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Hearing Date: TBD
Objections Date: TBD

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)

MOTION OF THE AD HOC COMMITTEE OF EQUITY SECURITY HOLDERS FOR THE APPOINTMENT OF AN EXAMINER PURSUANT TO 11 U.S.C. § 1104(c)

The members of the Ad Hoc Committee of Equity Security Holders (the "Ad Hoc Committee" or the "Movants"), by and through their undersigned counsel, hereby request appointment of an examiner in these cases pursuant to section 1104(c) of title 11, United States Code (the "Bankruptcy Code"). In support of this motion (the "Motion"), the Ad Hoc Committee respectfully states as follows:

PRELIMINARY STATEMENT

The Debtors have more than $5 million in fixed, liquidated, unsecured debt (other than for goods, services, or taxes). Accordingly, the Bankruptcy Code requires appointment of an examiner upon request of a party in interest.

Here, the Court must appoint an examiner, not only because it is mandated by statute, but also because preserving the integrity of the Chapter 11 process requires it. The Court, creditors, shareholders, and the Justice Department (through the Office of the United States Trustee) -- before approval of *any* plan in these cases -- need to know that the Debtors' have adequately pursued *all* options to maximize value and to understand the substance and outcome of the merger and sale discussions and analyses that the Debtors conducted or chose not to conduct during these Chapter 11 cases. Specifically, an independent investigation is required to determine whether the Debtors have any plans, agreements, or understandings to consummate a strategic transaction after confirmation and/or whether the Debtors are "parking" third-party interest in their businesses to disenfranchise constituents and to enrich management in violation of their fiduciary obligations.

Northwest's merger or sale, if realized *at* -- rather than deferred until *after* -- confirmation, likely would produce value sufficient to: (1) pay creditors in full, (2) provide shareholders with a meaningful recovery, (3) permit management *reasonable* participation, and (4) create a fully consensual case. These are not mere speculations. Indeed, there are indications of both the likelihood and the value of a transaction such that investigation is likely to lead to information (including admissible evidence) necessary for the Court's consideration of *any* plan. These indications include:

- The Debtors have never attempted any sales process or other effort to determine Northwest's fair market value. Even with the Debtors' proposed rights offering, the Debtors have refused to establish a data room or to provide the Movants' with due diligence (though they consistently attack the Movants for not offering to buy the *entire* $20+ billion business with no business diligence whatsoever).
- The Debtors' Chief Executive Officer, Doug Steenland, told the press in late January that the Debtors have no intent to merge with another carrier "*this* year," but that he does see industry consolidation "over time" (*i.e.*, perhaps *next* year).

- Days after Mr. Steenland told the press that "[t]he odds [of a hostile takeover] are *very small*," the Debtors modified their Plan to adopt "poison pill" and other anti-takeover provisions in corporate charter documents to ensure board and management control (and compensation) over the merger process.

- According to press reports, representatives of Delta Air Lines had "recurring" meetings with Northwest representatives as the alternative to a Delta/US Airways merger.

- Unlike a Delta/US Airways merger, which has significant route overlap, a Delta/Northwest merger is an "end to end" complementary combination, likely to gain regulatory approval, and largely accretive to those holding the equity when the merger occurs.

- The Debtors' hired Evercore Group L.L.C. ("Evercore"), a financial advisor whose mandate was to "focus[] on broad strategic alternatives in the airline industry." Yet, the Debtors set Evercore's compensation as a flat fee structure, not market pricing designed to incentivize Evercore actually to find and to consummate a value-maximizing transaction. And the Debtors do not even mention Evercore's name, let alone its "broad strategic alternative" work or the results of such work, in their Disclosure Statement.

- The Debtors hired Elmendorf Strategies, LLC to perform government and lobbying services. Movants believe that these lobbying activities include antitrust lobbying and have asked the Debtors for information on Elmendorf's undisclosed lobbying activities. The Debtors have not answered.

- Sophisticated claims traders (hedge funds, financial institutions, etc.) are actively and simultaneously accumulating claims in both this case and the Delta bankruptcy case (to be exchanged for post-confirmation equity). Indeed, here the Debtors' bond prices traded *up* after disclosure of a plan that proposes only a 74% recovery to unsecured creditors, and nothing to equity. No sophisticated trader buys debt at 90+% with the expectation of getting paid only 74%.

- Several analysts have published reports reflecting that the airline industry will consolidate and in fact needs to consolidate to remain viable.

