UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

In re:	§	
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SCOTIA DEVELOPMENT LLC,	§	Case No. 07-20027-C-11
	§	Jointly Administered
Debtor.	§	(Chapter 11)

SCOTIA PACIFIC COMPANY LLC'S RESPONSE TO THE NOTEHOLDER GROUP'S OBJECTION TO THE MOTION FOR AN ORDER COMPELLING THE AD HOC COMMITTEE TO FULLY COMPLY WITH BANKRUPTCY RULE 2019(A) BY FILING A COMPLETE AND PROPER VERIFIED STATEMENT DISCLOSING ITS MEMBERSHIP AND THEIR INTERESTS

Scotia Pacific Company LLC ("Scopac") files this Response to the objection (the "2019 Objection") filed by the Ad Hoc Committee of Noteholders (the "Ad Hoc Committee") to the Motion for an order compelling the Ad Hoc Committee to file a verified statement complying fully with the requirements of Bankruptcy Rule 2019(a) (the "2019 Motion"). In support of this Response, Scopac respectfully states as follows:

I.
PRELIMINARY STATEMENT

1. In Northwest Airlines' pending bankruptcy case, the Bankruptcy Court in the Southern District of New York recently faced the exact situation before the Court here and held that an ad hoc committee of equity security holders was a "committee" for the purposes of Rule 2019 and must comply fully with the Rule. *See In re Northwest Airlines Corp*., 2007 Bankr. Lexis 557 (Bankr. S.D.N.Y. February 26, 2007). The court in *Northwest Airlines* heard each of the arguments presented by the Ad Hoc Committee in this case, found them unconvincing and ordered full disclosure pursuant to Rule 2019.

2. In *Northwest Airlines*, just as in this case, the committee or group of equity holders appeared in the case as a committee, filed a notice of appearance as a committee, actively

litigated in the bankruptcy case as a committee, retained legal counsel as a committee, expected its counsel to seek payment from the estate as representing a committee, and gave instruction to the committee's counsel from the committee as a whole. The facts are remarkably similar in this case. Moreover, just as in *Northwest Airlines*, the Ad Hoc Committee argued that it was not the type of "committee" that was subject to Rule 2019. The court in *Northwest Airlines* saw through the word games and so should this Court.

3. On January 19, 2007, the first day of this case, holders of Scopac's secured Timber Notes appeared before this Court through counsel, referring to themselves as an unofficial committee of Timber Noteholders. On February 6, 2007, 19 days after Scopac filed its voluntary petition for chapter 11 bankruptcy, counsel for the Ad Hoc Committee filed a Notice of Appearance (docket no. 203) stating that it served as counsel for that unofficial committee. In each and every one of the numerous pleadings it filed from January 19 through March 16, 2007, and in each and every appearance it made before this Court during the same period, the Ad Hoc Committee held itself out as an unofficial committee. Indeed, in the context of Scopac's request to use cash collateral, the Ad Hoc Committee attempted to leverage its status as "representative" of more than 90% of Scopac's debt into a unilateral amendment to the documents underlying its members' claims. All of the Ad Hoc Committee's actions thus far evince its members' clear intent to collectively affect the course of this bankruptcy case.

4. On March 16, 2007, Scopac filed the 2019 motion. Two weeks later, the Ad Hoc Committee filed an amended notice of appearance claiming that it was no longer an unofficial committee, but rather was now a more casual "group" of noteholders who, notwithstanding the fact that every action taken by the "group" has been on behalf of its members, were all acting independently. This "independent" group of noteholders, however, speaks with one voice

through the same counsel, files pleadings collectively, and, as admitted in the 2019 Objection, takes a "consensus" of the members (i.e., they decide collectively) before the group acts.

