American College of Bankruptcy Program

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"Independent Directors, CROs and Examiners: Managing Conflicts in Multi-Debtor Chapter 11 Mega-Cases"

Panelists:

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When a company faces financial distress, the circumstances are generally novel for the business. The board and management likely have no experience in restructuring and often face tough choices. In recent years, distressed companies have become increasingly likely to appoint individuals or groups of individuals, previously unaffiliated with the company, to act as chief restructuring officers and/or independent directors.

Chief restructuring officers can provide current management with expertise, additional resources and trusted objectivity. Special committees of independent or outside directors, and the directors themselves can also to expand special restructuring expertise. These committees or directors can also provide conflict free decision-making where company insiders are likely to be investigated, or there are intercompany conflicts such as claims or shared operations. The appointment of CROs, independent directors or special committees by a debtor or prospective debtor has become a common tool in multi-debtor chapter 11 mega-cases.

No one would disagree that the process of bringing consensus to official committees, ad hoc groups and other dispirit interests is a significant set of challenges. Absent fraud or gross mismanagement, the bankruptcy debtors are the best to orchestrate the process of bringing all parties to agreement during the exclusive periods as they have the broadest duties – only the debtor has fiduciary duties that flow to all constituents. By contrast, committees – official and unofficial have duties to their constituents only. Governance which allows the debtor or debtors to continue this process, subject to access to judicial supervision, presents an important approach to consensus.

Often the debtor and other constituencies, including ad hoc and official committees have differing views on a particular restructuring issue or approach. These disagreements, should not in and of themselves be grounds to prevent the debtor from pursuing a particular path or strategy. If the debtor is disabled from taking action or leading on a particular matter, particularly if it relates broadly to the restructuring, the bankruptcy case can languish and or fall into a morass of litigation and administrative expenses. Dockets are rife with these results. By resolving potential conflicts of interest that can sideline debtors through taking steps to ensure independent governance, debtors can remain as the principal driver in the bankruptcy process, and the inter-constituency tension that Congress envisioned in enacting chapter 11 can remain in place to help to drive consensus.

1. What is an independent corporate director?

While the term “independent director” has no absolute and concrete definition, but in substance, it is a director with no material relationship (personal or financial) with the corporation. An independent director cannot be an employee or officer of the corporation.

Most corporate decision-making if it satisfies the duties of care and loyalty are subject to the "business judgment" rule, which presumes that directors make business decisions in the best interests of the corporation.

Decisions where board members have a conflict-of-interest, or affiliated transactions without independent review are subject to the "entire fairness" test. Independent directors and a proper independent decision process can protect the proper discharge of fiduciary duties by a corporate board and enable the business judgment standard in decision-making, even in transactions involving insider conflicts. This can also be true in the context where independent directors consider shareholder derivative actions against their board.

In connection with corporate restructuring, a special restructuring committee of independent directors can be appointed to "special committees" to help the company navigate the restructuring process, monitor current insider management, and make well-considered decisions which will necessarily be scrutinized for bias in the a chapter 11 reorganization.

2. When is it beneficial for a restructuring corporation to form a special committee, appoint independent directors or a chief restructuring officer?

The mega-corporate chapter 11 case generally involves multiple companies – sometimes dozens or more, usually represented by the same law firm.

During the case, there may be corporate actions that create conflicts among cases and interests. A few examples:

- a sale of a subsidiary whose interests diverge from other corporate entities;
- a need to settle intercompany claims;
- the interests of equity in contrast to the interests of creditor or other senior groups.

In general, the appointment of an independent director creates a decision-making process that is thorough, honest and independent. The presence of a newly added independent director can help restore creditor confidence in the company.

An independent director can also validate an action, whether it be a course of action or an approach to reorganization and provide needed expertise and specialty advise for the reorganization process. The utilization of an independent director in these contexts is simply a matter of good corporate governance and "best practices."

A few case examples:

***In re Edison Mission Energy*, No. 12-49219 (Bankr. N.D. Ill.)**

Edison Mission Energy, a group of unregulated power generation subsidiaries of Edison International filed chapter 11 in 2012, Case No. 12-49219, U.S. Bankruptcy Court, Northern District of Illinois. Based in Santa Ana, California, EME owned and operated 1,700 MW of wind power; 1,600 MW of gas-fired capacity; 4,300 MW of coal-fired capacity, and 400 MW of oil and waste coal-fired capacity, principally in California, Illinois, Pennsylvania and West Virginia. The company suffered financially for a number of years following the 2008 recession which resulted in reduced power demand, while wholesale power prices fell with cheaper natural gas, making it challenging for Edison's coal-fired plants to remain competitive.

