IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE:	§	**JOINTLY ADMINISTERED**
	§	
SCOTIA DEVELOPMENT LLC, ET AL.,	§	**Case No. 07-20027-C-11**
	§	
Debtors.	§	**Chapter 11**

Related Docket Nos. 265, 492 & 599
Hearing Date: April 10, 2007 @ 11:00 am CST

THIS PLEADING APPLIES ONLY TO
SCOTIA PACIFIC COMPANY LLC, CASE NO. 07-20032

MOTION OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND LOAN SYNDICATIONS AND TRADING ASSOCIATION FOR LEAVE OF COURT PURSUANT TO 11 U.S.C. § 1109(b) OR, ALTERNATIVELY, FED. R. BANKR. P. 2018(a) AND 11 U.S.C. § 105(a), TO APPEAR AS AMICI CURIAE, FILE BRIEF AND MAKE ORAL ARGUMENT IN SUPPORT OF NOTEHOLDER GROUP'S OBJECTION TO SCOTIA PACIFIC COMPANY LLC'S MOTION FOR ORDER COMPELLING AD HOC COMMITTEE TO FULLY COMPLY WITH BANKRUPTCY RULE 2019(a) BY FILING COMPLETE AND PROPER VERIFIED STATEMENT DISCLOSING ITS MEMBERSHIP AND THEIR INTERESTS

Securities Industry and Financial Markets Association ("SIFMA") and Loan Syndications And Trading Association ("LSTA", and along with SIFMA, the "Movants"),[1] through their under-signed counsel, hereby submit this motion (the "Motion") for leave of the Court, pursuant to section 1109(b) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code") or, alternatively, Rule 2018(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and section 105(a) of the Bankruptcy Code, to (i) appear as amici curiae, (ii) file the brief attached hereto (the "Amicus Brief") in support of the objection

[1] As described at greater length in the Amicus Brief (as defined below), Movants are two of the nation's leading industry groups focused on the health and vitality of the debt and equity markets, whose members include many of the largest and best-known participants in today's financial markets.

(the "Objection", Docket. No. 599) of the Ad Hoc Group of Timber Noteholders (the "Noteholder Group") to the motion of Scotia Pacific Company LLC ("Scopac"), debtor in possession in the above-captioned chapter 11 case, for an order compelling the Noteholder Group to file a statement pursuant to Bankruptcy Rule 2019 publicly disclosing the Noteholder Group's membership and certain proprietary trading information (the "2019 Motion", Docket. No. 492), and (iii) make oral argument in support of the Amicus Brief.

Movants respectfully request leave of the Court to appear as amici curiae, file the Amicus Brief and make oral argument with respect thereto pursuant to section 1109(b) of the Bankruptcy Code, which provides, in pertinent part, that "a party in interest . . . may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). Movants believe, as set forth in greater detail in the Amicus Brief, that, if granted, the relief sought in the 2019 Motion will have detrimental impacts on the liquidity of the active and vibrant trading markets as well as the willingness and ability of many stakeholders to participate in future chapter 11 cases. Accordingly, as leading industry associations focused on the health and vitality of the financial markets, Movants respectfully represent that, solely with respect to the Court's resolution of the 2019 Motion, they are "parties in interest" in the above-captioned matter. See In re Johns-Manville Corp., 36 B.R. 743, 747 (Bankr. S.D.N.Y. 1984) ("The term 'party in interest' has no specific definition in the Code and its applicability must be determined on an '*ad hoc*' basis [and] construed broadly so that parties affected by a Chapter 11 case have an opportunity to be heard.") (internal citations omitted).

Alternatively, Movants request leave of the Court to file the Amicus Brief and make oral argument with respect thereto pursuant to (a) Bankruptcy Rule 2018(a),

which provides that "after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene . . . with respect to any specified matter," and (b) the Court's broad equitable powers under section 105 of the Bankruptcy Code.

