

All for One and One for All: Overcoming Challenges When the Interests of Creditors' Committee Members Diverge

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Topics for discussion:

- If given the opportunity, should all creditors serve on the creditors' committee / are there circumstances when a creditor should not serve?
- When should a creditor recuse itself (a) from discussion of specific issues, and (b) from serving on the committee?
 - Committee member as bidder in a sale case
 - Committee member as key supplier
 - Committee member as competitor
 - Committee member as litigant in claims involving debtor and non-debtor insiders
 - Recuse only from discussion of issues related to sale and financial data not in data room or complete recusal?
- The importance of a committee's composition.
 - Role of the U.S. Trustee
- Claims.
 - Should committee members be permitted to buy or sell claims?
 - In addition to unsecured claims, should committee members be permitted to hold other types of claims: partially secured, section 503(b)(9), or other administrative claims (rent, trade, debt service)?
 - If a party acquires a committee member's claim, should the acquiring party be permitted to substitute as a committee member for the original holder of the claim?
 - Does claim or creditor control position on the committee?
- The influence of subgroups (majority v. supermajority; quorums, subcommittees).

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- The politics of selecting professionals for the committee.
 - Why it matters / Setting the tone: Let's Make a Deal versus Let's Litigate
- By-laws.
 - Minimum requirements for all cases – quorum, voting, confidentiality, etc.
 - Additional provisions for complex cases.
- Disputes among committee members.
 - Nature of frequently encountered disputes.
- Other factors influencing committee members.
 - Intercreditor agreements.
 - Self-interest versus best interests?
 - Setoffs.
 - 503(b)(9) claims.
 - Indenture trustee fees.
 - Cash versus go-forward customer.
 - Cash versus equity.
- Confidentiality issues
 - Section 1102 versus the Non-Disclosure Agreement
 - Other statutory duties to disclose
 - Remedies for breach

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THE LAW

This memorandum provides an overview of the fiduciary duties owed by an official committee of unsecured creditors and its members.

In short, an official committee owes a fiduciary duty to all general unsecured creditors, but not to a debtor's estate as a whole. (This broader duty is imposed on the debtor-in-possession.) Each committee member owes a fiduciary duty to all general unsecured creditors and to other committee members, and is obligated not to act in a way that benefits only the committee member's narrow individual interests.

However, committees and their members are not bound to act only in a way that benefits all creditors equally. The case law indicates that diverging interests among unsecured creditors are accommodated by committee consideration and voting. (We note in this regard that we have not found any cases that directly address obligations of members of an official committee in situations where the pursuit of an appeal from a confirmation objection may work to the arguable detriment of a subset of unsecured creditors.)

In any event, committee members, acting in their capacity as such, are afforded qualified immunity that provides protection to the committee members for all acts, other than those deemed to have been ultra vires (*i.e.*, without lawful authority) or to have amounted to willful misconduct.

**FIDUCIARY DUTIES OF OFFICIAL COMMITTEES
AND THEIR MEMBERS IN BANKRUPTCY**

A. Fiduciary Duties of the Official Committee

A statutory committee is a fiduciary of the class it represents, but not of the debtor's estate itself. See In re Adelphia, 544 F.3d 420, 424 n.1 (2d Cir. 2008) ("a committee owes a fiduciary duty to the class it represents, but not to the debtor, other classes, or the estate"); In re

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Smart World Technologies Inc., 423 F.3d 166, 175 n.12 (2d Cir. 2005) (same); In re SPM Mfg. Corp., 984 F.2d 1305, 1315 (1st Cir. 1993) (rejecting “erroneous assumption that the Official Unsecured Creditors’ Committee is a fiduciary for the estate as a whole”); see also 11 U.S.C. § 1103(c)(3) and (5) (referring to actions on behalf of “those represented” by an official committee).

In the case of a committee, there is a broad duty to all general unsecured creditors. See In re Kensington Intern. Ltd., 368 F.3d 289, 315 (3d Cir. 2004) (“it is established that a Creditors Committee owes a fiduciary duty to the unsecured creditors as a whole, not to the individual members”); In re Caldor, Inc., 193 B.R. 165, 169 (Bankr. S.D.N.Y. 1996) (finding that an official committee of unsecured creditors “stands as a fiduciary to the class it represents”).