At bankruptcy exit in 2014, NRG Energy acquired all of the assets of EME for $2.64 billion. Along with the closing of the NRG sale, the company's settlement with its parent, Edison International, also closed. EME's creditors received roughly $3.2 billion in cash and about $400 million in NRG stock against unsecured claims of roughly $3.824 billion.

Prior to the filing, EME hired two experienced restructuring professionals, Hugh Sawyer and Jake Brace to serve as independent directors. Along with a number of restructuring decisions made independent of Parent directors, the independent directors decided executive compensation and bonuses for Edison's inside management .

Over objections, the court agreed with the independent directors and approved the payments as appropriate incentive payments under the Bankruptcy Code, finding that: "[t]his is an incentive-for-performance plan" and "[t]he purpose is to increase stakeholder value."

While this may seem a small matter in the grander scheme of a case of this size, the independents here displayed the importance of independent operational decision making on matters that creditor and other constituencies may may be attempting to secure leverage on unrelated matters, even where it may not maximize corporate value.

***In re Maxus Energy Corporation*, No. 15-11501 (Bankr. D. Del.)**

Prior to filing for bankruptcy, the board of directors for Maxus Energy Corporation appointed two independent directors to examine the historical transactions, interrelationships, and course of dealings between Maxus and its corporate parent, YPF S.A. in order to identify potential claims arising from that relationship.

The independent directors, following diligence, agreed to settle the claims of Maxus and YPF. In June 2016, Maxus filed for bankruptcy seeking court approval of the settlement. As a result of YPF's control of the Maxus board and its roles as the settlement counterparty and postpetition lender, Maxus, at the encouragement of its creditors, expanded the scope of the independent directors' authority over key restructuring issues:

- The independent directors were given exclusive authority over any claims, transactions, litigations, disputes, arrangements or other matters among Maxus and YPF, including a YPF settlement agreement.

- In addition, the independent directors became the sole arbiters of any matter deemed a "conflict matter" (broadly defined as anything involving the debtors and their parent entity and nondebtor affiliates).

By delegating exclusive authority over significant case matters to independent directors, Maxus managed to overcome creditor challenges arising from the relationship between with its parent company which led to creditor support, and a timely bankruptcy exit.

***In re Cengage Learning, Inc.*, No. 13-44106 (Bankr. E.D.N.Y.)**

In 2007, Apax Partners LLP, the equity sponsor of Cengage Learning, Inc., acquired Cengage for $7.75 billion. Shortly thereafter, Cengage faced a precipitous financial decline arising from, among other things, a change in the platform for the delivery of textbooks – from analog to digital. Cengage filed for bankruptcy to reduce its debts by approximately $2 billion. Of note, prior to the bankruptcy filing, Apax purchased $1 billion of Cengage debt at a discount.

In July 2013, Richard Feintuch—a former Wachtell, Lipton, Rosen & Katz restructuring partner with over twenty years of restructuring experience – was appointed as an independent director of Cengage. Feintuch hired a law firm and investigated whether the company's equity sponsor, Apax Partners, violated its fiduciary duties in acquiring some $850 million of the company's pre-petition first-lien debt on the open market. Feintuch reported that "it is not in [the company's] best interest to pursue claims against Apax [Partners]."

***In re Frontier Communications Corporation,* No. 20-22476 (Bankr. S.D.N.Y.)**

Frontier Communicatons was a provider of telecommunications services in 29 states and the country's fourth largest incumbent local exchange carrier. After a series of acquisitions which left the company with over $17.5B of debt, the company lost almost a quarter of its customers and was facing insolvency in late 2018. It also badly needed to invest in more fiber connectivity to maintain its competitiveness but was unable to do so due to its high debt load.

To assist with assessing its options, the company appointed four independent directors who had extensive restructuring and turnaround experience and also significant telecom experience. Rob Schriesheim became chairman of the newly formed Finance Committee and was joined by Kevin Beebe, Paul Keglevic, and Mohsin Meghji. The Finance Committee was charged with developing a new business plan and with evaluating various strategic restructuring and transaction alternatives to rectify the company's poor balance sheet.