Dated: April 9, 2007
New York, New York

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BRIEF OF AMICI CURIAE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND LOAN SYNDICATIONS AND TRADING ASSOCIATION IN SUPPORT OF NOTEHOLDER GROUP'S OBJECTION TO SCOTIA PACIFIC COMPANY LLC'S MOTION FOR ORDER COMPELLING AD HOC COMMITTEE TO FULLY COMPLY WITH RULE 2019(a) BY FILING COMPLETE AND PROPER VERIFIED STATEMENT DISCLOSING ITS MEMBERSHIP AND THEIR INTERESTS

Securities Industry and Financial Markets Association ("SIFMA") and Loan Syndications and Trading Association ("LSTA", and along with SIFMA, the "Amici") hereby submit this brief (the "Amicus Brief") as amici curiae[1] in support of the objection (the "Noteholder Group Objection", Docket. No. 599) of the Ad Hoc Group of Timber Noteholders (the "Noteholder Group") to the motion of Scotia Pacific Company LLC ("Scopac"), debtor in possession in the above-captioned chapter 11 case, for an order compelling the Noteholder Group to file a statement pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure ("Rule 2019") publicly disclosing the Noteholder Group's membership and certain proprietary trading information of each member (the "2019 Motion", Docket. No. 492), and respectfully state as follows:

[1] By Motion filed contemporaneously herewith, Amici have moved for leave to file this Amicus Brief as amici curiae.

STATEMENT OF INTEREST

1. Amici are two of the nation's leading industry groups in the debt and equity markets, whose members include many of the largest and best-known participants in today's financial markets. While Amici have no view on the underlying merits of the various disputes between Scopac and the Noteholder Group in these bankruptcy cases, Amici are very concerned that an order approving the 2019 Motion will have a detrimental impact on the active and vibrant markets that trade in distressed companies' debt and equity securities and the willingness and ability of many sophisticated parties to participate in future chapter 11 cases.

2. Forcing disclosure of the information Scopac seeks will require public dissemination of highly confidential and proprietary information from certain stakeholders. Amici believe that such a requirement will in all likelihood erect a substantial obstacle to the participation of certain parties and stakeholders in bankruptcy cases. This obstacle will (a) prevent involvement by sophisticated parties that have frequently made positive contributions and offered valuable input in reorganizations and (b) negatively impact the markets that create liquidity in a debtor's securities by hampering the ability of parties to manage their exposures by liquidating their claims and avoiding the delay and uncertainty of a bankruptcy case. Although Scopac and the Noteholder Group are currently at odds in these cases, there are countless examples in other cases where groups of stakeholders have cooperated, many times as "*ad hoc*" committees, to create imaginative and strikingly successful solutions in reorganization cases.

3. SIFMA[2] represents the interests of more than 650 securities firms, banks and asset managers. SIFMA's mandate is to promote policies and practices that work to expand and

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[2] SIFMA represents a diverse mix of securities firms and banks, ranging from large, multi-product firms to companies with special market niches. With offices in New York, Washington, D.C., London, Frankfurt, Brussels and Tokyo and issuer and investor groups worldwide, SIFMA represents the shared interests of securities firms active in all U.S. and foreign markets and in all phases of corporate and public finance.

perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the securities markets and the industry.

4. LSTA is the trade association for all segments of the floating rate corporate loan market, with over 240 members, including broker-dealers, commercial banks, investment banks, mutual funds, merchant banks, and other major financial organizations worldwide. LSTA seeks to foster the development of policies and market practices designed to promote just and equitable marketplace principles and to encourage cooperation and coordination with firms facilitating transactions in loans and related claims. LSTA's mission is to promote the orderly development of a fair, efficient, liquid, and professional trading market for commercial loans and other similar private debt.

5. As associations that focus on the health and vitality of the financial markets, Amici are well situated to address the negative market impact and public interest concerns of granting Scopac's 2019 Motion and submit this Amicus Brief to provide the Court with the benefit of their respective vantage points.

