UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK		Hearing Date: March 7, 2007 Hearing Time: 11:00 a.m.
In re:	:	Chapter 11
Northwest Airlines Corporation, *et al.*,	:	Case No. 05-17930 (ALG)
Debtors.	:	(Jointly Administered)

RESPONSE OF THE UNITED STATES TRUSTEE TO MOTION OF *AD HOC* EQUITY COMMITTEE FOR AN ORDER PURSUANT TO 11 U.S.C. §§ 105(a) AND 107(b) AND RULE 9018 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE GRANTING LEAVE TO FILE ITS BANKRUPTCY RULE 2019(a) STATEMENT UNDER SEAL

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

I. INTRODUCTION

Diana G. Adams, Acting United States Trustee for Region 2 (the "United States Trustee"), hereby files her Response (the "Response") to the Motion of the *Ad Hoc* Equity Committee seeking an order pursuant to 11 U.S.C. §§ 105(a) and 107(b) and Rule 9018 of the Federal Rules of Bankruptcy Procedure Granting Leave to File its Bankruptcy Rule 2019(a) Statement Under Seal (the "Motion"). In this Response, the United States Trustee addresses the issues before the Court: in order to succeed on the Motion, the *Ad Hoc* Equity Committee must establish that (i) the disclosures required by Bankruptcy Rule 2019(a) fall within the exceptions in Section 107(b)(1) as either trade secrets or confidential commercial information, and (ii) the fact that some of this information is already in the public domain does not affect this protection.

II. FACTS

A. The Debtors

1. On September 14, 2005, Northwest Airlines Corporation, *et al.,* ("Northwest" or the "Debtors") filed their chapter 11 cases (the "Northwest Cases"). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of Bankruptcy Code.

2. On September 30, 2005, the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee") pursuant to Section 1102(a) of the Bankruptcy Code.

3. On November 21, 2006, the United States Trustee received a letter (the "November 21 Letter") from Kasowitz, Benson, Torres & Friedman LLP ("KBT&F") submitted on behalf of its client, the Owl Creek Asset Management, L.P. ("Owl Creek"), requesting that the United States Trustee exercise her discretionary authority under section 1102(a)(1) of the Bankruptcy Code to form an official committee of equity holders in this case. *See* Legal Docket No. 4955, Objection To Motion Of Ad Hoc Committee of Equity Security Holders Pursuant to 11 U.S.C. Section 1102(a)(2) For An Order Directing The United States Trustee To Appoint An Official Committee of Equity Security Holders, Exhibit A.

4. By letter dated December 21, 2006, the United States Trustee advised KBT&F of her decision not to form a committee of equity security holders in these cases.

5. On January 11, 2007, KBT&F filed a Motion on behalf of the *Ad Hoc* Equity Committee seeking an order directing the United States Trustee to appoint an official committee of equity security holders. *See* Legal Docket Nos. 4490-92.

6. On January 16, 2007, KBT&F filed a Verified Statement of Kasowitz, Benson, Torres & Friedman LLP pursuant to Bankruptcy Rule 2019(a) (the "First 2019 Statement") [Legal Docket No. 4514], and on January 19, 2007 KBT&F filed a Verified Amended Statement of Kasowitz, Benson, Torres & Friedman LLP pursuant to Bankruptcy Rule 2019(a) (the "Amended 2019 Statement" and with the First 2019 Statement, the "2019 Statement"). *See* Legal Docket No. 4574. The thirteen members of the *Ad Hoc* Equity Committee hold 19,065,644 shares of Northwest common stock[1] and claims against Debtors in the aggregate amount of $264,287,500. *See* Amended 2019 Statement, at 2, ¶3.

7. The Debtors filed a disclosure statement (the "Disclosure Statement") and the First Amended Plan Joint and Consolidated Plan of Reorganization (the "Plan") on February 15, 2007.

8. The Disclosure Statement proposes to distribute substantially all of the Debtors' new common stock to the general unsecured creditors of the consolidated Debtors and to cancel all of the old equity interests. *See* Disclosure Statement, at 37.

9. On February 26, 2007 the Court issued a Memorandum of Opinion and Order [Legal Docket No. 5032] (the "Order" or the "Opinion") directing the Ad Hoc Equity Committee to file an amended Bankruptcy Rule 2019(a) statement within three business days containing *inter alia* "the amounts of claims or interests owned by the members of the committee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof" (collectively, the "Trading Data"). Opinion, at 4 and 7.