Generally, a committee should not merely be a passive conduit for the debtor-in-possession to share its views with the constituency of unsecured creditors. See In re Daig Corp., 17 B.R. 41, 43 (Bankr. D. Minn. 1981). The committee’s role must be “adversarial” to be effective as a “watchdog” over the Chapter 11 process. See In re Seaescape Cruises, Ltd., 131 B.R. 241, 243 (Bankr. S.D. Fla. 1991) (discussing watchdog role of committee); Matter of Gusam Rest. Corp., 32 B.R. 832, 834 n. 1 (Bank. E.D.N.Y. 1983), rev'd on other grounds 737 F.2d 274 (2d Cir. 1984), (quoting In re Nikron, Inc., 27 B.R. 773 (Bankr. E.D. Mich. 1983) and noting concerns that “in too many cases where creditors’ committees are formed, the creditors’ committees exist in name only and are completely ineffectual”); In re Life Serv. Sys., Inc., 279 B.R. 504, 510 (Bankr. W.D. Pa. 2002), rev'd in part on other grounds 327 B.R. 561 (W.D. Pa. 2005), (noting “necessity” of adversarial relationship between the official committee and the debtor-in-possession). The committee must pursue “whatever lawful course best serves the interests of the class of creditors represented.” In re SPM Mfg., Corp., 984 F.2d at 1315 (1st Cir.

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1993).

The law recognizes that unsecured creditors will have not always have uniform interests. See Id., at 1315-16 (official committee did not breach duties by negotiating transaction benefitting unsecured creditors and not estate as a whole); In re EBP, Inc., 171 B.R. 601, 603 (Bankr. N.D. Ohio 1994) (no breach of fiduciary duty where official committee opposed plan accepted by class of unsecured creditors); In re Grant Broad. of Philadelphia, Inc., 71 B.R. 655, 664 (Bankr. E.D. Pa. 1987) (“[T]here is no prohibition [...] against an entity’s serving on a Creditors’ committee which has an interest adverse to other creditors. Indeed, if there were, many otherwise eligible committee members would be disqualified.”); Grayson-Robinson Stores, Inc. v. Sec. & Exch. Comm’n, 320 F.2d 940, 949 (2d Cir. 1963) (“We recognize that ... the trade creditors represented on the Creditors’ Committee have an interest in continuing to do business with the debtor...”); In re Seascapes Cruises, Ltd., 131 B.R. at 243-44 (finding official committee not improperly constituted where certain members moved to convert case to Chapter 7 liquidation); In re Levy, 54 B.R. 805, 808 (Bankr. S.D.N.Y. 1985) (members of official committee may object to claims of other general unsecured creditors); In re Microboard Processing, Inc., 95 B.R. 283, 285 (Bankr. D. Conn. 1989) (“It is axiomatic that each unsecured creditor has a conflict with every other unsecured creditor in the sense that absent a 100% distribution, the elimination or reduction of any such claim will benefit all others.”); In re McLean Industries, Inc., 70 B.R. 852, 861 (Bankr. S.D.N.Y. 1987) (“creditors committees often contain creditors having a variety of view-points. Some members may favor liquidation; others may favor continuation of the business in order to preserve jobs or the viability of an important customer. [...] Such conflicts are not unusual [...] In most cases they can be expected among creditors acting to protect their separate business interests. In the usual case, they might not

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require a separate committee unless they impair the ability of the unsecured creditors committee to reach a consensus.”) (internal citation omitted).

