DELAWARE BANKRUPTCY COURT ENTERS ORDERS REGARDING INFORMATION DISCLOSURE REQUIREMENTS FOR INVESTMENT MANAGERS

Two recent orders[1] (the "Orders") entered by Judge Kevin J. Carey of the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") add to the judicial ferment involving the information disclosure requirements for groups of hedge funds, banks, and other investors participating in bankruptcy cases. In the first order, Judge Carey required each of five unaffiliated investment managers to disclose, among other information, their aggregate holdings and the dates such holdings were acquired. In the second order, Judge Carey ruled that the investment managers were not required to disclose the identity (or domicile) of the underlying noteholders or the price paid for the notes by acquisition date. The Bankruptcy Court stated that it favored a fact-bound, flexible approach, with the nature and extent of disclosures required turning on the facts and circumstances of the particular case and the needs of the requesting party.

These Orders may serve as a warning to groups of investment managers with common legal counsel that they may need to disclose certain (although perhaps not the most sensitive) proprietary information of or involving their customers in order to participate in bankruptcy cases in the District of Delaware.

Background

The *In re Sea Containers Ltd., et al*. bankruptcy cases (the "Bankruptcy Cases") involve three debtor entities: Sea Containers Ltd. ("SCL"), a Bermudan parent company and the issuer of the notes in question; Sea Containers Services Limited ("SCSL"), a United Kingdom-incorporated services company; and a nominal U.S. affiliate. SCL and its affiliates operate a variety of businesses, but principally an international container leasing and management business. SCSL employs substantially all of SCL's employees, and such employees are predominately citizens and/or residents of the United Kingdom. SCL's two main pension funds, the 1983 Pension Scheme and the 1990 Pension Scheme, are operated at the SCSL level for the benefit of employees of SCSL and other participating employers. SCL's notes are held by undisclosed beneficial holders that may or may not be off-shore entities.

On February 25, 2008, Kramer Levin & Naftalis LLP ("Kramer Levin") filed its "Verified Statement Pursuant To Bankruptcy Rule 2019" (the "Verified Statement") in the Bankruptcy Cases.[2] The Verified Statement disclosed, among other things: (i) Kramer Levin represents six clients (six investment advisors to hedge funds or account holders) (the "Clients") with respect to

[1] In re Sea Containers Ltd., et al., Case No. 06-11156 (Bankr. D. Del.), Docket Nos. 1794, 1825.

[2] Docket No. 1481.

the Bankruptcy Cases; (ii) the six Clients hold SCL notes[3] of various maturities; and (iii) the total amount of the Clients' claims as of February 21, 2008.[4] The Verified Statement also attached Kramer Levin's engagement letter with the Clients. The official committee representing SCL's creditors (predominantly noteholders), one of two official committees appointed in the Bankruptcy Cases, consists of a single member, the Indenture Trustee of the various notes.

The Motion to Compel Compliance with Rule 2019

On March 11, 2008, the Official Committee of Unsecured Creditors of Sea Containers Services Limited (the "Services Committee"),[5] whose membership includes trustees of the 1983 Pension Scheme and the 1990 Pension Scheme, filed its "Motion For Order Pursuant To Bankruptcy Rule 2019(b) Conditioning The Affiliated Holders Of Unsecured Notes Issued By Sea Containers Ltd.'s Ability To Appear And Be Heard On Compliance With Bankruptcy Rule 2019(b)" (the "Motion").[6]

In the Motion, the Services Committee argued that the Clients, and not just Kramer Levin, were required to comply with Rule 2019 of the Federal Rules of Bankruptcy Procedure ("Rule 2019") because the Clients were an "entity or committee representing more than one creditor or equity security holder," other than the official committees appointed in the Bankruptcy Cases. Fed. R. Bankr. P. 2019(a). In support of this position, the Services Committee cited the recent decision in *In re Northwest Airlines Corp.*, 363 B.R. 701 (Bankr. S.D.N.Y 2007). In *Northwest*, an *ad hoc* committee of equity security holders argued that Rule 2019(a) applied only to the law firm representing the committee, but not the committee members themselves, because "no member of the Committee represents any party other than itself." *Id.* at 703. The Bankruptcy Court for the Southern District of New York rejected this argument, finding that individual committee members also were required to comply with Rule 2019(a) because, among other things: (i) the committee appeared as "a Committee" in the bankruptcy cases; (ii) the committee had been actively litigating matters before the bankruptcy court; and (iii) the law firm did not purport to represent the separate interests of any member but instead took instructions from the committee as a whole. *Id.* Based on this precedent, in *Sea Containers*, the Services Committee took the position that the Clients similarly had to comply with Rule 2019. Notably, under the Kramer Levin engagement letter, "Majority Clients," or those clients holding a majority of notes, were empowered to direct counsel on behalf of all common clients. Moreover, although the Kramer Levin engagement letter did not identify the Clients as an *ad hoc* committee, the engagement letter did provide that Majority Clients must consent before additional clients could be added to the representation, and that Kramer Levin