ARGUMENT

I. Requested Disclosure Is Inconsistent With Customary Practice And History Of Rule 2019

6. ***Inconsistent with Customary Practice.*** At the outset, Amici note that, as discussed extensively in the Noteholder Group Objection, with the exception of a single recent decision in the chapter 11 cases of Northwest Airlines Corporation and its affiliated debtors

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SIFMA serves as the voice for the global bond industry, the largest securities markets in the world comprising roughly $50 trillion in outstanding securities. SIFMA is composed of member firms of the former Bond Market Association (BMA) and Securities Industry Association (SIA), each of whose member firms voted to merge the two associations last year.

pending in the United States Bankruptcy Court for the Southern District of New York, which is currently on appeal, counsel for *ad hoc* committees have customarily satisfied the requirements of Rule 2019 by filing a statement disclosing (a) the identity of the members of the *ad hoc* committee, (b) the holdings of *ad hoc* committee counsel, if any, and (c) occasionally, the holdings of the committee members in the aggregate (at par). The commonly held view, which Amici maintain is the proper interpretation of Rule 2019 and consistent with the circumstances that led to the promulgation of Rule 2019 (as discussed below), is that Rule 2019 does not apply to the members of *ad hoc* committees because they represent only their own interests and are not fiduciaries for other stakeholders.

7. It should also be noted that the customary practice of stakeholders maintaining their proprietary trading information in strict confidence is a corollary to a fundamental principle of the market for trading in the securities of bankrupt companies: the value of a claim or interest is determined by the nature of the debtor's obligation under the instrument, not the price paid by the stakeholder asserting its rights under such instrument. It is well-established law that the consideration paid for a claim or interest is irrelevant to the treatment of such claim or interest in bankruptcy. See, e.g., Shropshire, Woodliff & Co. v. Bush, 204 U.S. 186, 189 (1907) (holding that senior bankruptcy claims (there, priority wage claims "due to workmen, clerks, or servants") "did not cease to be within that description by their assignment to another" as "[t]he character of the debts was fixed when they were incurred, and could not be changed by an assignment."); Texas Hotel Secs. Corp. v. Waco Dev. Co., 87 F.2d 395, 399 (5th Cir. 1936) (transfer of claim during bankruptcy "usually does not deprive the claim of any of its incidents"); Resurgent Capital Servs. v. Burnett (In re Burnett), 306 B.R. 313, 319 (B.A.P. 9th Cir. 2004) (claim filed in bankruptcy case by an assignee may not, in absence of evidence of breach of some specialized

duty of assignee, be disallowed solely because assignee does not reveal consideration it paid to assignor) ("[T]he consideration paid by [the assignee] is, as a matter of law, irrelevant to the allowance of [its] claims"), aff'd, 435 F.3d 971 (9th Cir. 2006); In re Executive Office Ctrs., Inc., 96 B.R. 642, 649 (Bankr. E.D. La. 1988) ("Once a claim is assigned, the assignee succeeds to all rights of his transferor.").

8. Courts have repeatedly recognized that to reduce the value of a claim or interest based on the price at which such claim or interest is acquired, is to visit an unearned windfall upon a debtor and to destroy the incentive for investors to purchase distressed claims.[3] Yet that is exactly what will happen if a stakeholder is required to disclose its basis in a debtor's securities. When such information is made available, debtors and other parties in interest will inevitably use such information to their advantage in negotiations over such things as treatment of the security under a plan of reorganization or the price of the security in a subsequent disposition thereof. By simply requiring that such information be disclosed, the terms of

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[3] In the words of the Court of Appeals for the Seventh Circuit:

> The debtor's obligation is to pay his debts. . . . In the absence of some equitable reason, taking the case out of the ordinary rule, the prices which security holders pay for their securities in no [way] affects the measure of their participation in reorganization or their voting power. ***To reduce the participation to the amount paid for securities, in the absence of exceptional circumstances which are not present here, would reduce the value of such bonds to those who have them and want to sell them. This would result in unearned, undeserved profit for the debtor, destroy or impair the sales value of securities by abolishing the profit motive, which inspires purchasers.***

Lorraine Castle Apts. Bldg. Corp. v. Machiewich (In re Lorraine Castle Apts. Bldg. Corp.), 149 F.2d 55, 57-58 (7th Cir. 1945) (emphasis added).