- The Debtors (and Delta Air Lines) vigorously opposed the Ad Hoc Committee's efforts to obtain discovery about negotiations or discussions concerning potential merger and sale transactions; if no such communications occurred, the Debtors (and Delta) could have said so. They never did; the Debtors sought civil contempt instead.

- The Debtors' Plan shifts huge value to management *in the form of equity that will benefit from later merger activity* through a $129 million claim (worth between $85-107 million on the Debtors' lowball valuation and likely more than $150 million on an actual market valuation) and through a "terms undisclosed"

> management *equity* plan. Though the Debtors disclose absolutely nothing, not even the amount of equity (*that will benefit from later merger activity*) that management is giving themselves, the Plan approves the management equity plan.

Because the Debtors refuse to conduct a fair (or any) sale process to determine whether an auction would maximize recoveries to stakeholders, because the Debtors fail even to address their merger prospects -- including mergers they have actually discussed, for which they hired experts allegedly "to explore," and that they may have "parked" until later -- and because there are at the very least serious questions about the elimination of shareholder interests in favor of dramatic insider management compensation, an independent examiner's investigation, mandatory under the Bankruptcy Code, must commence immediately to assure this Court and parties in interest that the Debtors are not hiding or delaying a merger or sale transaction in derogation of fiduciary duty. Failure to halt that kind of conduct -- to permit yet another *National Gypsum* and *Kmart* (and nearly *Mirant*) -- would be an unfortunate and undeserved reward for fiduciary misconduct. But the failure even to investigate the *existence* of the conduct would be an embarrassing perversion of the Chapter 11 process.

Accordingly, for the reasons discussed below, the Ad Hoc Committee respectfully requests that this Court appoint an examiner pursuant to section 1104(c) of the Bankruptcy Code.

FACTUAL BACKGROUND

A. The Equity Committee Motion.

1. On January 11, 2007, the Ad Hoc Committee moved for an order directing the Acting United States Trustee for Region 2 to appoint an official equity committee in these cases (the "Equity Committee Motion").

2. In early February 2007, the Ad Hoc Committee served third party subpoenas on several legacy carriers, including Delta Air Lines ("Delta"), seeking documents relating to merger negotiations with the Debtors.

3. On February 9, 2007, the Debtors, who were not subject to the subpoenas, moved against the Ad Hoc Committee, without prior notice and without meeting, conferring, or otherwise seeking any consensual limitation on discovery, seeking civil contempt for even asking about a merger and demanding that this Court quash the third party subpoenas.

4. During a February 14, 2007 hearing, the Court quashed the subpoenas, including the one directed at Delta. The Court stated, among other things, that the Ad Hoc Committee could not investigate Northwest's conduct regarding merger and acquisition ("M&A") activity because the Ad Hoc Committee members, whom the Court termed "speculators," remain free to trade in the Debtors' securities. (Declaration of David S. Rosner in Support of the Motion of the Ad Hoc Committee of Equity Security Holders for the Appointment of an Examiner Pursuant to 11 U.S.C. § 1104(c) (the "Rosner Decl."), Ex. A)

5. On February 26, 2007, the Court entered a protective order quashing all third party subpoenas.

6. On February 28, 2007, the Ad Hoc Committee withdrew the Equity Committee Motion. The Ad Hoc Committee did so, among other reasons, because the outcome will not impact the ultimate issues in this bankruptcy, and the resources of the Court and all interested parties (including the Debtors, whose residual value belongs to the shareholders) are best served by focusing the dispute on the insufficiency of the disclosure statement and the illegality of the plan. (Rosner Decl., Ex. B) In its statement concerning the withdrawal, the Ad Hoc Committee disclosed that it would seek the relief requested in this Motion. (*Id.*)

B. The Debtors' Plan.

7. On February 15, 2007, the Debtors filed an amended Chapter 11 plan of reorganization (the "Plan"). The Plan wipes out the interests of the Debtors' shareholders,

notwithstanding that there exist billions of dollars of disputed claims that, if resolved favorably, would result in creditors receiving more than full payment *even under the Debtors' low valuation*.

8. The Plan has other patent defects: (1) it effects improper "substantive consolidation" of certain of the Debtors with no explanatory disclosure whatsoever[1], while at the same time "allowing" guaranty claims to permit certain creditors to double dip; (2) it allows management, with no explanatory disclosure whatsoever, approximately $129 million in claims; (3) it gives management, with no explanatory disclosure whatsoever, an undisclosed amount of new equity and options (reserving the ability to delay filing the terms of the management equity plan until *after* the vote to approve it (a vote the Debtors do not solicit from shareholders));[2] and (4) it pays creditors more than in full through equity distributions and the right to purchase equity at below market pricing.