[3] The Clients hold (i) 10.75% notes due October 15, 2006; (ii) 7.875% notes due February 15, 2008; (iii) 12.5% notes due December 1, 2009; and (iv) 10.5% notes due May 15, 2012, issued by Sea Containers Ltd. The notes are registered under U.S. law and are governed by New York law.

[4] On March 19, 2008, Kramer Levin filed its "First Amended And Restated Verified Statement," disclosing that one of the six Clients was no longer represented by Kramer Levin. Docket No. 1571. According to the Clients (per the Second Verified Statement, defined below), as of May 16, 2008, the Clients hold claims of approximately $173,052,500 in face amount.

[5] Willkie Farr & Gallagher LLP serves as co-counsel to the Services Committee in the Bankruptcy Cases.

[6] Docket No. 1537.

was to be compensated based on the pro rata ownership of notes as of January 4, 2008. Based on these factors, the Services Committee argued that the Clients were, in substance, a "committee" plainly within the ambit of Rule 2019(a) and relevant case law.

By its Motion, the Services Committee sought entry of an order sanctioning the Clients by conditioning the Clients' ability to appear and be heard in the Bankruptcy Cases on full compliance with Rule 2019(a). In other words, in order to appear in the Bankruptcy Cases, each Client would have to disclose: "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,"[7] and "the amounts of claims or interests owned by the entity [or] the members of the committee . . . , the times when acquired, the amounts paid therefor, and any sales or other disposition thereof."[8]

Opposition to Motion to Compel Compliance with Rule 2019

On May 13, 2008, the Clients filed an objection (the "Objection") to the Motion.[9] The Clients' principal contention was that the disclosure requirements of Rule 2019(a) do not apply to the Clients because the Clients: (i) are not a "committee"; (ii) do not represent any party but themselves; and (iii) have no fiduciary obligation or other duty to unsecured creditors generally. Citing *In re CF Holding Corp.*, 145 B.R. 124 (Bankr. D. Conn. 1992), the Clients argued that a "committee" is a specific body that "act[s] in a fiduciary capacity to those they represent, but [is] not otherwise subject to control of the court." *Id.* at 126.

The Clients described themselves as five individual investment funds that decided to share the costs of legal counsel through representation by a single law firm. Moreover, the Clients argued, they were not appointed or elected by any court or any body and did not receive a delegation of authority to perform any function on behalf of any party. While *ad hoc* committees such as the one in *Northwest* share many of these characteristics, the Clients distinguished their group from the *ad hoc* committee in *Northwest* by noting that they had not styled their affiliation as an "*ad hoc* committee," had not sought recognition as an official committee, and had not purported to speak for a group. The Clients also pointed out that there have been no reported decisions that followed *Northwest*, and in one case decided after *Northwest*, *In re Scotia Dev. LLC*, Case No. 07-20027 (Bankr. S.D. Tex. Apr. 17, 2007), the Bankruptcy Court for the Southern District of Texas refused to require members of an *ad hoc* committee of noteholders to file a Rule 2019 statement.

Lastly, the Clients argued that the sanctions requested by the Services Committee were inappropriate and unwarranted. In turn, the Clients characterized the Motion and the relief sought therein as a transparent litigation tactic aimed at restricting the expression of other creditor viewpoints.

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[7] Fed. R. Bankr. P. 2019(a)(2).

[8] Fed. R. Bankr. P. 2019(a)(4).

[9] Docket No. 1760. Also on May 13, 2008, the Loan Syndications and Trading Association filed a brief as *amicus curiae* in opposition to the Motion. Docket No. 1750.