Similarly, the Court of Appeals for the Ninth Circuit flatly rejected any limitation on the rights of a claim purchaser to recover the full value of his claim in bankruptcy:

> Analysis shows the application of such a principle [limiting a creditor's recovery based on the price at which its claim was purchased] would be grossly inequitable to the holder of the . . . debt. It would destroy or impair its sales value. ***Buyers purchase bonds or other secured indebtedness primarily from the profit motive. . .***He expects to realize out of the purchase more than the purchase price, at the same time running the risk of recovering less. Under the proposed equity, a buyer, confined to the maximum of his purchase price, buys nothing but the chance to "break even" or make a loss.

Security-First Nat. Bank v. Rindge Land & Navig. Co., 85 F.2d 557, 563 (9th Cir. 1936) (emphasis added).

negotiation will unavoidably shift from being focused on the obligations of the debtor under the terms of the relevant instrument to consideration of the relative return to the specific stakeholder, thereby effectuating a significant departure from well-settled law and customary practice. Likewise, it should come as no surprise that parties trade in securities with an expectation to make a profit. Disclosure of a party's basis in a security may impair this prospect and ultimately parties may decide not to purchase securities and participate in a restructuring.

9. ***Inconsistent With History of Rule 2019.*** If Scopac's 2019 Motion is granted, the disclosure requirements of Rule 2019 will be visited upon "committees" that do not raise the concerns that the rule was created to address. Since the prospect of such disclosure will force certain stakeholders with relatively small individual positions to choose between participating efficiently in a bankruptcy case, on the one hand, and revealing highly confidential proprietary information and strategies, on the other, many will effectively be unable to organize and act collectively. Therefore, these parties will be disadvantaged in terms of their ability to negotiate with larger stakeholders and debtors and effectively handcuffed by unintended restraints on engaging in collective action. Amici submit this result is inconsistent with Rule 2019's intent of assuring small stakeholders a voice (and a principle of bankruptcy law that encourages settlement and collaboration among parties).

A. Rule 2019's Disclosure Requirements Intended For Representative Committees With Fiduciary Duties

10. The linchpin for Scopac's argument that members of the Noteholder Group should be required to make disclosures under Rule 2019 is the coincidental usage of the word "committee" in both Rule 2019 as well as in the terminology commonly used to refer to a group or consortium of similarly-situated stakeholders that seek to share costs of professional fees in connection with a bankruptcy case. As discussed at length in the Noteholder Group Objection,

the use of the term "committee" in Rule 2019 is a relic of the inclusion of that same term in the Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees issued by the Securities and Exchange Commission in 1937 under the supervision of then-SEC Commissioner (and later Supreme Court Justice) William O. Douglas (the "Douglas Report"), which led to Congress' adoption of sections 210 and 211 of Chapter X of the Bankruptcy Act and, subsequently, Rule 10-211 (also under Chapter X), the direct predecessor of Rule 2019.

11. As the Douglas Report makes apparent, the mention of "committees" contained therein refers to the "protective committees" that typically dominated corporate restructurings during the time period that is the subject of the Douglas Report (i.e., before and during the 1930's). As documented at length in that report, the protective committees served as fiduciaries in a representative capacity for individual creditors that deposited their securities with the representative agents pursuant to one-sided depository agreements. According to the Douglas Report, typical depository agreements at the time essentially gave the protective committees *carte blanche* to agree to virtually any disposition of the securities they held for their depositors while exculpating the fiduciaries from any liability for self-dealing, insider trading and other conflicts of interests, leading to widespread behavior of exactly that sort. Recognizing the rampant abuse of the agency relationship established by the protective committee mechanism, the Douglas Report recommended that committee members be required to disclose their conflicting interests to those stakeholders that the committees would purport to represent. In this respect, the Douglas Report proposed the disclosure requirements found today in Rule 2019 as a solution to an agency problem that is simply irrelevant to *ad hoc* committees who typically

expressly disclaim any intent to represent and do not owe a fiduciary duty to each other or any third parties.