5. Rule 2019, by its terms, applies here. The Ad Hoc Committee, or group, is an "entity" that stands in the shoes of its members (i.e. represents their interests) and seeks collectively to leverage the position of all of its members in order to secure a more favorable result for them in this bankruptcy case. The court in *Northwest* noted that "Rule 2019 more appropriately seems to apply to the formal organization of a group of creditors holding similar claims, who have elected to consolidate their collection efforts." *Id.* at *7 *citing Wilson v. Valley Electric Membership Corp.*, 141 B.R. 309, 314 (E.D. La. 1992). This is the precise purpose of the Ad Hoc Committee. As such, the Ad Hoc Committee's argument that Rule 2019 does not apply here is based on an untenable misreading – in fact, a rewriting – of Rule 2019 and should not be countenanced by this Court. Moreover, the Ad Hoc Committee has failed to provide any justification for its refusal to provide the basic factual and financial information required by Rule 2019. Accordingly, the Court should grant the 2019 Motion.

II.
BANKRUPTCY RULE 2019(A) BY ITS VERY TERMS APPLIES TO THE AD HOC COMMITTEE.

6. The Ad Hoc Committee concedes that where a statute or rule is clear on its face, it is the court's duty to apply the statute as written. See 2019 Objection at ¶ 29, *citing United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1995). Rule 2019 provides, in full, that:

> 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, every entity or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement setting forth
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> (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;
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> (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, 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
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> (4) with reference to the time of the employment of the entity, the organization or formation of the committee, or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof.
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> The statement shall include a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

Fed. R. Bankr. P. 2019.

7. Apparently recognizing that it has a problem, namely that the plain language of Rule 2019 requires the Ad Hoc Committee to disclose certain basic facts about its membership, the Ad Hoc Committee deals with the problem in the 2019 Objection by radically misquoting the rule. According to the Ad Hoc Committee, Rule 2019 provides that a "(i) 'a committee' (ii) 'representing more than one creditor' to make certain disclosures and to provide a copy of (iii) 'the instrument' (iv) 'whereby the . . . committee . . . is empowered to act on behalf of creditors.'" 2019 Objection at ¶ 1.

8. To put the argument simply, the Ad Hoc Committee would have this Court judicially amend Rule 2019 so that the Ad Hoc Committee is not required to disclose basic information about its members. It is inappropriate to ask this Court to rewrite a Federal Rule of Bankruptcy Procedure to accommodate the Ad Hoc Committee's desired result of shielding

financial information regarding claims held by market participants who are actively trading their claims. Rule 2019 is clear on its face and applies to the Ad Hoc Committee.

III.
WHATEVER THE AD HOC COMMITTEE LABELS ITSELF, IT REMAINS SUBJECT TO THE PLAIN LANGUAGE OF RULE 2019.

9. Rule 2019, as actually written, requires that *every* entity or committee that represents more than one creditor file a statement comporting with the Rule. The Ad Hoc Committee, probably attempting to avoid the fairly obvious argument that the rule applies to it because it holds itself out to be a committee (and has called itself a "committee" since it was formed in March 2005), unilaterally changed its title from "committee" to "group" after Scopac filed the 2019 Motion. Yet the Ad Hoc Committee has not changed anything other than its name. There is no suggestion that either the organization or operation of the group has changed since its February notice of appearance. The name change, therefore, is entirely nonsubstantive and it does not permit the Ad Hoc Committee to escape its obligations under Rule 2019. It was a committee on the first day of the case and remains a committee today.

10. The Ad Hoc Committee asserts that it cannot be a "committee for the purposes of Rule 2019 because its members do not owe fiduciary duties to one another or to the class as a whole." This argument, however, was tested and failed in the Northwest Airlines bankruptcy case. The Court in *Northwest* held that Rule 2019 was designed not only to protect all members of the class represented by the Committee but also all parties to the bankruptcy case. The bankruptcy court in *Northwest Airlines* recently held:

> Assuming . . . that the Committee does not act as a fiduciary, Rule 2019 is based on the premise that the other shareholders have a right to information as to Committee member purchases and sales so that they make an informed decision whether this Committee will represent their interests . . . . It also gives *all parties* a better ability to gauge the credibility of an important group that has chosen to appear in a bankruptcy case and play a major role.