Over more than a two-year period stretching from early 2019 through the filing in April 2020 and emergence in April 2021, the Finance Committee led a comprehensive program that included delevering Frontier by over $10B, selling the Pacific Northwest states to raise cash, refinancing the secured debt during chapter 11, renegotiating with unions, and keeping

unsecured trade creditors unimpaired. The restructuring was achieved on a largely consensual basis with the various creditor groups after many months of diligence and negotiations, led by the Finance Committee and the company's advisors. The original board was kept advised and voted on key decisions, but running the restructuring was almost fully delegated to the newly appointed restructuring experienced directors.

In addition to the very successful balance sheet restructuring, the Finance Committee led a business transformation process to replace senior management and turn around the operations to eliminate continuing sales to new customers with a negative value. The company also improved its customer service and sales processes such that it was able to reverse the trend from losing fiber customers on a net basis every month to adding customers.

Today the company has an entirely new management team and a $3.4B market cap post emergence.

In an unconventional move, upon signing of the Restructuring Support Agreement, the Consenting Noteholders were given two observer spots on the Finance Committee throughout the bankruptcy case and worked collaboratively throughout the restructuring. One of those observers became the new Board Chairman at emergence.

3. Can the existence of an independent director or CRO, supplant the need for a trustee or examiner?

In recent years, distressed companies have become increasingly likely to appoint particular individuals or groups of individuals, previously unaffiliated with the company, to act as chief restructuring officers and/or independent directors. Chief restructuring officers are frequently hired in distressed situations to provide current management with additional expertise. Indeed, the company's secured creditor may require it in a default scenario as a condition to a restructuring or forbearance.

A few discussion examples here are discussed below in Question 4, but another case of note, albeit, 10 years past is Tribune Media Company, no. 08-13141 (Bankr. Del).

4. Are there circumstances when an examiner is preferred element of independence and objectivity as an additional measure?

On certain occasions, the bankruptcy process, transparency and integrity can only be defended through the appointment of an examiner.

Example:

In re Purdue Pharmaceuticals, Case No. 19-23649 (Bankr. S.D.N.Y.)

In the Chapter 11 case of Purdue Pharma, filed in the U.S. Bankruptcy Court for the Southern District of New York Bankruptcy Court in September 2019, the Purdue debtors stated that the special committee was comprised of "four blue-chip restructuring and pharmaceutical professionals, none of whom had any prior connection to the Sackler Families."

However, the independence of that special committee was challenged by a parent — whose child allegedly died as a result of the opioid epidemic — who sought the appointment of an examiner.

On June 16, U.S. Bankruptcy Judge Robert Drain ordered the appointment of an examiner with limited powers tasked with investigating whether the Purdue special committee, "in directing that the Chapter 11 plan ... to be filed and pursued, was acting independently."

> **See Motion for Appointment of Chapter 11 Examiner, In re Purdue Pharma LP – Appendix 1**
>
> **See Debtors' Opposition to Motion for Order to Appoint an Examiner, In re Purdue Pharma LP – Appendix 2**

While the Code provides that an examiner is mandatory in circumstances which are not a high bar, in practice, case application seem to be largely sui generis based upon the unique facts at issue.

5. How have independent directors and their role been criticized in bankruptcy cases?

Because the existing board of directors generally appoints the independent directors in accordance with its bylaws, true objectivity sometimes comes into question.

While this is the traditional "best practices," approach to allow the board to act in the face of interested directors. This approach has been criticized by counsel in a number of bankruptcy cases, particularly where there is a desire by an official committee or other creditor constituency to exert more control of the direction of the case – sometimes well justified.

The main criticisms:

- The independent director has been recommended by main bankruptcy counsel and is a "figure head" and will approve any proposal supported by the main board;
- The board is motivated to appoint an independent who will not disrupt the approach of the inside directors; and,
- While the appointed independent director may have no material relationship (personal or financial) with the corporation, often the

independent directors in a bankruptcy case have acted in that capacity in several cases, and thus have personal and professional relationships with the main case professionals and an indirect financial interest.

These criticisms most certainly spawn a need to be thorough and thoughtful in the appointment of independent directors. That said, many of the foregoing criticisms, seem to assume venal characteristics which may apply equally, to all reorganization constituents – but each require integrity both actually and visually. Thus, the appointment and use of independent directors can only be efficacious for their purpose, if both process and powers are appropriate.