9. Thus, the Proposed Plan transfers all of the benefits of today's intrinsic equity value plus any post-confirmation merger or other business combination to the board, management, and creditors without any consideration to current shareholders.

C. Amount of Unsecured Debt.

10. On January 23, 2007, the Debtors filed a Form 8-K with the Securities and Exchange Commission estimating that the Debtors' unsecured claims total between $8.75 billion and $9.5 billion. The Debtors' Disclosure Statement repeats this estimate with little

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[1] Merely restating in its disclosure statement (the "Disclosure Statement") *what* the Plan provision is, without explaining *why* it is included (i.e., why it is legal, equitable, preferable, beneficial, enforceable, possible, or why the Plan contains it at all) is not, of course, disclosure; it is repetition.

[2] The Ad Hoc Committee understands that the Debtors' pilots union recently started informational picketing because of the huge management payday that the Plan promises. (Rosner Decl., Ex. C).

further disclosure. Exhibit G to the Disclosure Statement indicates that there are only $5.5 billion in allowed claims and that the Debtors dispute the balance. The Ad Hoc Committee also disputes the claims estimate that the Debtors use to claim insolvency. However, for purposes of this motion, the Ad Hoc Committee agrees with the Debtors that there is at least $5 million in fixed, liquidated, unsecured debt exclusive of claims for goods, services, or taxes, or owing to an insider. (Rosner Decl., Ex. D)

D. The Court Has Not Appointed A Trustee.

11. The Court has not appointed a trustee under section 1104 of the Bankruptcy Code.

E. The Ad Hoc Committee And Its Members Are Parties In Interest.

12. The Ad Hoc Committee consists of holders of the Debtors' equity securities. The Ad Hoc Committee and each member, separately and collectively, are parties in interest under section 1109 of the Bankruptcy Code.

F. Potential Board And Management Misconduct:
The Debtors Likely Will Merge Or Be Sold Post-Confirmation.

(i) Consolidation In The Industry.

13. Since November 15, 2006, when U.S. Airways launched its first unsuccessful bid for Delta, each of the airlines, industry securities analysts, the press, and market participants has concluded that consolidation among the legacy airline carriers is likely, if not inevitable.

14. Among others, a November 2006 Bear Stearns report disclosed that, "we believe the probability of a transaction is clearly rising and if one major transaction takes place, it could trigger a cascade of deals." (Rosner Decl., Ex. E, at p. 1) The Bear Stearns report concludes that Northwest will be a "key driver[] of M&A" and that there will be substantial value-added synergies and other benefits of a Northwest/Delta merger. (*Id*., at pp. 13, 16) A November 16, 2006 Credit Suisse report also concluded that "[f]rom our perspective, the question has

consistently been *not whether* the industry consolidates, but *when*, which is why consolidation has been a consideration in our Overweight sector stance and ratings." (Rosner Decl., Ex. F, at p. 1 (emphasis added))

(ii) Northwest Has Been Discussing A Merger.

15. The Debtors have been careful not to deny that they had merger discussions with legacy carriers, including Delta. A January 31, 2007 article disclosed that:

- "Northwest and Atlanta-based Delta Air Lines, also in bankruptcy protection, specifically have been the subject of merger rumors and speculation. Yet Northwest, the nation's fifth-largest carrier, has no plans to merge *this year*, Steenland said in an interview with reporters . . .."
- "Delta has denied talks with Northwest as it fends off a hostile bid from US Airways, and also insists it intends to emerge from bankruptcy court as an independent business. Steenland doesn't believe a hostile deal can succeed in today's market: 'The odds on it are *very small*. If it does, it puts pressure on the rest of the industry as to what their options are.'"
- "No matter what happens with Delta and US Airways, Steenland said he sees industry consolidation *over time*."

(Rosner Decl., Ex. G) (emphasis added)).

16. A January 10, 2007 Wall Street Journal article disclosed that "Delta has had recurring talks with Northwest Airlines Corp. about a tie-up between the two carriers as a possible alternative to a Delta takeover by U.S. Airways." (Rosner Decl., Ex. H)

17. No Northwest representative ever denied the report.

(iii) Evercore's Retention Was Not Structured to Maximize Value through a Sale.

