7. The Report

7.1 Timing

Section 1106(b)(4) states that the report should be filed "as soon as practicable." The timing of the examiner's reports are often set by the order appointing the examiner. In *Mirant Corporation*, the examiner was ordered to file his first report in just under two months.[176] Later, the court ordered the *Mirant* examiner to file reports "every other month" and "any other time he deems necessary…."[177]

7.2 What Should Be Included

In general, an examiner that conducts an investigation must

> file a statement of any investigation conducted…including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate.[178]

The contents of the report will necessarily vary depending on the nature of the assignment. For example, if the court directs the examiner to investigate whether or not particular transfers to a specific transferee were fraudulent, the examiner should reach a conclusion and report it. If the scope of investigation is more open-ended, and the examiner identifies a cause of action available to the estate, the report should document that claim (or the elements of the claim investigated).

However, if an examiner has been directed to conduct an open-ended investigation, it does not necessarily follow that an examiner should report, as to a particular potential defendant or a particular potential claim, that there is no claim. The examiner is likely conducting the investigation under intense time and budget constraints and cannot be certain that all relevant leads were followed, or that all relevant documents were

176 *In re Mirant Corp.*, Case No. 03-46590, ECF 3727 (Bankr. N.D. Tex. Apr. 24, 2004) (Order Defining Role of Examiner).

177 *In re Mirant Corp.*, Case No. 03-46590, ECF 4817 (Bankr. N.D. Tex. July 30, 2004) (Memorandum Order Expanding Role of Examiner).

178 11 U.S.C. § 1106(a)(4)(A).

obtained. The examiner should consider whether or not it is appropriate to issue a "clean bill of health" in such a case when other information may be discovered at a later date by the debtor or the creditors' committee that would be sufficient to assert a claim.

7.3 Standard for Reporting a Claim

How much support should there be in order for an examiner to report "a cause of action *available* to the estate"? First, of course, the examiner must review applicable statutes and case law to determine the elements of the cause of action, as well as the likely defenses.

As to the level of factual support, the Federal Rules of Civil Procedure have two "extremes" that can be useful in thinking about this question: a motion to dismiss for failure to state a claim and a motion for summary judgment. On the former, in *Ashcroft v. Iqbal* the Supreme Court stated:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

> inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.
>
> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.... Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will...be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief.
>
> While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.[179]

By comparison, a court should grant a motion for summary judgment if the movant shows that there is "no genuine dispute" as to any material fact and the movant is entitled to judgment as a matter of law.[180] A respondent can survive a motion for summary judgment by showing that a fact is "genuinely disputed" by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations...admissions, interrogatory answers, or other materials."[181] Frequently, such motions are considered only after discovery has closed.[182]

Because an examiner is given broad power to gather the relevant facts, certainly more than a recitation of "allegations" should be required before an examiner should report that a claim is available. However, it is also true that an examiner should probably not shoulder the burden of documenting each and every element of a particular claim, or evidence that would negate each and every possible defense. For example,

179 129 S.Ct. 1937, 1949-50 (2009) (citations omitted) (internal quotes and brackets omitted).

180 Fed. R. Civ. P. 56(a).

181 Fed. R. Civ. P. 56(c)(1)(A).

182 Fed. R. Civ. P. 56(b).

an examiner might have a reasonable basis to "assume" insolvency at the relevant time when reporting on avoidance actions, or might leave the development of expert testimony on certain valuation or damages issues to later litigation that might be brought based on the examiner's report that focuses on and documents causation.

In the usual case, however, basing the analysis on the legal framework applicable to a claim (and likely defenses), the examiner should be able to conclude that the claim (or elements of the claim) would be submitted to the appropriate fact-finder, based on citations to particular parts in the factual record developed by the investigation and reasonable inferences that can be drawn from such evidence in light of the examiner's experience and common sense.[183] The examiner is not, of course, the decision-maker: If a claim is brought by the debtor, that role is reserved to the fact-finder—whether a judge or jury—after considering the documentary evidence, the testimony and credibility of witnesses, and the reasonable inferences that may be drawn from the evidence.

