived. *Id.* at 6. By requiring that unofficial committees make public disclosures of the very information that the Ad Hoc Equity Committee here seeks to keep secret, the Rule—which has existed for decades and survived major overhauls of the Bankruptcy Code—attempts to shine a light on the activities of those who combine to influence the outcome of a reorganization. *See id.* This Court should not lightly alter this carefully crafted regulatory design, the core purpose of which is to promote integrity and transparency in bankruptcy court proceedings.

Nor is the Rule in any way unfair, as the Ad Hoc Equity Committee attempts to suggest. Nothing in the Rule requires disclosure as a precondition for participation in bankruptcy proceedings. Rather, the disclosures are a requirement for *collective* participation. If the

individual hedge funds that make up the Ad Hoc Equity Committee wish to keep their positions in the Debtors' securities private, they may do so, but they must forfeit the right to participate in a collective effort to influence the Debtors' reorganization in this Court. Sacrificing some privacy is one price of being able to exert collective influence in what is a traditionally open proceeding. In these circumstances, generalized and purely speculative claims of commercial need must not trump the important public interest in the integrity and transparency of this process.

Access to the Ad Hoc Equity Committee's disclosure statement is also "particularly appropriate" because "the subject matter . . . is of especial public interest." *In re Agent Orange Product Liability Litig.*, 821 F.2d 139, 146 (2d Cir. 1987). Public attention to this proceeding is extensive, in no small part due to the role of hedge funds—not only with regard to this particular airline, but in the reorganization of financially distressed corporations more generally. *See* Karen Richardson, *New Way to Play Distressed Companies: Acquire the Stock*, WALL STREET JOURNAL, May 1, 2006 (a true and correct copy of which is attached hereto as Exhibit A) (discussing a "growing band of distressed investors," led by hedge funds, who are "bet[ting] on the stocks of companies in bankruptcy proceedings" and seeking to "challenge the 'knee-jerk reaction that equity gets wiped out' in the event of a bankruptcy").[5] As the importance of hedge funds in the U.S. economy has grown exponentially, so has the legitimate public interest in understanding their largely unregulated practices. Countless thousands of Americans, including especially the current and former employees of Northwest, have a direct and substantial interest

[5] There also is substantial public interest in the emerging role of hedge funds in the airline industry as a whole. *See* Julie Johnsson & Michael Oneal, *Funds Not Hedging on Airline Stocks*, CHICAGO TRIBUNE, Dec. 17, 2006 (a true and correct copy of which is attached hereto as Exhibit B) ("[T]he largest shareholders at each of the four largest U.S. airlines are hedge funds, displacing mutual funds . . . that have traditionally backed this industry.").

in knowing more about the role that hedge fund managers are playing in the reorganization of this major corporation. *See* Philippa Maister, *Delta Kept Under Close Tabs to Keep Merger Option Open*, FULTON COUNTY DAILY REPORT, Feb. 6, 2007 (a true and correct copy of which is attached hereto as Exhibit C) ("The role of hedge funds in bankruptcy proceedings has grown dramatically in the last decade . . . ."); Stephen Taub, *Hedge Fund Bankruptcy Role Seen Probed*, CFO MAGAZINE, Nov. 29, 2005 (a true and correct copy of which is attached hereto as Exhibit D) ("The Securities and Exchange Commission is investigating the increasing role played by hedge funds in bankruptcy proceedings . . . ."). The practices of hedge fund managers also have led to increased scrutiny from lawmakers and regulators in recent months. *See* Alison Fitzgerald, *Grassley Asks Paulson to Spur Hedge Fund Disclosure*, BLOOMBERG, Oct. 16, 2006 (a true and correct copy of which is attached hereto as Exhibit E) (quoting the former chairman of the Senate Finance Committee as saying: "The potential for significant losses at our nation's pension funds due to hedge fund investments could put the retirement security of American workers in jeopardy.").

Against this backdrop of legal rights and policy considerations, the Court must consider whether the Ad Hoc Equity Committee has made a sufficient factual showing to overcome the heavy constitutional and statutory presumption in favor of public access to the Rule 2019(a) disclosures.

C. The Ad Hoc Equity Committee Has Failed to Satisfy the Standards Required to Defeat Qualified Right of Access

To deny the public access to any portion of its Rule 2019(a) disclosures, the Ad Hoc Equity Committee must demonstrate: (1) that the information sought to be protected is a bona fide trade secret or confidential business information, the disclosure of which would cause its members actual, tangible harm; and (2) that the blanket sealing order it seeks is narrowly tailored

to prevent that specific injury. Based on the record presently before the Court, the Ad Hoc Equity Committee has satisfied neither requirement.

The Second Circuit has defined "confidential . . . commercial information," under Bankruptcy Code Section 107(b)(1), to mean material that is less sensitive than a "trade secret" but that nevertheless "*would cause* 'an unfair advantage to competitors by providing them information as to the commercial operations of the debtor.'" *Orion*, 21 F.3d at 27 (citation omitted) (emphasis added). Where a party seeks to have court records sealed because of the purported economic consequences of disclosure, however, the Court of Appeals has demanded more than mere argument and speculation. *See Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (holding that a Special Litigation Committee's report filed in court in connection with a shareholder derivative action could not be sealed based on "a naked conclusory statement that publication of the Report will injure the bank in the industry").