---

[1]As of July 31, 2005 Northwest had 87,918,886 shares of common stock outstanding. *See* Declaration of Neal S. Cohen Pursuant to Local Bankruptcy Rule 1007-2 and in Support of the Debtors' Chapter 11 Petitions and First Day Orders, Schedule 4. Legal Docket No. 10.

10. On February 28, 2007, the *Ad Hoc* Equity Committee filed a "Statement of *Ad Hoc* Committee Withdrawing Motion of Official Equity Committee" (the "Notice of Withdrawal"). *See* Legal Docket No. 5086. The Notice of Withdrawal set forth the *Ad Hoc* Equity Committee's intention to "move the Court for the appointment of an examiner on the limited issue of whether the Debtors and creditors are contemplating a merger or other transaction upon emergence, rather than engage in such transaction with this bankruptcy, ..." Notice of Withdrawal, at 4.

11. The Motion, in addition to seeking to seal the disclosures required by Bankruptcy Rule 2019(a), also seeks to modify the disclosures by limiting the disclosures to "(i) the aggregate amount of stock and claims purchased and sold by each member during the year prior to the Petition Date, (ii) the aggregate amount of stock and claims purchased and sold by each members [sic] after the Petition Date, and (iii) the aggregate amount of stock and claims purchased and sold by each of the individual committee members after the [sic] November 15, 2006 (a date chosen by the Debtors on which, among other things, US Airways announced its offer to purchase Delta Air Lines[)] (collectively, as may be amended, the 'Subject Information')." Motion, at 4, 14-16.

III. ARGUMENT

A. Bankruptcy Rule 2019(a) Requires the Members of the Ad Hoc Equity Committee to Disclose Trading Data

12. While the *Ad Hoc* Equity Committee disclosed the aggregate claims and interests held by its members in its Amended 2019 Statement, the Court, in its February 26, 2007 Opinion, directed the members to comply fully with the disclosures required by Bankruptcy Rule 2019(a).

13. The applicable portion of Bankruptcy Rule 2019(a) provides as follows:

> (a) *Data Required.* In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 or 1114 of the Code [an official committee], every entity or committee representing more than one creditor or equity security holder . . . shall file a verified statement setting forth
>
> (1) the name and address of the creditor or equity security holder;
>
> (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition;
>
> (3) . . . in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and
>
> (4) with reference to the time of . . . the organization or formation of the committee . . . the amounts of claims or interests owned by . . . the members of the committee . . . the times when acquired, the amounts paid therefor, and any sales or other disposition thereof.

14. The Court found the 2019 Statement to be insufficient on its face for failing to disclose "the amounts of claims or interests owned by the members of the committee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof." Opinion, at 4.

15. In requiring compliance with the plain language of Bankruptcy Rule 2019(a), the Court stated as follows:

> Unofficial committees have long been active in reorganization cases, and the influential study in the 1930's by Professor (later Justice) William O. Douglas for the Securities and Exchange Commission centered on perceived abuses by unofficial committees in equity receiverships and other corporate reorganizations. *See* Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1937). The four-volume SEC report led directly to the adoption of Chapter X and Rule 10-211 thereunder, which provided for disclosure of the "personnel and activities of those acting in a representative capacity" in order to help foster fair and equitable plans free from deception and

> overreaching. 13A King *et al.*, *Collier on Bankruptcy*, ¶ 10-211.04 (14th ed. 1976).

Opinion, at 6.

16. In light of the compelling policy reasons for requiring full disclosure from unofficial committees – guarding against abuse and helping to foster fair and equitable plans free from deception and overreaching – strict compliance with the disclosure requirements under Bankruptcy Rule 2019(a) should be the general rule. But, in cases where less than full disclosure would nonetheless permit adequate oversight over potential abuses, deception or overreaching by an unofficial committee, modifications to the disclosure requirement may be permitted. *See In re Kaiser Aluminum Corp.*, 327 B.R. 554, 560 (D.Del. 2005)(law firms representing thousands of asbestos claimants were permitted to file exemplars of their empowering documents rather than the actual documents.).