In re Northwest Airlines, No. 05-17930, at 7-8 (Bankr. S.D.N.Y. filed March 9, 2007) (emphasis added.

11. During a subsequent hearing in which the ad hoc equity committee was seeking to stay the 2019 decision in *Northwest Airlines*, the Court clarified that it need not find that a committee is a fiduciary for the committee to be required to comply with Rule 2019, and that the Court's

> opinion held to the contrary. I'm not saying that these individual funds can't take action in their own interests; I'm just saying that Rule 2019 says that, if they're a group that wants to affect this case – and they certainly do – that they've got to file certain basic information that I didn't make up. I didn't create that requirement. It's on the books, it should be filed.

Transcript of Record at 45, *In re Northwest Airlines*, No. 05-17930 (Bankr. S.D.N.Y. March 15, 2007).

12. The Ad Hoc Committee suggests that the *Northwest Airlines* opinions are wrong because the opinions imply that in order for a creditor to be taken seriously, the creditor must band together with others and act as a group. The Court in *Northwest Airlines*, however, made no such point and was, instead, commenting on the fact that "[b]y appearing as a 'committee' of shareholders, the members . . . implicitly ask the court and other parties to give their positions a degree of credibility appropriate to a unified group with large holdings." *In re Northwest Airlines*, 2007 Bankr. LEXIS 557, at *7.

13. Rule 2019 is clear on its face: every entity, including groups and committees, must file a verified statement comporting with the rule. The Ad Hoc Committee is no exception.

IV.
THE AD HOC COMMITTEE REPRESENTS ITS MEMBERS' INTERESTS.

14. The Ad Hoc Committee next argues that Rule 2019 does not apply in this case because the group does not "represent" the interests of its members. This argument was, also,

tried and found wanting in the *Northwest Airlines* case. *See In re Northwest Airlines*, 2007 Bankr. LEXIS 557, *5-6 ("The Committee's only substantive argument in response is that [Rule] 2019 applies, by virtue of its lead-in clause, only to 'every entity or committee representing more than one creditor[']. . . . [The Committee] contends that no member of the Committee represents any party other than itself and only [its] counsel represents 'more than one creditor[']. . . . However, the Rule cannot be so blithely avoided.")[1] The Court in *Northwest Airlines* found instructive the fact that the equity committee had (i) appeared as a committee, (ii) moved for substantive relief as a committee and (iii) retained and compensated counsel as a committee. Each of these factors is present in this case.

15. The Ad Hoc Committee, at each and every turn of this case prior to Scopac's filing of the 2019 Motion, appeared as a committee; for example, it filed its notice of appearance as a committee. The Ad Hoc Committee has moved for substantive relief as a committee. The SARE Motion was filed by the Ad Hoc Committee, the Ad Hoc Committee filed *three* responses to the various motions to change venue, the Ad Hoc Committee made a collective and concerted effort to defeat Scopac's request to use "its" cash collateral. The Ad Hoc Committee cannot now be heard to argue that in each of these instances the "group" was not acting collectively.

16. At the center of the requirement of representation is some measure of collective action. There is no question that a group, by its very nature, acts collectively. Indeed, when

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[1] The Ad Hoc Committee spends considerable time in its papers arguing that *Northwest Airlines* was wrongly decided and that the reasoning set forth therein does not apply in this case. This argument is an illusory statement as each asserted distinguishing fact has absolutely nothing to do with the court's decision. The Court in *Northwest Airlines* merely applied the plain language of Rule 2019. The equity committee in *Northwest* did *not* appeal the decision subjecting the committee to Rule 2019. A Motion for Reconsideration was filed by a splinter group of members of the committee, and the court considered that motion a "nullity." The only pending appeal of the Northwest Court's 2019 opinion regards the Court's decision not to allow 2019 statements under seal. Moreover, Rule 2019 is not dependant on the complexity of the case or the of capital structure of the parties. The rule requires full disclosure under all circumstances.