B. Application Of Disclosure Requirements Will Eviscerate Rule 2019's Intent

12. If the Court grants Scopac's 2019 Motion, the chapter 11 process will likely suffer from decreased involvement from all but the largest, most affluent investors. Smaller investors (or large investors with small positions), faced with the prospect of disclosing highly confidential and proprietary trading information, will not coordinate efforts in order to share costs and it will, therefore, become economically irrational for many such stakeholders to actively participate in bankruptcy cases. These parties, many of which are highly sophisticated and experienced in restructuring matters, will be forced to participate individually and bear the significant time and expense thereof, which will ultimately lead many to a business decision to not purchase the security -- to the detriment of those that want to liquidate their positions -- and not become actively involved in a bankruptcy case -- potentially to the detriment of all parties in interest.

13. Such a result would actually run contrary to the broader intent behind Rule 2019 -- i.e., to protect stakeholders from having their claims or interests restructured on terms negotiated by larger stakeholders without proper representation of their interests. As demonstrated by the Douglas Report, the disclosure requirements embodied in Rule 2019 were developed to expose the self-dealing of conflicted protective committees that took advantage of small stakeholders. Presumably, the disclosure of such self-dealing, along with other protections recommended by the Douglas Report, was intended to encourage stakeholders to find alternative ways to represent their interests. Today, the empowerment of stakeholders is often realized by collective action of *ad hoc* committees. To require stakeholders to choose between effective

representation of their individual interests through collectivization and maintaining the confidentiality of their proprietary information, is to thwart Rule 2019's broader aims.

II. Discouraging Collective Action in Bankruptcy Cases Will Likely Decrease Successful Reorganizations

14. Courts have repeatedly recognized that "[j]oint activity by creditors facing a debtor is commonly in the interests of all parties." Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1052 (2d Cir. 1982) (citing Falstaff Brewing Corp. v. New York Life Insurance Co., 513 F. Supp. 289 (N.D. Cal. 1978)); see also United Airlines, Inc. v. U.S. Bank, N.A., 406 F.3d 918, 921 (7th. Cir.) ("Coordination is especially common in bankruptcy, which often is described as a collective proceeding among lenders"), mandate enforced by 409 F.3d 812 (7th Cir.), cert. dismissed, 126 S. Ct. 508 (2005); In re Balderas, 328 B.R. 707, 726 (Bankr. W.D. Tex. 2005) (applying "game theory" to analysis of creditors' incentives, likening isolated creditors' positions to the "volunteer's dilemma" and noting that "creditors do not know what one another are doing with respect to a given motion [and w]ithout that knowledge (and the concomitant ability to coordinate a response and share costs), each creditor will wait for someone else to "fall on the grenade" by filing an objection").

15. If this Court grants the 2019 Motion and requires disclosures of stakeholders' proprietary strategies, such a ruling will have the practical effect of forcing many creditors to act only in their individual capacities. Leaving these stakeholders with no practical choice but to act on their own will compel each of them to resort to the most extreme action available in order to protect its individual claim or interest. See Sharon Steel, 691 F.2d at 1052. Encouraging such action will obviously not foster consensual reorganization and "might well drive [debtors] out of business thereby eliminating any opportunity for [them] to work out of present difficulties and ultimately satisfy [their] debts." Id. "[B]y reducing both losses to creditors and the transaction

costs resulting from bankruptcy, [concerted creditor action] reduces the costs of borrowing and the costs of doing business, all of which is to the consumer's advantage." Id.