B. <u>Public Policy Favors Open Access To Documents Filed in Bankruptcy Cases</u>

17. Federal Rule of Bankruptcy Procedure 5001(b) provides, in pertinent part, as follows: "All trials and hearings shall be conducted in open court and so far as convenient in a regular court room." *See In re Global Crossing Ltd.*, 295 B.R. 720, 723-24 (Bankr. S.D.N.Y. 2003). Thus, parties seeking to deny public access to court documents must overcome a strong presumption. *Neal v. The Kansas City Star* (*In re Neal*), 461 F.3d 1048, 1053 (8th Cir. 2006); *Gitto v. Worcester Telegram & Gazette Corp.* (*In re Gitto Global Corp.*), 422 F.3d 1, 6 (1st Cir. 2005).

18. In the bankruptcy context, the general rule of open access is set forth in Section 107(a) of the Bankruptcy Code, which provides, in part, that subject to certain limited exceptions,

> a 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). *See In re Continental Airlines*, 150 B.R. 334, 338 (D. Del. 1993) (section 107 reflects Congress's intent to favor public access to papers filed with the bankruptcy court).

19. "The policy of open inspection, codified generally in Section 107(a) of the Bankruptcy Code, evidences Congress' strong desire to preserve the public's right of access to judicial records in a bankruptcy proceeding." *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994); *In re Barney's, Inc., et al.*, 201 B.R.703, 707 (Bankr. S.D.N.Y. 1996) ("Congress did not intend that sealed pleadings be the rule in bankruptcy cases"); *In re Alterra Healthcare Corp.*, No. 03-10254 (MFW), 2006 WL 2946055, at * 6 (Bankr. D. Del. 2006) ("Congress has codified the historical practice of open access in bankruptcy").

C. The Denial Of Public Access Is An Extraordinary Remedy That Is Appropriate Only Under Very Limited Circumstances

20. Limited exceptions to the general rule are contained in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. Section 107(b) of the Bankruptcy Code provides bankruptcy courts with the power to issue orders that will protect entities from potential harm that may result from the disclosure of certain confidential information. Section 107(b) provides in relevant part that

> [o]n request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may – (1) protect an entity with respect to a trade secret or confidential research, development or commercial information; or (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title."

11 U.S.C. § 107(b).

.

21. The burden is on the moving party to show that a request to place documents under seal falls within the parameters of Bankruptcy Code Section 107(b) and FRBP 9018. *Goldstein v. Forbes (In re Cendant Corp.)*, 260 F.3d 183, 194 (3d Cir. 2001); *In re Fibermark, Inc.*, 330 B.R. 480 (Bankr. D. Vt. 2005). Courts do not lightly ignore their mandate to conduct open proceedings. A party that invokes Section 107(b) must demonstrate that "compelling circumstances" are present before a court will deviate from the rule that "all documents filed in bankruptcy cases should be available to the public." *In re Hemple*, 295 B.R. 200, 202 (Bankr. D. Vt. 2003).

22. In light of the general rule that "the public has a right to know," the sealing of records "is a highly unusual and extraordinary remedy." *In re Eric Associates V*, 54 B.R. 445, 448 (Bankr. E.D. Va. 1985). While "not absolute," "the right of public access to court records is firmly entrenched and well supported by policy and practical considerations . . . ." *Orion*, 21 F.3d at 27. Therefore, "documents which are part of the court record should not remain under seal absent the most compelling reasons." *Fibermark*, 330 B.R. at 503-04. The inquiry then is whether the moving party has met its burden for keeping documents "out of the public domain." *Id.* at 504.

23. The strong presumption of openness does not permit the routine closing of judicial records to the public, and the party seeking to seal any part of a judicial record bears the heavy burden of showing (1) that the material is the kind of information that courts will protect and (2) that disclosure will work a clearly defined and serious injury to the party seeking closure. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984). Before sealing the record, the court must be able to articulate the compelling countervailing interests to be protected, make specific findings on the record concerning the effects of the disclosure and provide an

opportunity for interested third parties to be heard. *Id.*, 733 F.2d at 1072.

24. Moreover, to meet the burden of demonstrating that the facts should lead to the extraordinary remedy of hiding documents from public view, the moving party must "clearly define[]" the "serious injury" that would ensue from public disclosure of the documents. *In re Cendant Corp.*, 260 F.3d at 194. Vague allegations that public access to documents would cause hardship are not sufficient to defeat the clear public policy embodied in Section 107(a). *See id.* ("specificity is essential" for party seeking to deny public access).