To the extent there are conflicts among creditors, a committee is obligated to consider the interests of all creditors, and the best course of action under the circumstances must be charted in light of the fiduciary duty owed to all general unsecured creditors. See Matter of Bohack Corp., 607 F.2d 258, 262 n.4 (“Moreover, the committee owes a fiduciary duty to the creditors, and must guide its actions so as to safeguard as much as possible the rights of minority as well as majority creditors”). When conflicts arise between committee members, they must be brought to the attention of the full committee for discussion and deliberations. See Westmoreland Human Opportunities, Inc. v. Walsh, 327 B.R. 561, 575-76 (W.D. Pa. 2005) (“the requirements of notice and opportunity to object must be given by a committee member to all of its fellow committee members when it seeks to deal with nonestate property of the debtor where the dealings with such property could impact in any manner, negatively or positively, upon the recovery of the creditors in Bankruptcy.”); see also In re Nutritional Sourcing Corp., 398 B.R. 816, 836 (Bankr. D. Del. 2008) (“in general, even if a creditor or a group of creditors does not hold a seat on the committee, adequate representation exists through a single committee so long as the diverse interests of the various creditor groups are represented on and have participated in that committee”) (internal quotation and citations omitted). However, we have found no case setting forth any sort of general rule that a committee’s fiduciary obligations bar it from taking an action that would be to the disadvantage of some general unsecured creditors.

B. Fiduciary Duties of Committee Members

Members of a creditors’ committee (and counsel to the committee) “have obligations of fidelity, undivided loyalty and impartial service in the interest of the creditors they represent.” See In re Mesta Mach. Co., 67 B.R. 151, 156 (Bankr. W.D. Pa. 1986); In re ABC Auto. Products

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Corp., 210 B.R. 437, 441 (Bankr. E.D. Pa. 1997) (“[Creditors on a committee must] act with undivided loyalty for the benefit of all of the unsecured creditors”); In re Nationwide Sports Distributors, Inc., 227 B.R. 455, 463 (Bankr. E.D. Pa. 1998) (“both official creditors’ committees and their members owe a fiduciary duty to their constituencies”); In re Mountain States Power Co., 118 F.2d 405, 407 (3d Cir. 1941) (“[when a creditor joined an equity committee], he assumed a fiduciary relationship toward the preferred stockholders whom he and his associates on the committee represented”).

As the Court noted in In re Map Int’l, Inc., 105 B.R. 5, 6 (Bankr. E.D. Pa. 1989), members of a creditors’ committee “may not use their positions as committee members to advance only their individual interests.” In this regard, “[g]ood faith, trust and candor are essential to ensure that the work of the committee does not come to a standstill and is completed for the benefit of all unsecured creditors.” Westmoreland Human Opportunities, Inc. v. Walsh, 327 B.R. 561, 573 (W.D. Pa. 2005); see also In re El Paso Refinery, L.P., 196 B.R. 58, 75 (Bankr. W.D. Tex. 1996) (“courts [should not] decree that, whenever there is such a conflict [between the interests of the committee and the interests of an individual committee member], the [fiduciary] duty to the committee ought always to prevail”); In re Rickel & Associates, Inc., 272 B.R. 74, 100 (Bankr. S.D.N.Y. 2002) (“Although Committee members owe fiduciary duties, they are hybrids who serve more than one master. Every member of the Committee is, by definition, a creditor. Thus, he is [in] competition with every other creditor for a piece of a shrinking pie. He may assert his rights as a creditor to the detriment of the creditor body as a whole without running afoul of his fiduciary obligations”).

Members of a creditors’ committee also owe a fiduciary duty to one another; a member of a committee who pursues his or her own self-interest (as opposed to fiduciary obligations to

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general unsecured creditors as a whole) at the expense of another violates that fiduciary duty. See Westmoreland Human Opportunities 246 F.3d at 256 (3d Cir. 2001) (“A committee member violates its fiduciary duty by pursuing a course of action that furthers its self-interest to the potential detriment of fellow committee members”).