18. In fact, no Northwest representative has *ever* denied that Northwest had discussed a merger or sale during these Chapter 11 cases. Just the opposite; the Debtors recognize it and apparently agree that they must at least appear to have investigated their merger and acquisition value. They hired Evercore, a financial advisor whose "work will be focused on broad strategic

alternatives in the airline industry." (Rosner Decl., Ex. I, ¶ 9) However, it appears that the Debtors may have priced Evercore's retention to provide themselves with cover for *not* merging while in Chapter 11 rather than pricing the retention to seek the best transaction for the Debtors' stakeholders.

19. Evercore's retention was structured as a flat fee arrangement of an additional $2 million M&A fee (significantly lower than Seabury's M&A fee) that did not increase as the value of the transaction increased. In addition, Evercore was also granted a restructuring fee of $3 million, plus monthly fees of $75,000 and a retainer fee of $275,000 even if no sale occurred. Had the Debtors wanted to incentivize Evercore to find and execute a value-maximizing transaction the Debtors' would have (i) structured the retention on a standard incentive fee basis, with fees significantly greater than the $2 million M&A fee (which equates to about 1/100 of 1% on the Debtors' lowball $14 billion implied enterprise valuation) and (ii) eliminated the fixed restructuring fee of $3 million.

20. The Debtors do not even mention Evercore or any of its work on "strategic alternatives" or the results of such work in the Disclosure Statement; not a word. The Debtors' complete silence speaks the proverbial volumes regarding what the Debtors likely hired Evercore to do and *not to do*.

(iv) Seabury Can Get Paid (Again) For A Later Merger.

21. Seabury Securities LLC ("Seabury"), the Debtors' other financial advisor, has a retention agreement that would pay transaction fees of over $11.0 million for the proposed restructuring transaction including the rights offering outlined in the Plan versus its M&A fee, which was capped at $10.0 million once an $8.5 billion transaction value was achieved (significantly lower than the disclosure statement implied enterprise value of approximately $14

billion). (Rosner Decl., Ex. J, pp. 22-24) In addition, as a result of the way the retention was structured, implementing a plan is significantly more favorable economically to Seabury because, post-restructuring, Seabury would at the very least have the opportunity to obtain another *much larger fee* for advising on a later M&A transaction with Northwest. *Id.*

(v) The Debtors' Anti-Takeover Provisions.

22. And, although Mr. Steenland claimed in January that the chances of a Northwest hostile takeover were "very small," a few days later, he proposed the Plan with "poison pill" and other anti-takeover initiatives. (Rosner Decl., Ex. K, at pp. 59-61 (Disclosure Statement discussion of anti-takeover measures)). Either the Debtors are exercising demonstrably bad business judgment or they believe that they need these extreme anti-takeover protections (again the Disclosure Statement merely repeats the Plan's terms but provides no explanation). Assuming the latter, the Debtors' insistence on these anti-takeover provisions strongly suggests that they know of a particular transaction or at the least that the post-confirmation environment will be rich in transaction possibilities.

(vi) The Debtors' Lobbyist.

23. The Debtors also recently hired a lobbyist, Elmendorf Strategies, LLC ("Elmendorf"), slipped in as an "ordinary course professional," and therefore absent any information regarding Northwest's lobbying purpose.[3] Accordingly, the Ad Hoc Committee wrote and asked the Debtors about Elmendorf and specifically whether the Debtors retained it for antitrust purposes. (Rosner Dec., Ex. L) The Debtors ignored the request.

[3] The pension bill, for which Elmendorf lobbied on Northwest's benefit while with Bryan Cave Strategies, has already passed.

(vii) Sophisticated Claims Traders Accumulate Northwest and Delta Claims.

24. Sophisticated hedge funds and financial institutions are rapidly buying up Northwest's and Delta's claims. They include Lehman Commercial Paper Inc., Deutsche Bank Securities Inc., Morgan Stanley Senior Funding Inc., Goldman Sachs Credit Partners, L.P., and Silver Point Capital Fund, L.P. Some of these entities also competed to backstop the Debtors' proposed rights offering and the Debtors provided them with due diligence. It appears that many are buying in both cases and several are members of the *ad hoc* creditors committees in both cases.