The Ad Hoc Equity Committee so far has offered nothing but rank speculation about the harms that supposedly might follow public release of their Rule 2019 disclosures—namely that other investors will be able to decipher the trading strategies and practices of the member hedge funds, that the value of the members' various stakes in Northwest will decline, and that hedge funds will cease to participate in unofficial committees. *See* Mot. at ¶¶ 22-29. Nowhere, however, does the Ad Hoc Equity Committee explain—let alone offer anything resembling *evidentiary proof*—how the revelation of information concerning its members' financial positions with regard to Northwest will inevitably cause such a parade of horribles. The unadorned fact that the information *might* shed some light on business strategies, without more, cannot support a finding that the material is confidential commercial information within the meaning of Section 107(b)(1).

Likewise, the Ad Hoc Equity Committee's claims of an adverse impact on the secondary trading market are entirely speculative and unsupported by evidence. Indeed, this bald assertion is reminiscent of another attempt to seal bankruptcy records in this Court. In that case, *In re Barney's, Inc.*, 201 B.R. 703 (Bankr. S.D.N.Y. 1996), the Court declined to classify an investment proposal as confidential commercial information for purposes of Section 107(b)(1) where the party requesting the sealing order "could only speculate that the public disclosure of the content of the [proposal] will adversely impact debtors' reorganization efforts," *id.* at 708, by causing "other investors [to] submit only marginally higher and better competing offers—rather than proposals reflecting their true assessment of the debtors' value," *id.* at 707. To obtain any sealing order, the Ad Hoc Equity Committee must provide the Court with something more than a mere hypothesis, which is all that it has done in this case.[6]

Nor does *In re Kaiser Aluminum Corp.*, 327 B.R. 554 (D. Del. 2005), provide any precedent for a sealing order as the Ad Hoc Equity Committee claims. To the contrary, as the opinion itself makes plain, "the Bankruptcy Court *did not seal* the Rule 2019 information." *Id.* at 560 (emphasis added). Rather, the *Kaiser Aluminum* court made the information available at the courthouse upon request instead of through the electronic public docket. *Id.* at 557. Although Bloomberg does not concede that even this *sui generis* restriction on public access was proper, that restriction clearly was *not* based on any conclusion that Rule 2019 statements necessarily constitute "confidential . . . commercial information" under Section 107(b)(1).

All apart from the failure to demonstrate any proper basis for sealing, the blanket order requested by the Ad Hoc Equity Committee is plainly overbroad, and thus cannot satisfy the

[6] The Ad Hoc Equity Committee's "chilling" argument misses the point of Rule 2019 entirely. The drafters of the Rule obviously recognized that the disclosure requirements would deter some participation in *collective* activities. Enforcing the disclosure requirements of Rule 2019 has no effect on interested parties who wish to participate in a bankruptcy proceeding on an *individual* basis.

"narrow tailoring" mandate of the First Amendment. It would, for example, seal information about Owl Creek's stock holdings in Northwest that is publicly available in its Schedule 13D filing. *See supra* at 4. Indeed, the Ad Hoc Equity Committee has not proffered declarations or other evidence that would permit this Court to make a factual finding that any of the particular information in the Rule 2019(a) disclosures actually has been maintained in strict confidence. All the Court has before it is a representation from KBT&F, with no particularity, that the individual members of the Committee had not shared information contained in the Rule 2019(a) disclosures amongst themselves. Mot. at ¶ 22. Based on that, and that alone, the Ad Hoc Equity Committee seeks a blanket sealing order that would deny the public access to the entirety of its mandatory Rule 2019(a) disclosures. Such a request cannot be reconciled with the constitutional requirement that a sealing order be crafted to minimize restrictions on the public right of access. *See Hartford Courant Co.*, 380 F.3d at 96 (holding that, where "the public and the media possess a qualified First Amendment right to inspect [judicial records]," the presumption of access is rebuttable only "upon demonstration that suppression . . . is narrowly tailored to serve [a compelling government] interest") (internal quotations and citation omitted). Particularly in the circumstances of this case, information concerning the role and interests of the hedge funds should be disclosed to the greatest extent practicable to promote transparency and insure the integrity of the proceeding.

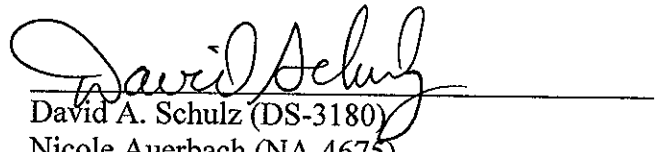
CONCLUSION

For each of the foregoing reasons, Bloomberg News respectfully requests that it be permitted to intervene for purposes of enforcing the public right of access to these proceedings, and that the request for an order sealing the Rule 2019(a) disclosures of the Ad Hoc Equity Committee be denied.

Dated: March 5, 2007

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.



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CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of March, 2007, and pursuant to Local Bankruptcy Rule 9013-1(c), I caused true and correct copies of the foregoing Notice of Motion to Intervene and the accompanying Memorandum of Law in Support of Intervention and in Opposition to the Ad Hoc Equity Committee's Request for an Order Sealing its Rule 2019(a) Disclosures, exhibits thereto, and Corporate Disclosure Statement to be served upon the following interested parties in the manner noted.

By e-mail and/or ECF filing:

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