Scopac is able to commence negotiations with the Ad Hoc Committee regarding the plan of reorganization, Scopac fully expects that the "group" will seek a resolution that is fair for all the members of its class; the negotiations with this Ad Hoc Committee will *not* proceed on a case by case basis for each member of the Ad Hoc Committee or for each Timber Noteholder (of which there are somewhere close to 200). As the Court held in *Northwest Airlines*, this is the very situation contemplated by Rule 2019:

> [b]y acting as *a group*, the members of this shareholders' Committee subordinated to the requirements of Rule 2019 their interest in keeping private prices at which they individually purchased or sold the Debtors' securities . . . [I]n negotiations between a committee and other parties in interest, the question is whether a tranche is being treated fairly, not the price at which individual members might be induced to sell.

In re Northwest Airlines, No. 05-17930, at 6-7.

17. There can be no doubt that Rule 2019 applies to groups, such as the Ad Hoc Committee, appearing in bankruptcy cases and purporting to stand in the shoes of its members. The Ad Hoc Committee has not provided any justification for not applying Rule 2019 as written.

V.
THE ABSENCE OF AN INSTRUMENT IS IRRELEVANT.

18. The Ad Hoc Committee next argues, amazingly, that it should not have to abide by Rule 2019 because it does not have an "instrument" governing its operations. Rule 2019 provides that a verified "statement shall include a copy of the instrument, *if any*, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors . . . ." (emphasis added). The Rule is clear that an entity otherwise subject to the rule that does not have an "instrument" does not have to create one just to comport with the rule. There is absolutely no suggestion in Rule 2019, or elsewhere, that compliance with the remaining requirements of the rule is somehow dependant on the existence of an instrument.

VI.
AT THE VERY LEAST, THE AD HOC COMMITTEE IS AN "ENTITY" SUBJECT TO RULE 2019.

19. The Ad Hoc Committee argues that because it is not a "committee" anymore it has no disclosure obligations under the Bankruptcy Rules. Rule 2019, however, is not so narrow. The rule also applies to any "entity" that represents more than one creditor, and it is obvious that this "group" is an entity subject to the rule.[2] Merriam Webster's Dictionary defines an "entity" as, among other things, "an organization (as a business or governmental unit) that has an identity separate from those of its members." Merriam Webster's dictionary further defines a "group" as "a number of individuals assembled together or having some unifying relationship." Implicit in these definitions is that a group has a separate identity from its members and therefore could stand as an "entity."

20. An entity remains subject to certain of the disclosure requirements of Rule 2019. An entity must disclose "the name and address of the creditor . . . the nature and amount of the claim or interest and the time of acquisition thereof [and] a recital of the pertinent facts and circumstances in connection with the employment of the entity . . . ." To the extent that the entity wants to withhold the amount of the claims, the entity must demonstrate that "its to have been acquired more than one year prior to the filing of the petition." The Ad Hoc Committee's 2019 statement sets forth the names of the parties; the statement fails to provide any of the

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[2] The Ad Hoc Committee argues that this portion of the definition is not applicable as Scopac did not argue in the 2019 Motion that the Ad Hoc Committee was an "entity." *See* Ad Hoc Objection at ¶16 n. 6. . First, the text of Rule 2019 does not change, regardless of what Scopac argues or does not argue. Second, at the time the 2019 Motion was filed, the Ad Hoc Committee was holding itself out as an unofficial committee and, as a result, there was absolutely no need to argue that the Ad Hoc Committee was an "entity". Moreover, the 2019 Motion is not so limiting. *See* 2019 Motion at ¶ 15 ("Pursuant to Rule 2019(a), any entity or committee representing more than one creditor or equity security holder, such as the Ad Hoc Committee which admittedly represents a committee of *numerous* note holders, must file a verified statement setting forth the information required by that rule.")

information required by the rule. The Ad Hoc Committee's 2019 statement is defective on its face and the Court should grant the 2019 Motion.