25. Beside the apparent indication of these sophisticated claims traders' view on Northwest's actual value (they are *not* buying debt near par expecting to receive the 74 cents that the Debtors predict), both Northwest and Delta plan to exchange reorganized equity for these claims. Indeed, here, the Debtors' debt prices went *up* after it disclosed that unsecured creditors will receive only a 74% recovery, but will receive reorganized equity in exchange, and will be given the opportunity to buy additional equity at a discount. That reorganized equity will realize all of the benefits of the synergies of a Northwest/Delta transaction or any other Northwest M&A transaction. And being a shareholder in both companies, not only will be lucrative, but also will assist in getting the post-confirmation shareholder approval for the actual transaction.

RELIEF REQUESTED

26. The Ad Hoc Committee respectfully requests appointment of an examiner pursuant to section 1104(c) of the Bankruptcy Code to investigate and to report on: (i) whether the Debtors have explored all available options to maximize the value of their estates, (ii) the Debtors' and the Creditors Committee's merger and acquisition activity, negotiations or discussions with other airlines (or the creditors and shareholders of other airlines), and (iii) whether the Debtors have any plans, agreements, or understandings, tacit or otherwise, to consummate a valuable transaction after confirmation and/or whether the Debtors are "parking" third-party interest in their businesses.

GROUNDS FOR THE RELIEF REQUESTED

A. Examiner Appointment Is Mandatory.

27. Section 1104(c)(2) of the Bankruptcy Code provides that:

> (c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, *the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate*, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—
>
> . . . .
>
> (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

11 U.S.C. § 1104(c)(2) (emphasis added).

28. Unlike Bankruptcy Code section 1104(c)(1), which requires examiner appointment if "in the interests of . . . any equity security holders[,]"[4] section 1104(c)(2) leaves

[4] Here, even if the Court analyzes this request under subsection (c)(1)'s permissive provision, the Ad Hoc Committee submits that the Court should appoint an examiner because the

no discretion to the court where, as here, the claims threshold is met. *See, e.g., In re Loral Space & Commc'n, Ltd.,* 2004 WL 2979785 (S.D.N.Y. Dec. 23, 2004) (hereinafter, "*Loral*"); *see also In re Revco D.S., Inc.*, 898 F.2d 498, 500-01 (6th Cir. 1990) (holding that appointment of examiner is mandatory because of the phrase "the court shall order"); *In re UAL Corp.*, 307 B.R. 80, 86 (Bankr. N.D. Ill. 2004) (same); *In re Mechem Fin. of Ohio, Inc.*, 92 B.R. 760, 761 (Bankr. N.D. Ohio 1988) (same); *In re The Bible Speaks*, 74 B.R. 511, 514 (Bankr. D. Mass. 1987) (same); *In re 1243 20th St., Inc.*, 6 B.R. 683, 685, n.3 (Bankr. D.D.C. 1980) (same); *In re Lenihan*, 4 B.R. 209, 211 (Bankr. D.R.I. 1980) (same).

29. The legislative history behind the antecedent to section 1104(c) confirms the mandatory nature of section 1104(c)(2):

> [T]o insure that adequate investigation of the debtor is conducted to determine fraud or wrongdoing on the part of present management, an examiner *is required to be appointed* in all cases in which the debtor's fixed, liquidated, and unsecured debts, other than debts for goods, services, or taxes, or owing to an insider exceed $5 million. *This should adequately represent the needs of public security holders in most cases*.

124 Cong. Rec. H11,100 (Daily ed. Sept. 28, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6465, *reprinted in* D Collier on Bankruptcy App. Pt. 4-2458 (L. King 15th ed. 2003); 124 Cong. Rec. S17,417 (Daily ed. Oct. 6, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6456, *reprinted in* D Collier on Bankruptcy App. Pt. 4-2572 (L. King 15th ed. 2003); statements of Rep. Edwards and Sen. DeConcini (emphasis added).

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limited but critical investigation that the Ad Hoc Committee seeks is decidedly in the interests of all constituents in these cases, including the Debtors' equity security holders, and necessary for the Court to consider confirmation of *any* plan in these cases. *See, e.g, TENN-FLA Partners v. First Union Nat'l Bank of Fla.*, 229 B.R. 720 (W.D. Tenn. 1999); *In re Public Serv, Co. of N.H.*, 99 B.R. 177, 182 (Bankr. D.N.H. 1989) (both discussed *infra*).