Debtor corporate governance which includes independent directors has also been criticized for attempting to supplant the role of Examiner or UCC. Specifically:

- Independent directors often take on the role of investigator in restructuring cases. Undoubtedly, this may lead to tension between independent directors and the examiner or creditors' committees.
  - However, even though a creditors' committee may view the use of an independent investigation as usurping its role, creditors' committees certainly retain remedies (standing motions, etc.) and will employ them irrespective of the appointment of independent directors.
- In certain situations, a court still may appoint an examiner to investigate and provide recommendations for various reasons, even though a committee and the debtor, are pursuing an investigation in parallel.
- The claim investigation process in bankruptcy has become an hugely expensive proposition – where independent board members are not trusted, examiners are being appointed, and each ad hoc committee, in addition to the official committees, seeks to be involved in the investigation.

6. Do some or all of these criticisms sometimes have merit?

A few examples:

***In re Neiman Marcus Group Ltd., LLC*, No. 20-32519 (Bankr. S.D. Tex.)**

A compelling example and cautionary tale of the importance of strict adherence to duties across constituent groups.

Neiman Marcus is luxury fashion retailer founded in 1907 in Dallas, Texas. In 2013, Ares Capital and the Canadian Pension Plan Investment Board purchased the Company for about $6.0 billion. In part, to diversify from traditional brick and mortar retail, in 2014 the Company purchased MyTheresa, a German luxury e-commerce platform.

After investigations by the Committee and the Company's disinterested directors concerning claims against the Sponsors relating to the MyTheresa transaction, the parties entered into a global settlement resolving estate claims relating to the transaction. As part of that settlement, Neiman Marcus Group Inc. would contribute 140 million shares of Series B preferred shares in MyTheresa to the Debtors' estates, which would then be contributed for ultimate distribution to non-deficiency general unsecured claim holders. In part to create liquidity for the recipients of such shares, Committee member Marble Ridge agreed to back stop the purchase of 60 million Series B shares at $0.20 per share (which effectively means Marble Ridge would purchase such shares for $0.20 from holders seeking to sell). On July 31, 2020, Jefferies contacted the Committee's financial advisor and also indicated an interest in purchasing all 140 million Series B shares.

Two independent directors – Marc Beilinson and Scott Vogel – were tasked with investigating allegations of fraudulent asset transfers related to MyTheresa.com.

Marble Ridge, a hedge fund that challenged the MyTheresa asset transfer, requested a court-appointed examiner lead the investigation of the transfer. Specifically, Marble Ridge argued that the two directors appointed by the Company's board were not independent since (i) they could be removed at any time; (ii) had numerous business and professional ties to equityholders, and their professionals; and (iii) Mr. Beilinson served on Neiman's non-bankruptcy parent company before being appointed to Neiman's board.

When Judge Jones challenged Mr. Beilinson on the legal issues of the case and the role of the independent directors, according to Judge Jones, Mr. Beilinson was unable to articulate exactly what he was investigating. This deeply concerned Judge Jones, leading him to question the quality of the investigation. He went on to state that he was disappointed to see an "unprepared, uneducated and borderline incompetent" witness put on the stand.

While Judge Jones said he would grant the motion, he indicated that the investigation would be limited to a three-week examination of the independent directors' management of the case with another week to do a report. Marble Ridge declined this proposal and withdrew the motion.

Juxtapose this ruling to a development later in the case:

Marble Ridge and Kamensky became the focus of various civil and criminal suits, including, (1) On August 26, 2020, the Company filed a complaint against Marble Ridge seeking, among other things: compensatory damages, subordination of Marble Ridge's claims to other general unsecured claims, and a multi-million dollar fine and (2) on September 3, 2020, Kamensky was arrested and charged by United States Attorney's Office for the Southern District of New York for fraud in the offer or sale of securities, extortion, bribery, and obstruction of justice, each of which carries a 5–20 year maximum sentence. On September 25, 2020, the Company announced an agreement in principle with respect to its claims against Kamensky and Marble Ridge. The terms of the deal included Kamensky agreeing to

(1) never serve on another creditors' committee; (2) reimburse $1.4 million to the debtors' estates for fees and costs incurred to date; (3) subordinate Kamensky's 2.15% interest in the Marble Ridge Master Fund to the interests of other creditors; (4) donate $100,000 to charity; and (5) perform 200 hours of community service. The settlement did not cap the amount of loss calculated in future criminal proceedings.

On February 3, 2021, Kamensky pled guilty to one count of bankruptcy fraud, which carries a maximum sentence of five years in prison.

