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09-BK-025

February 1, 2010

Advisory Committee on Bankruptcy Rules
c/o Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Fed. R. Bankr. P. 2019 ("PBR 2019"): Attaining Transparency without Chilling Participation

To the Members of the Judicial Conference Advisory Committee on Bankruptcy Rules:

Pursuant to the memorandum dated August 12, 2009 of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, I submit this comment to the proposed amendment to Rule 2019.

I am the chairman of the Business Solutions & Governance Department of Dewey & LeBoeuf LLP and teach Corporate Reorganization at Harvard Law School and University of Michigan Law School. This comment is solely my comment and is not submitted on behalf of any of these entities. I have practiced in the field of corporate reorganization for 32 years. My practice has been balanced among representing debtors, creditors' committees, bondholders, shareholders, lenders, and other investors.

I write to suggest what I believe is a superior method of attaining the transparency sought by the proposed rule change, without the chilling and other negative impacts objected to by representatives of investors in distressed securities and others.

My Proposal. As an alternative to providing the disclosure required by the proposed rule change by listing each disclosable economic interest (specifically, the data required by PBR 2019(c)(2)(B) and (C) and 2019(c)(3)(B) and (C)), parties in interest should be allowed to make the following three certifications that get straight to the bottom of the purpose of the inquiry:

1. On behalf of [insert name of party in interest ("PIA") holding claims against debtor], I certify that PIA holds an aggregate of $____ of prepetition claims against the debtor's estate and an aggregate of $____ of postpetition claims against the debtor's estate.

2. On behalf of PIA, I certify that PIA [does or does not] hold other disclosable economic interests that may increase in value if claims against the debtor's estate decrease in value.

3. On behalf of PIA, I certify that PIA [does or does not] hold claims or other disclosable economic interests in respect of an affiliate of the debtor that may increase in value if claims against the debtor's estate decrease in value.

Additionally, PBR 2019 should apply to the most important committees in the case, namely statutory committees.

Mechanics of Implementing this Suggestion. To implement the foregoing suggestion, the currently proposed Rule 2019 can be changed as follows:

1. PBR 2019(b) would be changed by (i) deleting the period after PBR 2019(c)(4), (ii) inserting "; or" after PBR 2019(c)(4), and (iii) inserting PBR 2019(c)(5) as follows: "(5) in lieu of providing the data required by subdivisions 2019(c)(2)(B) and (C) and 2019(c)(3)(B) and (C), each such entity and member of such group or committee may provide the following three certifications: [the three certifications at the top of this page shall be inserted]."
2. PBR 2019(d) would be changed by (i) deleting the period at its end and inserting: ", or by updating the certifications to make them correct as of the supplement's date."
3. PBR 2019(c)(1)(B) and 2019(c)(3) would be amended by deleting from each of them: "other than a committee appointed pursuant to §§ 1102 or 1114, of the Code,".

Reasons to Adopt this Suggestion:

1. The Suggestion Provides Greater Transparency. Those supporting PBR 2019 have done so to enable the courts and parties interest to know whether a litigant claiming to have a large claim against the debtor's estate may have an ulterior motive for desiring something other than maximization of value of the estate. My suggestion gets to the heart of the matter and requires the litigant to certify whether it owns economic interests that appreciate if the estate decreases in value.

2. PBR 2019 Currently Can Not Satisfy its Purpose in Many Instances. As currently drafted, a party in interest must disclose a list of credit default swaps, total return swaps, shorts, and other derivatives it has in addition to its claims. Absent a review of the documentation of each derivative, along with the use of a computer program capable of modeling the changes in value of each derivative and claim as the estate's value changes, the disclosure will not provide the court the information it needs, namely whether the party in interest benefits from a diminution in estate value. Moreover, the disclosures of derivatives will inexorably lead to inquisitions, disputes, and hearings on the meaning of the disclosures, which will add to the complexity, time and expense of the relevant proceedings. Conversely, the certifications suggested above, get right to the point, and false certifications will be subject to sanctions. Moreover, nothing prevents the court from authorizing or demanding additional discovery or disclosure in appropriate circumstances.

3. This Suggestion Does not Chill Statutory Committee Membership or Other Creditor Participation. As currently drafted, PBR 2019 requires investors to divulge proprietary and sensitive data. Moreover, existing Rule 2019 can be and has been invoked as a litigation tactic to chill participation. The chilling problem is acknowledged by judges who have filed or supported comments to PBR 2019. The correct solution is to obtain transparency without sacrificing transparency from all entities including the most important committees in the case (the statutory committees). Imagine how a bankruptcy judge or party in interest would feel if it were discovered after the fact that a statutory committee member held an interest that appreciated if the estate diminished in value. The instant suggestion enables transparency without chilling participation.

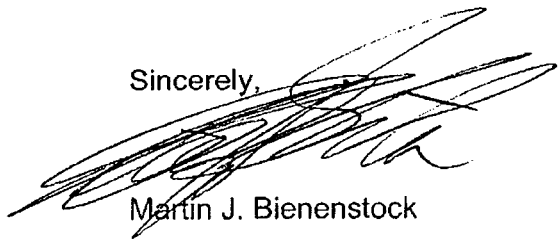
4. PBR 2019 May be Vulnerable to 28 U.S.C. § 2075. Pursuant to section 2075, the Bankruptcy Rules can not alter rights under the Bankruptcy Code substantively or procedurally. The Bankruptcy Code provides (section 1109) a party in interest includes a creditor and any creditor may appear and be heard on any issue. Bankruptcy Code section 363(e) entitles every holder of a secured claim to adequate protection of its security interest, in accordance with the Fifth Amendment. As currently drafted, PBR 2019 imposes serious obstacles, namely the surrender of proprietary information, on secured claimholders and unsecured

claimholders, to vindicating their rights to be heard under section 1109 and their Fifth Amendment rights. When the goal of PBR 2019 can be accomplished without creating onerous obstacles to vindicating procedural and substantive rights granted by the Fifth Amendment and the Bankruptcy Code, there is good reason not to amend Rule 2019 to make it more susceptible to a meritorious challenge under section 2075.

5. PBR 2019 Should Avoid Impacting Substantive Law. As several supporting comments to PBR 2019 have acknowledged, most disputed matters in Bankruptcy Court must be decided on the facts and law, independent of a litigant's motive. Indeed, there is ample jurisprudence holding motive immaterial and the price paid for a claim immaterial in most circumstances. Therefore, every litigant deserves to know when the court finds its motive or cost material and relevant to a decision. If PBR 2019 is adopted without change, then litigants would have to be prepared at every hearing to prove the meaning of their PBR 2019 disclosures of lists of derivatives and the motives fairly attributed to them. The bankruptcy system will be far more efficient and fair if the disclosures do not have to be interpreted and dissected at every hearing. The 3 certifications suggested here are simple and direct and would minimize such extra litigation or inquiry.

I appreciate the opportunity to submit this comment and I am available to the Advisory Committee on Bankruptcy Rules to respond to any inquiries.

Sincerely,



Martin J. Bienenstock