Distinct from liability based on general theories of liability for actions taken in their capacity as committee members, committee members also face liability as fiduciaries and have “obligations of fidelity, undivided loyalty and impartial service in the interest of the creditors they represent.” In re Mesta Mach. Co., 67 B.R. at 156. This fiduciary duty “extends to the class as a whole, not to its individual members.” In re Drexel Burnham Lambert Group, Inc., 138 B.R. 717, 722 (Bankr. S.D.N.Y. 1992). Specifically, committee members have a duty not to disclose confidential information, to avoid conflicts of interest, and not to trade in claims of the debtor based upon material nonpublic information they receive in their capacity as committee members. 7 Collier on Bankruptcy § 1103.05[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.), citing Locks v. United States Trustee, 157 B.R. 89 (W.D. Pa. 1993) (holding, in a mass tort case, that a conflict of interest exists when member of an unsecured creditors’ committee seeks appointment of a representative for holders of future potential future claims because a committee member “is prohibited from concurrently serving both masters”); and In re Kuhns, 101 B.R. 243 (Bankr. D. Mont. 1989) (denying approval of the purchase of a claim of a committee member by person desiring to frustrate the actions of the committee without any suggestion that the committee member violated a duty by selling the claim). A committee member’s violation of its fiduciary duty is separate and distinct from actions based on other theories of liability stemming from a committee member’s actions.

C. Protection Afforded to Members of Official Committees

Section 1103 of the Bankruptcy Code gives rise to a qualified immunity for committee

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members. A member of an official committee has a qualified immunity from legal action for matters relating to the performance of the committee's duties. 7 Collier on Bankruptcy § 1103.05[4]. The qualified immunity of an official creditors' committee has been recognized to be analogous to that of a bankruptcy trustee to the extent that the committee acts within its statutory authority. See, e.g., Central Transp., Inc. v. Roberto (In re Tucker Freight Lines, Inc.), 62 B.R. 213, 218 (Bankr. W.D. Mich. 1986), see also Dana Commercial Credit Corp. v. Nisselson (In re Center Teleprods., Inc.), 112 B.R. 567, 578 (Bankr. S.D.N.Y. 1990). In the Third Circuit (which includes the Delaware Bankruptcy Court), committee members are afforded qualified immunity for acts taken in connection with their service on an official committee. See In re PWS Holding Corp., 228 F.3d 224, 246 (3d Cir. 2000) (interpreting Bankruptcy Code section 1103(c) as providing a grant of qualified immunity to committee members); see also In re Granite Partners, L.P., 210 B.R. 508, 516 (Bankr. S.D.N.Y. 1997) (finding that committee members are protected by qualified immunity for actions taken within the scope of authority conferred upon them by statute or the court).

To overcome this grant of immunity, a party must establish that the actions of the committee or its members were ultra vires or amounted to willful misconduct. See In re PWS Holding Corp., 228 F.3d at 246 (limiting liability of a committee to willful misconduct or ultra vires acts); see also In re Dow Corning Corp., 255 B.R. 445, 485 (E.D. Mich. 2000) (stating that section 1103(c) provides an "implicit grant of limited immunity" to committee members for actions within the scope of their authority in the absence of willful misconduct or ultra vires activity); Pan Am Corp. v. Delta Air Lines, Inc., 175 B.R. 438, 514 (S.D.N.Y. 1994) (finding that creditors' committees enjoy a qualified immunity "for conduct within the scope of the committee's statutory or court-ordered authority"); Luedke v. Delta Air Lines, Inc., 159 B.R.

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385, 392-93 (S.D.N.Y. 1993) (stating immunity is limited to actions taken within the scope of the committee's authority and does not extend to "willful misconduct" of the committee or its members).

The Pan Am court noted that willful misconduct requires a showing of either "the intentional performance of an act with knowledge that the performance of that act will probably result in injury" or "the intentional performance of an act in such manner as to imply reckless disregard of the probable consequences." 175 B.R. at 514 n. 66, quoting Republic Nat'l Bank of N.Y. v. Eastern Airlines, Inc., 815 F.2d 232, 238-39 (2d Cir. 1987). With regard to ultra vires actions, the movant must demonstrate that the conduct was engaged in "without any authority whatsoever." Pan Am Corp. v. Delta Air Lines, Inc., 175 B.R. at 515, quoting Minotti v. Lesink, 798 F.2d 607, 609 (2d Cir. 1986), cert. denied, 482 U.S. 906 (1987)). The court in In re Walnut Leasing Co., Inc. dismissed a claim that the creditors' committee's action against debtor's directors, auditors and underwriters for tortiously precipitating the debtor corporations' bankruptcies was ultra vires because it caused harassment and annoyance. 2000 WL 283843 at *2 (E.D. Pa. March 15, 2000). The court stated that such a suit was within the committee's authority as granted under section 1103(c). Id.