The circumstances that led to Marble Ridge's (and Kamensky's) undoing involved a perfect storm of facts and events, and serves as a cautionary tale. It provides a striking and unequivocal example of a committee member seeking to leverage its position on the committee, and information obtained in connection with the same, to benefit itself.

As we know, once formed and appointed, the committee owes duties, including the duties of care, loyalty, good faith, and candor, to all unsecured creditors in an applicable bankruptcy case. Accordingly, each member of the committee similarly owes fiduciary duties to all unsecured creditors, as well as to the other committee members. The committee and its members do not owe fiduciary duties to the estate as a whole.

This case exposed, quite prominently, the importance of scrupulous adherence to duties, both in appearance and in fact, by not only the debtor, but also other official case constituents. But also, the importance of arming all constituents to act as envisioned by the Code. It also highlights the key role of the Court as well in holding parties faithful to their role and duties.

In re Payless Holdings, LLC, Case No. 17-42267-659

Payless was founded in the 1950s as a no-frills destination for fashionable shoes at affordable prices. In 2012, Payless was purchased by several private equity firms Blum Capital, and Golden Gate Capital as part of a $2 billion buyout of its parent company. Subsequent to the acquisition the Company, like many bricks and mortar retailers suffered from flat and declining sales, as shoppers shifted their purchases to online and discount stores, and away from malls.

Payless filed bankruptcy in the United States Bankruptcy Court for the Eastern District of Missouri. Prior to the filing, Payless appointed an independent director to its board to investigate all third-party claims, including against insiders based upon the buyout and insider transfers. After the bankruptcy filing, an official committee was formed which sought to investigate and prosecute claims against the private equity firms that acquired the businesses.

In connection with the Debtors' plan process, the independent director worked to mediate the differences between the private equity firms, the official committee and secured creditors, resulting in a comprehensive settlement at exit.

<u>See</u> Objection of the Official Committee of Unsecured Creditors to Debtors' Motion for Entry of an Order (I) Approving the Adequacy of the Debtors' First Amended Disclosure Statement, etc. – Appendix 3

In re Nine West Holdings, Case No. 18-10947

Another victim of the declining retail landscape, Nine West Holdings Inc. filed chapter 11 in 2018. Nine West was owned by Sycamore Partners Management, which took a controlling stake in the Company in 2014. It secured a $300 million DIP loan to help fund its operations during the bankruptcy case. Prior to the filing, the Company appointed two independent directors to investigate potential insider claims and to make key reorganization decisions without affiliation with the private equity owner.

Several years before the bankruptcy filing, Sycamore split Jones into six different companies: Nine West Group, One Jeanswear Group, Jones New York, the Kasper Group, Stuart Weitzman and Kurt Geiger. The Jones Group was renamed Nine West Holdings and became parent to Nine West Group and One Jeanswear Group. Later in 2014, Anne Klein, Easy Spirit and NW Jewelry Group were split into separate operating companies of Nine West. Once a creditors committee was formed in the case, it sought detailed discovery relating to the transactions, and the Office of the United States Trustee sought the appointment of an examiner to investigate claims. Creditors accused Sycamore Partners of carving out valuable company assets to sell to itself, ensuring a profit for the fund even as the Company itself headed toward bankruptcy, and also alleged that the Company could be hurt if Sycamore-owned department store chain Belk refused to buy from the Company.

The Court also appointed a mediator to aid in the resolution of the insider claims. Notwithstanding, the Committee's position that the independent directors were not in fact independent, it did not favor the examiner appointment. Nine West confirmed a plan of reorganization just under a year after filing which provided for the transfer of majority equity ownership to its principal secured creditors, CVC Credit Partners and Brigade Capital, and for the settlement of all claims by the estate against Sycamore.

<u>See</u> Order Approving Motion of Aurelius Capital Master, Ltd. For the Entry of an Order Approving Specified Information Blocking Procedures and Permitting Trading of Claims of the Debtors on the Establishment of a Screening Wall – Appendix 4

<u>See</u> Motion of Official Committee of Unsecured Creditors for the Entry of an Order Pursuant to Bankruptcy Code Section 105 and Federal Rules of Bankruptcy Procedure 2004, 9006, and 9016 Authorizing Expedited Discovery of the Debtors and Third Parties – Appendix 5

7. **Is a special committee and independent directors properly formed or elected properly subject to these issues? Are there best practices for special committees, independent directors and CROs?**