First Order: Compelling Compliance

On May 14, 2008, Judge Carey heard argument on the Motion and found that the Clients are a "committee" within the contemplation of Rule 2019(a). In weighing the relevance of the information sought against the sensitivity of providing the information, Judge Carey ruled that the Clients, in order to participate, must "revise the 2019 statement to provide the information that's required by 2019(a)(1), (2) and (3) but not (4) because I don't think it's relevant in any way." [10] On May 19, 2008, Judge Carey entered an order (the "First Order") to that effect.[11]

The Amended Statement and the Second Order

Pursuant to the Bankruptcy Court's ruling on May 14, 2008, on May 16, 2008, Kramer Levin filed its "Second Amended And Restated Verified Statement Pursuant To Bankruptcy Rule 2019" (the "Second Verified Statement").[12] The Second Verified Statement included, for each Client, the total amount of claims held and acquisition dates of those claims.

In connection with ongoing litigation concerning settlement of claims asserted by the Services Committee's members, on May 21, 2008, the Clients filed a "Motion For Access To Confidential Information" (the "Motion for Access") seeking access to confidential information of the Services Committee.[13] On May 22, 2008, the Services Committee filed a response contending that the Clients' Second Verified Statement failed to comply with the Rule 2019(a) disclosures required under the First Order and sought an order conditioning the Clients' continued participation in the Bankruptcy Cases on compliance with Rule 2019.[14] In particular, the Services Committee found the Second Verified Statement deficient because it failed to disclose: the identity of the underlying entities that actually own the bonds, as required by Rule 2019(a)(1),[15] and a disaggregated accounting of the principal amount of bonds held by members and the dates such members acquired their respective positions, as required by Rule 2019(a)(2).[16]

On May 22, 2008, Judge Carey heard argument on the Motion for Access. Judge Carey ruled that the Services Committee did not present evidence sufficient to "warrant the ordering of any further relief [against the Clients] under the circumstances."[17] On May 23, 2008, Judge Carey entered a second order granting the Clients' request for access to the Services Committee's confidential

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[10] Transcript of Hearing on May 14, 2008, p. 45, ln. 9-11. Docket No. 1890.

[11] Docket No. 1794.

[12] Docket No. 1788.

[13] Docket No. 1806.

[14] Docket No. 1814.

[15] Rule 2019(a)(1) requires the disclosure of "the name and address of the creditor or equity security holder." Fed. R. Bankr. P. 2019(a)(1).

[16] Rule 2019(a)(2) requires the disclosure of the "nature and amount of the claim or interest and the time of acquisition thereof." Fed. R. Bankr. P. 2019(a)(2).

[17] Transcript of Hearing on May 22, 2008, p. 17, ln. 3-5. Docket No. 1883.

information and denying the Services Committee's request to condition the Clients' future participation in the Bankruptcy Cases on further disclosures pursuant to Rule 2019.

Conclusion

In the Orders, the Bankruptcy Court for the District of Delaware found that a group of investment advisors to hedge funds or account holders with shared legal counsel advocating a common position is a "committee" under Rule 2019(a), irrespective of how the group described itself or the labels it employed. At the same time, the Bankruptcy Court was unwilling to force the Clients to divulge the most sensitive proprietary information, such as the name of the underlying holders of the notes, the note acquisition amounts by date of acquisition, and the price paid for the notes so acquired. In its decisions, the Bankruptcy Court questioned the relevance of the information sought and balanced the need for disclosure against the sensitivity of disclosure. While it is difficult to draw broad conclusions from the Orders (which are not precedent in any technical sense), they can be viewed as a warning to groups of investors that participate in bankruptcy cases through representation by a single counsel that proprietary information may be required for disclosure in order to continue to participate.

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If you have any questions concerning the foregoing or would like additional information, please contact Marc Abrams (212-728-8200, mabrams@willkie.com), Michael J. Kelly (212-728-8686, mkelly@willkie.com), Brian O'Connor (212-728-8251, boconnor@willkie.com), Daniel Schloendorn (212-728-8265, dschloendorn@willkie.com), Rachel C. Strickland (212-728-8544, rstrickland@willkie.com), or the attorney with whom you regularly work.

This memorandum was authored by Marc Abrams, Michael J. Kelly, Rachel C. Strickland, and Seth J. Kleinman.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

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