VII.
THE AD HOC COMMITTEE HAS PROVIDED NO JUSTIFICATION FOR EXEMPTION FROM THE REQUIREMENTS OF RULE 2019

A. The Bankruptcy Code and Rules Actualize Public Policy Promoting Full and Public Disclosure.

21. The Bankruptcy Code and Rules employ the salient public policy interest in favor of access to information about litigants in a bankruptcy case. *See In re Food Mgmt. Group LLC*, 2007 WL 458022, at *6 (Bankr. S.D.N.Y. Feb. 13, 2007) (the public policy interest in favor of public disclosure "is at its zenith where issues concerning the integrity and transparency of bankruptcy proceedings are involved"); *Ferm v. United States Trustee (In re Crawford)*, 194 F.3d 1, 7 (9th Cir. 1999) (access to bankruptcy case information "fosters confidence among creditors regarding the fairness of the bankruptcy system."); *see also*, *Express News v. Blackwell (In re Blackwell)*, 263 B.R. 505, 508-09 (W.D. Tex. 2000) (the framework regarding protecting information that should be disclosed in a bankruptcy case "begins with the presumption that parties will not proceed in public litigation anonymously.")

22. The Ad Hoc Committee has provided no justification for exempting it from the requirement that it make full public disclosure and comply with Rule 2019.

B. The Cases Cited by the Ad Hoc Committee are Distinguishable and Actually Support Compliance with Rule 2019.

23. Both cases cited by the Ad Hoc committee in support for its contention that the court should exempt it from the disclosure requirements of Rule 2019 are readily distinguishable. First, *Lloyd's, London v. Baron & Budd PC (In re Kaiser Aluminum)*, 327 B.R. 554 (D. De. 2005), is factually distinct from the case at bar. In *Kaiser*, the bankruptcy court provided that attorneys representing "thousands of asbestos personal injury tort claimants" were allowed to

submit "exemplars" instead of thousands of actual engagement letters. *Id.* at 559-560. Here, the Ad Hoc Committee does not have thousands of engagement letters, indeed it claims not to have even one. Moreover, the opinion in *Kaiser* reflects sensitivity to both the purposes of Rule 2019, as argued by the Ad Hoc Committee, and "the complexities of mass tort litigation." *Id.* Scopac is not seeking to have an entire class of persons who may be suffering from serious medical conditions relating to asbestos exposure file private medical information on the public docket in this bankruptcy case. Scopac is merely asking that a group representing parties who voluntarily purchased Scopac's notes comply with its obligations under the Bankruptcy Rules.

24. In *In re I.G. Servs. Ltd.*, 244 B.R. 377 (Bankr. W.D. Tex. 2000), a group of non-U.S. creditors participating in a complex series of ancillary proceedings under Section 304 of the Bankruptcy Code argued that they could be subject to physical harm or death in their home country as a result of being forced to disclose their holdings on the public docket. *Id.* at 380. A newspaper attempted to argue, among other things, that the court should require these creditors to abide by their obligations under Rule 2019. The Court held that in light of the circumstances, it would alter the requirements under Rule 2019 and not require the creditors to disclose their information. *Id.* at 383. This case is also inapplicable, as the Ad Hoc Committee has not alleged that its members are under any threat of physical harm that would require them to withhold the basic information required by Rule 2019.

25. Perhaps more important, however, is that *In re I.G. Servs.* was vacated and set aside "in its entirety" by the district court on appeal. See *Express News v. Blackwell (In re Blackwell)*, 263 B.R. 505, 510 (W.D. Tex. 2000):

> The Court has begun, as directed by the Fifth Circuit, with the presumption that the names of these investors must be made public. The Court has carefully considered the evidence offered by the investors to overcome this presumption . . . . After reviewing the admissible evidence, as well as the evidence of questionable admissibility, the Court

finds that the evidence, taken together, is inadequate for the task of rebutting a presumption of openness. Therefore, the Court will order that the confidentiality order, in its entirety, be stricken.