<u>In re Energy Future Holdings, Case No.</u>

EFH filed chapter 11 in the District of Delaware on April 29, 2014, to restructure nearly $49 billion in debt. In connection with the filing, EFH entered into an agreement with a number of its major creditors to restructure around $40 billion of outstanding debt. EFH's debt resulted from the leveraged buyout of its predecessor company, TXU Corp. Investors, principally KKR and Texas Pacific Group, invested $8 billion in equity and obtained commitments for another $37.35 billion in financing—not all of which was expected to be drawn or used at closing—to purchase TXU. After the acquisition TXU then changed its name to Energy Future Holdings Corp. and began transitioning the Company into several indirect subsidiaries, including Texas Competitive Energy Holdings, the unregulated side —which owned Luminant and TXU—and the state regulated side Oncor Electric Delivery Holdings Company LLC. EFH remained profitable after the acquisition, but decreasing natural gas prices decreased profitability and ultimately caused the company to file chapter 11 in Delaware.

The filing and the initial motions in the case, including administration consolidation, met with significant opposition from numerous constituencies. Because of potential conflicts between estates holding the material assets, independent directors were seated at the parent and the key operating subsidiaries. When the Debtors sought to commence a sale process for the regulated Oncor business, various creditor groups opposed the motion. Contentious litigation ensued resulting in the hiring of separate counsel and financial advisors directed exclusively by the independent directors.

After months of negotiations and legal angling, EFH emerged from bankruptcy in two phases. The first phase of the restructuring occurred in August 2016. EFH spun off its largest indirect subsidiary, TCEH, into a separate company. The first lien debt, approximately $24.38 billion, was converted into common stock. TCEH was renamed Vistra Energy.

The second phase of the restructuring entailed the acquisition by Sempra Energy of EFH and its 80% stake in Oncor Energy Holding Company LLC for $9.45 billion in cash, plus debt assumed, for a total purchase price of $18.8 billion. The Texas Public Utility Commission approved the transaction during its March 2018 meeting.

<u>See</u> Transcript of Hearings to Approve Engagement of Professionals on Behalf of Energy Future Holdings Subsidiaries as Directed by Independent Directors – Appendix 6

<u>See</u> Draft Board Resolution Delegating Decisions on Conflicts to Independent Director and Empowering Him to Hire Independent Professionals – Appendix 7

In re Seadrill Limited, Case No.

<u>See</u> Transcript of Joint Emergency Motion for Entry of an Order Approving (1) the Settlement Between the Seadrill Limited Debtors, etc. – Appendix 8

In re Sanchez Energy, No. 19-34508 (Bankr. S.D. Tex.)

In preparation for its chapter 11 filing, Sanchez Energy established a special committee of two disinterested directors in November 2018 to investigate potential claims against related parties. Sanchez filed for chapter 11 protection on August 11, 2019. On September 6, 2019, the special committee sought to retain Ropes & Gray as counsel.

The unsecured creditor committee, along with several other creditor groups, objected to the application to appoint counsel, arguing that the special committee was not truly independent because (1) it was a group handpicked by the same insiders that were the subject of the investigation; (2) the special committee allowed payments to directors months before the petition date; and (3) the special committee's proposed counsel received more than $5 million in fees prepetition from those parties.

The objecting parties believed that the only efficient manner to move forward was to conclude the investigation and hand it over to the UCC. The special committee and the debtors replied, stating it is the special committee, not the UCC or ad hoc group of unsecured noteholders, that is vested with the responsibility to investigate related-party transactions and the objecting parties' efforts to deprive the debtors of their investigative powers were for reasons unrelated to the retention application.

The dispute was ultimately resolved through a stipulation between the committee and the debtors, whereby the special committee agreed to provide the UCC with an unredacted copy of its investigation report, and produce related documents to the UCC on a fairly accelerated basis. Stipulation notwithstanding, the ad hoc committee filed a motion for an examiner. The ad hoc group initially prevailed, with Judge Isgur finding that appointment of an examiner was "mandatory" given the facts of the case. Judge Isgur ultimate abated the examiner appointment after it was determined that the extent of any examiner's duties had become moot.

<u>See</u> Transcript of hearing on Ad Hoc Group of Unsecured Noteholders' Limited Objection to Debtor's Application to Employ Ropes and Gray as Special Counsel – Appendix 9

<u>See</u> Transcript of Emergency Motion Before the Honorable Marvin Isgur – Appendix 10