16. Specifically, the negative impact of the decreased cooperation that will likely result from granting of the 2019 Motion will be borne by, among others, the following parties.

(i) Individual Claim and Interest Holders. If forced to disclose confidential proprietary trading information and strategies, many investors in a debtor's securities will be less willing to enter the market for such claims or interests. The holders of a debtor's securities will suffer from decreased vitality and diminished liquidity in the markets for such securities, which will drive down the value of those securities. Furthermore, it should be noted that liquid markets provide benefits not only to sophisticated investors that seek out opportunities for investment in bankruptcy situations but also offer those creditors or interest holders that do not wish to endure the time and uncertainty of the bankruptcy process the ability to efficiently liquidate their claims or interests.

Individual securities holders will also be disadvantaged by decreased collective action because individual claimants or interest holders that are forced to bear the costs of their own representation on any given issue (as opposed to sharing the cost with other similarly situated stakeholders in a collective fashion) will be less likely to appear and be heard to vindicate their rights provided for under the securities they hold. Without such representation, recoveries will become more arbitrary, thereby decreasing market efficiency and, consequently, liquidity.

(ii) Creditor Body. It is common practice in large reorganizations for groups of sophisticated investors to retain professionals to negotiate with debtors on their own behalf in order to quickly and efficiently formulate plans of reorganization that maximize recoveries to creditors and equity holders. Other similarly situated creditors will benefit from the actions of these consortiums although they are not represented by these investors because of the protections afforded by the Bankruptcy Code (particularly the "fair and equitable" and "best interest of the creditors" tests of section 1129). By discouraging the collective action of stakeholders, fewer sophisticated and knowledgeable investors will be willing or able to efficiently and effectively negotiate restructurings that have the effect of increasing recoveries for debtors' creditors and interest holders.

(iii) Bankruptcy Debtors. In the present case, Scopac currently purports to see the actions of its organized creditors as "diverting Scopac's attention away from and, therefore, delaying the successful reorganization of its business." 2019 Motion at 10. Nonetheless, it is indisputable that debtors must have counterparties with a stake in the restructuring with which to

> negotiate any plan of reorganization that will ultimately be successful. More and more *ad hoc* committees are forming in recent cases irrespective of the appointment of official committees because of certain stakeholders' view that their specific voice needs additional representation given the complex corporate structures of today's debtors. Because of the class voting requirements of section 1126(c) and (d) of the Bankruptcy Code, in situations where there is no single creditor or equity holder in an impaired class with sufficient holdings to offer an accepting class, it is highly probable that a debtor seeking to reorganize will inevitably have to negotiate with multiple members of a given class and their respective professionals (assuming the debtor can find such parties to negotiate with in the first instance) or it will run the risk that a proposed plan is voted down by parties entitled to vote. Accordingly, debtors may suffer from unnecessary delay and duplication of efforts if stakeholders are discouraged from forming groups represented by professionals with which the debtors can negotiate.

17. Furthermore, imposing the disclosure requirements of Rule 2019 on members of an *ad hoc* committee risks the presumably unintended consequence of creating potential liability for the members by adjudging them representatives for others when, in fact, it is clear their participation is solely intended to represent their own economic interest. Therefore, if the Court chooses to imply a representative capacity upon stakeholders who have not sought to assume such a role, the Court will discourage the productive activity of groups of organized and sophisticated stakeholders in bankruptcy cases.

CONCLUSION

18. Amici fear that firms will conclude that the only rational business decision for parties that buy and sell securities of a debtor or distressed company would be to not participate in a case if required to disclose confidential proprietary information under Rule 2019. This may ultimately lead to firms deciding not to buy distressed securities, which, for reasons discussed above, would likely be detrimental to reorganizations to come.

WHEREFORE, Amici respectfully request that the Court enter an order (i) sustaining the Noteholder Group Objection, (ii) denying Scopac's 2019 Motion, and (iii) awarding such other, further relief as is just and proper.

Dated: April 9, 2007
New York, New York

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