C. The Timber Notes Are Freely Traded and Information Regarding The Case Should be Provided to All Potential Purchasers Through the Bankruptcy Case.

26. Rule 2019 is a "disclosure rule", it requires groupings of creditors to provide the universe, members and potential members, with basic information. Rule 2019 is not, in any way, linked to the representative capacity of the group.

27. Moreover, the potential universe of Timber Noteholders is not, at this time, fixed. The Timber Notes are publicly traded. To the extent that any member of the Ad Hoc Committee is trading in the Timber Notes, every potential purchaser has a right to know the constitution of the group appearing in this bankruptcy case and purporting to represent the interests of the Timber Noteholders. In a similar context in this case, the Ad Hoc Committee argued that it should be allowed to credit its counsel's fees against the outstanding principal of the Timber Notes. When questioned about the propriety of such a proposal in light of the fact that the Timber Notes were being traded, the Ad Hoc Committee represented that its members would bear the responsibility to disclose pertinent information about the group's position in this case. *See* Transcript of Hearing at 38, *In re Scotia Development LLC*, et al., (07-20027 March 9, 2007) ("This will be a court order, respectfully, it will be public record, so I think they will know that. We will certainly tell all our holders who do hold all the notes now so they will know to tell any buyers of their notes that this is the case.") The Bankruptcy Rules, however, shift the responsibility of information flow from a private courtesy between buyer and seller to a public obligation to tell the world who exactly is appearing in a bankruptcy case on behalf of similarly situated holders of these notes. *See In re Northwest Airlines*, No. 05-17930, at 6-7 ("[b]y acting as *a group*, the members of this shareholders' Committee subordinated to the requirements of

Rule 2019 their interest in keeping private prices at which they individually purchased or sold the Debtors' securities.").

28. The flow of information becomes particularly important where, as here, the members of the Ad Hoc Committee are neither fixed nor given a sense of each other's holdings. *See* 2019 Objection at ¶ 12 ("The individual holdings are provided only to Bracewell and on a strictly confidential basis; they are not shared with other members of the Noteholder Group, with the group's Texas counsel . . . or with any other professional for the Noteholder Group.") There is absolutely no justification based on these facts for releasing this group from its obligations under Rule 2019.

VIII.
SCOPAC IS NOT ATTEMPTING TO INFRINGE THE RIGHTS OF THE TIMBER NOTEHOLDERS.

29. Scopac did not write Rule 2019. The Rule has been on the books for over 70 years and should come as no surprise to groups appearing in bankruptcy cases. The Ad Hoc Committee admits that it was aware of the rule, but that it believed a statement from its attorneys was sufficient, and has been sufficient in the majority of bankruptcy cases. This is simply not adequate justification for perpetuating non-compliance with a clear rule. *See In re Northwest Airlines*, 2007 Bankr. LEXIS 557, at *10 (holding Rule 2019 "is long-standing and there is no basis for failure to apply it as written.").

30. Furthermore, Scopac is not seeking to deny any party full participation in this case. Scopac welcomes the participation of the Timber Noteholders and of the Ad Hoc Committee. However, to the extent that the Timber Noteholders wish to appear collectively in this case, they are subject to the terms of Rule 2019 and must file a verified statement complying fully with the rule. Until such a statement is filed, Rule 2019(b) provides that the group should not be allowed to participate in these proceedings.

WHEREFORE, Scopac requests entry of an order (1) compelling the Ad Hoc Committee to file a verified statement pursuant to Bankruptcy Rule 2019(a), (2) stating that the Court will refuse to further hear the Ad Hoc Committee unless and until it files an adequate verified Rule 2019 statement; and (3) granting any other relief this Court deems just and proper.

Respectfully submitted this 8th day of April 2007.

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