In Vasconi & Assoc., Inc., et. al. v. Credit Manager Ass'n. of Cal., several unsecured creditors initiated adversary proceedings against the creditors' committee and its members alleging breach of fiduciary duty and negligence based on the committee's sale of stock awarded to the unsecured creditors as part of the debtor's plan of reorganization. 1997 WL 383170, *2 (N.D. Cal. 1997). The plan provided for the unsecured creditors to receive payments including a proportionate share of common stock of the reorganized debtor. Id. at *2. The plan provided that should any of the stock become liquid, the committee could, in its discretion, direct the

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liquidation of such stock and thereafter distribute or reserve the proceeds consistent with the terms of the plan. Id. at *1. The plan also contained a provision releasing the committee and its members from liability for actions taken in good faith to implement the plan or within the scope of section 1103, unless such action constituted gross negligence or willful misconduct. Id. After the committee directed the sale of the stock and made a distribution to the unsecured creditors, the reorganized debtor proceeded with an initial public offering of its stock, causing the value of the stock to skyrocket. Id. at *2. The plaintiffs alleged that the committee and its members improperly ordered the sale and usurped from creditors the opportunity to determine for themselves the timing of a sale. Id. at *2.

The court held that, as a threshold matter, the release of liability contained in the plan was proper, because by preserving liability for willful misconduct, the provision maintained the proper balance between the fiduciary obligations and implicit immunity of section 1103. Id. at *4. The court went on to evaluate the claims of willful misconduct and ultra vires activity based on the standards set out above. Id. The court held that both claims failed. Id. First, the plaintiffs did not allege any willful misconduct, but merely alleged that the committee should have provided the unsecured creditors with notice. Id. Further, the court held that the committee members were acting well within their authority when they authorized the sale, as the plan provided for them to authorize a sale at their discretion. Id. at *5.

D. Fibermark – A Hard Lesson

FiberMark, a former Boise Cascade division spun off in a 1989 management buyout, filed for bankruptcy in March 2004, reporting assets of \$400 million. Harvey Miller, an appointed examiner in the case, found abuse in the committee by FiberMark bondholders AIG Global Investment, Post Advisory Group and Silver Point Capital. See “In Re: FiberMark—Report of Harvey R. Miller, as Examiner” (“Miller’s Report”) (Though it’s marked confidential,

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the report was unsealed and is available from the Wall Street Journal's website at http://online.wsj.com/public/resources/documents/WSJ-HarveMiller_report.pdf).

Miller's Report indicates that all three bondholders were distressed-trading firms that had purchased 85% of FiberMark debt in the secondary trading market. The three creditors are also among the distressed arena's most powerful players: AIG Global is the investment division of insurance giant American International Group; Post Advisory is Principal Financial's distressed-trading arm, run by Lawrence Post, a former Michael Milken lieutenant at Drexel Burnham Lambert; and Silver Point is a \$4 billion hedge fund run by Edward Mulé and Robert O'Shea, former Goldman Sachs partners.

The reorganization stalled over who would control the company post bankruptcy. With the case at a standstill, Post and AIG leveled an incendiary charge that Silver Point had engaged in insider trading, using confidential information it had obtained as a member of the committee. Miller asserted that AIG and Post fabricated the insider-trading charge to gain bargaining leverage over Silver Point, which controlled the most debt of the three creditors. Miller contended that AIG and Post's eventual goal was to gain veto power over company decisions, despite holding a minority of the total debt. That, Miller said, amounted to a breach of fiduciary duties because they were acting in their own interests rather than the committee's.