7.4 Format

The format of the examiner's report is determined by the scope of the investigation and the complexity of the matters reported on. As the length and complexity increases, there is a greater need for a high-level summary of the examiner's conclusions, with detailed appendices that set out (1) the legal standards applicable to topics of the investigation and the claims reported on, and (2) each claim (or types of claims). Detailed appendices documenting claims may be on a defendant by defendant basis (*e.g.*, officers or directors) or organized by the types of claims (*e.g.*, avoidance actions). Each team needs to prepare draft reports so that the initial conclusions can be shared with the examiner and, as appropriate, with other team leaders, to aid in the ongoing direction of the examination and the consistency of the various portions of the report.[184]

183 However, an examiner may be required to file the final report after an investigation that is shorter in time or narrower in scope (perhaps as a result of budget restrictions imposed by the court) than discovery in an adversary proceeding or civil action. In such a case, an examiner may be justified in reporting on a claim that may available to the estate, depending on the outcome of further discovery regarding a key fact that, at the time of the final report, lacks support in the record.

184 *In re Enron Corp.*, Case No. 01-16034, ECF 27706 (Recommendation and Advisory Report of the Fee Committee on the Final Compensation of Neal Batson, Esq.) ("Teams were assigned discrete portions of the reports to draft under the supervision of team leaders. A group of senior attorneys from the various practice groups, together with Mr. Batson, formed an Issue Review Panel (the 'IRP'). The IRP met in regular sessions where it reviewed and gave initial observations on reports on the structures of the SPEs in order to direct ongoing investigation and analysis. The overall review was by an Executive Committee established by Mr. Batson.... Of necessity the Reports were written by committee; but they were molded together into integrated wholes that show very little of the committee authorship.").

7.5 Citations to the Record for All Factual Assertions

Each and every factual assertion contained in an examiner's report should be documented by a citation to a document, a transcript of a Rule 2004 examination, a deposition in a contested matter, adversary proceeding or civil action, or other reliable sources of information. The failure to do so can result in a report (or a portion thereof) that is not persuasive or, worse yet, is criticized by the bankruptcy court as simply being "flat wrong."[185]

7.6 Distribution of the Report

An examiner is to "transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates."[186] Orders regarding confidentiality and privilege may require the examiner to distribute an advance copy of the report to the debtor and the creditors' committee or others so that any concerns about use of confidential or privileged information can be raised before the report is filed and becomes available to the public. Such orders are discussed, and examples are given, in Chapter 6.

7.7 Filings under Seal at the Request of Those Discussed in the Report

Sometimes parties that are discussed in the report would prefer that the report of an examiner remain under seal—forever. The basis for such a request may be found in § 107 of the Bankruptcy Code, which provides (in pertinent part):

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185 *See, e.g., In re Granite Broadcasting Corp.*, 369 B.R. 120, 129 n. 10, 134 (Bankr. S.D.N.Y. 2007) ("[M]any of [the examiner's report's] conclusions have been proved wrong by the evidence of record"; "The Examiner's Report assumes that Houlihan Lokey believed in June 2006 that there was residual value in the Debtors for the preferred stockholders and that the negotiations with the parties proceeded on that basis.…Although this is a critical assumption, there is no source reference for it in the Report, and the evidence of record at the confirmation hearing does not support it. Hilty testified to the contrary, and the Debtors received a third party offer during this period that was far below the secured debt. Moreover, the Examiner's conclusion that in June 2006 'Harbinger had proposed [a] restructuring transaction that would pay the debt in full and create potential value for the existing preferred stock' is flat wrong.") (citations omitted).

186 11 U.S.C. § 1106(a)(4)(B).

> (a) Except as provided in subsections (b) and (c) and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.
>
> (b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—
>
> (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
>
> (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.[187]

In the case of *Gitto v. Worcester Tel. & Gazette Corp. (In re Gitto Global Corp.)*,[188] the examiner filed a motion requesting that the court authorize him to submit the report under seal pending a further order of the court. The court granted the motion, but later required the examiner to 'provide each person named in the report…with a copy of only that portion or portions of the report that relate to the individual.'[189] The modified order also invited motions from individuals seeking to seal or redact the report, as well as objections to motions to seal or redact. Gary Gitto, part-owner and former CEO of the debtor, and Charles Gitto, Gary's father, who held himself out as chairman of Gitto Global, filed motions requesting that the report remain under seal, as did approximately 24 other individuals. The bankruptcy court concluded that there was nothing scandalous or defamatory in the report and ruled that it should be made publicly available, and the district court affirmed.