D. The *Ad Hoc* Equity Committee Must Prove that the Trading Data Falls Within the Exceptions Set Forth in Section 107(b)(1) and that the Protections have not been Forfeited

25. ***Trading Data as Confidential Information***. "Commercial information" " has been defined as information which would cause 'an unfair advantage to competitors by providing them information as to the commercial operations of the debtor.'" *Orion Pictures Corp.* 21 F.3d at 27, *citing Ad Hoc Protective Comm. For 10 ½% Debenture Holders v. Intel Corp. (In re Intel Corp.)*, 17 B.R. 942, 944 (9th Cir.BAP 1982). The *Ad Hoc* Equity Committee contends that Trading Data constitutes both confidential commercial information as well as trade secrets which should be protected under Section 107.

26. The *Ad Hoc* Equity Committee relies on *Fed. Open Market Comm. Of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 361-62 (1979) (During the month that the Domestic Policy Directives and associated tolerance ranges – in essence the Government's buy-sell order to its broker – "provide guidance to the Account Manager, they are surely confidential, and the information is commercial in nature because it relates to the buying and selling of securities on the open market.") as support for its position that the Trading Data – the buying and selling of the securities itself, constitutes confidential information.

27. But *Fed. Open Market Comm. Of the Fed. Reserve Sys. v. Merrill* appears to treat the trading policy or strategies, as opposed to the actual purchase and sale of securities (i.e., the Trading Data) as confidential commercial information. Accordingly, the *Ad Hoc* Equity Committee must establish that the disclosure of the Trading Data – the purchases and sales and the amount paid – are the equivalent to disclosing the underlying trading strategies in order to establish that the Trading Data constitutes confidential commercial information.[2]

28. ***Trading Data as Trade Secrets.*** The *Ad Hoc* Equity Committee argues that the Trading Data constitutes trade secrets within the protection of Section 107(b)(1).

> Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken by [the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [the owner's] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement (First) of Torts § 757 (1939). *See Softel, Inc. v. Dragon Med. & Scientific Communications, Inc.*, 118 F.3d 955, 968 (2d Cir.1997) (". . . 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.' Restatement of Torts § 757 cmt. b. at 5 (1939)").

[2] In addition to arguing that the Trading data constitutes confidential information, the *Ad Hoc* Equity Committee implies that its members may have engaged in hundreds, perhaps thousands, of individual trades. Motion, at 14-15, ¶ 31. But, the volume of trades is not determinative of the issue of whether certain commercial information is confidential. In addition, Bankruptcy Rule 2019 does not provide an exclusion for voluminous transactions.

29. Other than stating that the Trading Data is the equivalent of trading strategy or policy, the only support for this position articulated in the Motion is that the individual members of the *Ad Hoc* Equity Committee have not shared the Trading Data with each other. Motion, ¶ 22. The *Ad Hoc* Equity Committee must establish that the Trading Data constitutes trade secrets that deserve the protection of Section 107.

30. ***Previous Disclosure of Certain Information.*** Not addressed or disclosed in the Motion is the fact that certain members have voluntarily made, or may be compelled to make, disclosures of trading information that the *Ad Hoc* Equity Committee seeks to classify as a trade secret. For example, it appears that Owl Creek may have been required to file Schedule 13D with the Securities and Exchange Commission disclosing the date and purchase price of its acquisition of 4.4 million shares (more than 5%) of Northwest common shares (5% of 87,918,886 shares equals 4,395,944 shares). The *Ad Hoc* Equity Committee must demonstrate that the trade secret or confidential information exception applies to information that is already public.

31. Similarly, where a member of the *Ad Hoc* Equity Committee has sold or purchased a claim and filed an appropriate notice of transfer of claim on the legal docket, the *Ad Hoc* Equity Committee must demonstrate that the trade secret or confidential information exception is still available to shield the disclosures required by Bankruptcy Rule 2019(a).

IV. SUMMARY

Before the Court can approve the sealing of the Rule 2019 disclosures, the *Ad Hoc* Equity Committee must demonstrate that (i) the Trading Data constitute trading policies or strategies that are either confidential information or trade secrets, and (ii) that the disclosures already made have not removed them from the protections afforded by Section 107.

Dated: New York, New York
March 7, 2007

DIANA G. ADAMS
ACTING UNITED STATES TRUSTEE

By: /s/ Brian S. Masumoto
Brian S. Masumoto
Trial Attorney

33 Whitehall Street
21st Floor
New York, New York 10004-2112
Tel. No. (212) 510-0500
Fax. No. (212) 668-2255