30. Here, the appointment of an examiner is critical because there will not be an official equity committee appointed in this case. The *Loral* District Court decision is on point. There, an Ad Hoc Committee moved for appointment of an official equity committee. The Bankruptcy Court denied the motion. *Loral*, 2004 WL 2979785 at *1. The equity group sought an examiner, relying on meeting the debt threshold and arguing that the debtor's undervaluation of its assets required investigation. *Id*. Although the Bankruptcy Court recognized that the debt threshold in section 1104(c)(2) was met, it nevertheless denied the motion. *Id*. On appeal, the District Court reversed, holding that "the Bankruptcy Court had *no discretion to deny* appointment of an examiner where, as here, the $5,000,000 debt threshold is met and shareholders of a public company have moved for appointment of an examiner." *Id*. at *5 (emphasis added).

31. Here, there is no dispute that "the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000" and that the Court has not appointed a trustee. 11 U.S.C. § 1104(c)(2). Accordingly, the Ad Hoc Committee's right to an examiner is absolute.

B. <u>The Proposed Scope Of The Examiner's Investigation Is Appropriate</u>.

32. An examiner's investigative powers are extremely broad. "Bankruptcy Rule 2004 likewise gives the Examiner scope to investigate which is broader than that of civil discovery under Rule 26" and "investigation of an examiner in bankruptcy, unlike civil discovery under Rule 26(c), is supposed to be a "fishing expedition," as exploratory and groping as appears proper to the Examiner." *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 432 (S.D.N.Y. 1993); *In re FiberMark, Inc.*, 339 B.R. 321, 324 (Bankr. D. Vt. 2006) (same). This Court has some, albeit limited, discretion to establish the scope of duties and tasks of an examiner to ensure that

the "investigation of the debtor . . . is appropriate." 11 U.S.C. § 1104(c); *see also In re Revco*, 898 F.2d at 501 (noting that "the bankruptcy court retains broad discretion to direct the examiner's investigation, including its nature, extent, and duration"). However, this Court recently declined to limit the scope of an examiner's investigation holding that the scope "should remain broad." *In re Granite Broadcasting Corp.*, 06-12984 (Bankr. S.D.N.Y.), Transcript of Feb. 15, 2007 hearing, p. 75. (Rosner Decl., Ex. M) The Court, recognizing that "[a]ll parties can certainly argue that *the examiner* should restrict or constraint his or her examination to certain issues and such constraints would certainly appear to be reasonable under the conditions of a case in which time is limited," held that "it would be improper *for the Court* to micro manage this process any further." (*Id.* (emphasis added)).

33. The Court should approve the Ad Hoc Committee's proposed investigation. No party can reasonably dispute that the Debtors' value in a sale or merger transaction could be significantly higher than the Debtors' lowball valuation (which, among other things, does not include synergies or a merger premium in its stand-alone, non-market valuation).[5] (Rosner Decl., Ex. E, F) (analyst reports describing valuation premiums and synergies for legacy airline combinations).

34. The Court, the Ad Hoc Committee, and other shareholders must understand what the Debtors have done or determined to delay doing regarding merger or sale discussions, values and pricing, and whether the Debtors have intentionally delayed or "parked" third party interest until after confirmation. Not only will this investigation directly bear on value, but it will assist

[5] The Debtors' Disclosure Statement admits that Seabury's valuation does not project "actual market value" or values to be realized "if assets were sold in arms' length transactions between buyers and sellers." (Rosner Decl., Ex. K, p. 56)

the Court in addressing the adequacy of disclosure and whether the Debtors have proposed the Plan in good faith.[6]

35. In this latter regard, if, as seems apparent, the Debtors' Plan strips constituents' rightful recovery by delaying a premium transaction until after confirmation, then, the Court cannot find good faith. *TENN-FLA Partners v. First Union Nat'l Bank of Fla.*, 229 B.R. 720 (W.D. Tenn. 1999) (revoking confirmation order where debtor failed to disclose to creditors, and later consummated, a premium transaction); *Official Committee of Unsecured Creditors v. Michelson (In re Michelson)*, 141 B.R. 715, 725 (Bankr. E.D. Cal. 1992) ("The suppression of material facts that likely would have led to a different result unambiguously constitutes an impairment of the adjudicatory process."); *F & M Marquette Nat'l Bank v. Emmer Bros. Co. (In re Emmer Bros. Co.)*, 52 B.R. 385, 394 (D. Minn. 1985) (finding that a debtor in possession "who fraudulently conceals an asset during the course of the bankruptcy proceedings surely violates" the "fiduciary responsibility to the bankruptcy court and its creditors").