On appeal, the First Circuit began its analysis with a discussion of the common law presumption of access to court filings, explaining as follows:

> Under the common law, there is a long-standing presumption of public access to judicial records. This presumption of access "helps safeguard the integrity, quality, and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies." Despite these important interests…the right of access is not absolute. As the Supreme Court has recognized, "[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." Courts have exercised their discretion under the common law to abrogate the right of public access where doing so was necessary

187 11 U.S.C. § 107.

188 422 F.3d 1 (1st Cir. 2005).

189 *Id.* at 5.

> to prevent judicial records from "being used to gratify private spite or promote public scandal," or to prevent their records from becoming "reservoirs of libelous statements for press consumption or...sources of business information that might harm a litigant's competitive standing." Although these examples demonstrate that it is within a court's discretion to curtail the common law presumption of public access, "[o]nly the most compelling reasons can justify non-disclosure of judicial records."[190]

Turning to the provisions of 11 U.S.C. § 107, the First Circuit quoted with approval the comments of the Ninth Circuit:

> Section 107(a) is rooted in the right of public access to judicial proceedings, a principle long-recognized in the common law and buttressed by the First Amendment. This governmental interest is of special importance in the bankruptcy arena, as unrestricted access to judicial records fosters confidence among creditors regarding the fairness of the bankruptcy system.[191]

Despite the teachings of the common law, however, the First Circuit concluded:

> Because § 107 speaks directly to the question of public access, however, it supplants the common law for purposes of determining public access to papers filed in a bankruptcy case. Therefore, "issues concerning public disclosure of documents in bankruptcy cases should be resolved under § 107," not under the common law.[192]

Similarly, in the *FiberMark* case, the examiner "filed a report...which included conclusions that two members of the Official Committee of Unsecured Creditors (the 'Committee') and the Committee's counsel had breached certain fiduciary duties."[193] Consistent with a prior order of the court entered to protect confidential information provided to the examiner, the examiner was instructed to file his report "under seal subject to further Order of the Court."[194] After the report was filed under seal, the committee members and their counsel discussed in the report filed a motion seeking to "keep the Examiner's report...under seal."[195] For the court, the "primary issue

190 *Id*. at 6.

191 *Id*. at 7 (quoting *In re Crawford,* 194 F.3d 954, 960 (9th Cir. 1999)).

192 *Id*. at 7 (internal citations omitted).

193 *In re FiberMark Inc.*, 330 B.R. at 488.

194 *Id.* at 492.

195 *Id.* at 488.

presented is whether these parties have shown that the contents of the Report warrant an exception to the general rule, under 11 U.S.C. § 107, that all court documents should be public."[196]

The *FiberMark* court began by noting that, absent compelling circumstances, all documents filed in bankruptcy cases should be available to the public.[197] Thus, the parties seeking to keep the examiner's report under seal had the burden to demonstrate that the report contained scandalous or defamatory material. However, a conclusion of an examiner that is merely critical of a party is not defamatory.[198] As the court said:

> Since [the examiner] investigated alleged breaches of fiduciary duty by well respected professionals, it was clear that the Report might be negative and strongly worded. It was within the Examiner's prerogative to present his observations, opinions and conclusions candidly and descriptively.[199]

The *FiberMark* court did, however, require that the Report contain a cautionary legend on each page that stated:

> The statements and conclusions in this report have not been adopted or accepted by the Court, and constitute only the opinions of the Examiner. No portion of this report has been admitted into evidence. Several parties dispute the accuracy of the contents of this report. The publication of this report is without prejudice to the right of any party to challenge the statements contained in the report.[200]

196 *Id.*

197 *Id.* at 505, citing *In re Hemple*, 295 B.R. 200, 202 (Bankr. D. Vt. 2003).

198 330 B.R. at 507.

199 *Id.*

200 *Id.* at 509-10.