36. *TENN-FLA Partners* is a case in point. There, the Bankruptcy Court used an extremely rare remedy and revoked the confirmation order it previously entered. The District Court affirmed. *TENN-FLA Partners v. First Union Nat'l Bank of Fla.*, 229 B.R. 720. The Courts found that the debtor in possession owed a fiduciary duty to both the estate and the court and that this fiduciary duty included a duty to disclose all known material information. That duty required the debtor in possession "to disclose the known interest in the [estate's] property" and the debtor in possession's "failure to disclose the true interest in the property would be

[6] The good faith showing requires that "the plan was proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code." *In re Sound Radio, Inc.*, 93 B.R. 849, 853 (Bankr. D.N.J. 1988), *aff'd in part, remanded on other grounds*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990); *see also Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1989); *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984).

material to a determination on whether TFP's plan met the Code's disclosure requirements, was proposed in good faith, and on whether TFP complied with its fiduciary duty as a debtor in possession." *Id.* at 736. And, in fact, that the debtor in possession's "parking" of known third-party interest in estate property "precluded [the Bankruptcy Court] from confirming TFP's plan because of inadequate disclosure, bad faith, and breach of fiduciary duty." *Id.* The Court held that:

> the willingness of courts to leave debtors in possession is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee. . . . This does not allow a debtor in possession . . . to engage in conduct that essentially amounts to concealing assets and self-dealing.

Id. (citing *CFTC v. Weintraub*, 471 U.S. 343, 355, 105 S. Ct. 1986, 85 L. Ed.2d 372 (1985)). The District Court ultimately found that the TFP debtor in possession breached its duty to maximize the value of the estate "by not obtaining the known highest available price for the property prior to confirmation." *Id.*

37. Accordingly, Courts freely appoint examiners where, as here, questions may exist about a debtor's good faith in proposing a plan. *See In re Public Serv, Co. of N.H.*, 99 B.R. 177, 182 (Bankr. D.N.H. 1989) (appointment is "in the interests of this estate and its various constituencies, in that there is a need for investigation of matters relevant to the case and the formulation of a plan"); *In re Landscaping Serv., Inc.*, 39 B.R. 588, 590 (Bankr. E.D.N.C. 1984) (appointment of an examiner is appropriate under section 1104(c)(1) when there is a question of the debtor's good faith in proposing a plan).

38. Here, the Ad Hoc Committee's proposed examiner investigation comports with the intended role of examiners in bankruptcy cases. "The purpose of an examiner's investigation in bankruptcy is to discover whatever assets may exist for the estate of the

bankrupt, just as one purpose for the appointment of a trustee is so that a trustee may use statutory powers conferred by the Bankruptcy Code to collect all property belonging to the debtor for the benefit of the debtor's creditors." *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 432 (S.D.N.Y. 1993).

39. In quashing the Ad Hoc Committee's subpoenas, the Court expressed a concern that the members might be able to use the discovered information outside of protecting their interests in these cases. Though the Ad Hoc Committee respectfully takes strong exception to this inference, an examiner's independent investigation should alleviate any lingering concern of the Court. The Court and *all* parties in interest will have the benefit of the examiner's report. *In re FiberMark, Inc.*, 339 B.R. at 325 ("The benefit of appointing an independent examiner is that he or she will act as an objective nonadversarial party who will review the pertinent transactions and documents, thereby allowing the parties to make an informed determination as to their substantive rights."); *In re Apex Oil Co.*, 101 B.R. 92, 99 (Bankr. E.D. Mo. 1989) ("The Examiner is appointed to act as an independent party to review, without monetary interest, transactions and documents. He is first and foremost disinterested and nonadversarial. The benefits of his investigative efforts flow solely to the debtor and to its creditors and shareholders.") (citations omitted).

WAIVER OF MEMORANDUM OF LAW

40. The Ad Hoc Committee respectfully requests that the Court waive the requirement of a separate memorandum of law under Local Rule 9013-1(b) because the Ad Hoc Committee incorporated the legal points and authorities upon which it relies in this Motion.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE and at the hearing on this Motion, the Ad Hoc Committee respectfully requests entry of an order appointing an examiner and granting such other and further relief in favor of the Ad Hoc Committee as is just and proper.

Dated: New York, New York
March 6, 2007

Respectfully submitted,

By: /s/ David S. Rosner

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