Judge Colleen Brown of the U.S. Bankruptcy Court in Vermont, who had appointed Miller to serve as an independent examiner, explained that Miller's Report, "reveals Machiavellian thoughts gone awry, shocking breaches of fiduciary duty . . . well-respected professionals losing their ethical compass in a storm of power plays . . . and the thirst for power derailing the reorganization process"

Miller concluded that the committee had breached its fiduciary duties to the general

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unsecured creditors. He explained that “AIG usurped the role of the committee for its own purposes and engaged in self-interested and destructive conduct in the negotiation of corporate governance provisions for the reorganized FiberMark.” Miller’s Report at 294-95. The actions overwhelmingly established a pattern rising to a “willful disregard of the consequences to interests of the general creditor constituency as well as wrongful misconduct.” Id. at 295. This turned a simple uncomplicated chapter 11 case “into one of the worst examples of a chapter 11 reorganization gone awry to the prejudice of all parties and particularly, the entire general unsecured creditor constituency.”

But Miller saved some of his harshest words for counsel to the creditors’ committee. Miller accused counsel of pandering to AIG and Post rather than representing the interests of all general unsecured creditors. Counsel’s “performance of services on behalf of AIG and Post in furtherance of their self-interests and its lack of objectivity and disinterestedness in representing the committee and the committee members, exacerbated the tempest that raged in these chapter 11 cases. Such services were in disregard and not in the best interest of the committee’s constituency – all of the general unsecured creditors of FiberMark.” Miller’s Report at 321.

The two firms agreed to sell their entire claims to Silver Point at a discount, giving them less of a recovery than any other creditor, and the firms and counsel were sanctioned. In his report, Miller recommended that AIG and Post be required to pay upwards of \$8.3 million to the other creditors for the loss in value that AIG and Post caused, and asked that the court disallow a “significant portion” of the fees earned by the committee’s counsel. Miller’s Report at 25-26.

AMERICAN BANKRUPTCY INSTITUTE

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF [DEBTOR IN POSSESSION]

BY-LAWS

1. *THE COMMITTEE*

- 1.1 *Appointment of Committee.* On _____, the United States Trustee appointed _____ members to the Official Committee of Unsecured Creditors (the “Committee”) in the pending chapter 11 case entitled _____ (the “Debtor”). The United States Trustee has stated that additional members [may/will] be appointed to the Committee at a later date upon the filing of chapter 11 cases by other entities related to or affiliated with the Debtors.
- 1.2 *Membership and Designation of Representative.* Each member of the Committee appointed on _____, has an individual designated to act on its behalf as its representative on the Committee. This designation is contained in the notice of appointment. Each existing or future member of the Committee may designate, in writing, one or more additional persons to act on its behalf as set forth in Section 1.3 below. The members of the Committee and their respective representatives, including Alternates, are as set forth on Schedule I attached hereto, as such Schedule shall be updated from time to time.
- 1.3 *Alternates.* Any member of the Committee may designate an alternate representative to attend Committee meetings and to act on its behalf, provided the alternate representative is an employee of, or attorney or attorney-in-fact for, the member. In the absence of the primary representative, an alternate representative shall be deemed a representative of such member of the Committee for all purposes of the meeting.
- 1.4. *Change of Representative.* If any representative of a member of the Committee resigns, dies, is no longer employed by or is no longer an agent of, or for any other reason is unable or unwilling to serve as the representative of such member of the Committee, then such member of the Committee shall have the absolute right to designate, in writing, a successor representative, who shall be an employee or duly authorized agent of such member of the Committee, to represent it on the Committee.
- 1.5 *Ex-Officio Members.* No ex-officio members of the Committee shall be permitted.
- 1.6 *Powers and Duties of Committee.* The powers and duties of the Committee are described in 11 U.S.C. § 1103 and include the duty to take actions, in good faith, believed to be for the benefit of the unsecured creditors of the Debtor in the pending bankruptcy case.

- 1.7 *Chairperson.* At its initial organization meeting, held in [city, state], at which the initial _____ members of the Committee were represented, the Committee selected _____ as Chairperson of the Committee.
 - 1.8 *Counsel.* At its initial organization meeting, held in [city, state], at which the initial _____ members of the Committee were represented, the Committee voted to employ and retain the law firm of _____ to serve as the Committee's counsel ("Counsel") in the performance of its duties under 11 U.S.C. § 1103.
 - 1.9 *Financial Advisor.* At its initial organization meeting, held in [city, state], at which the initial _____ members of the Committee were represented, the Committee voted to employ and retain _____ to serve as the Committee's financial advisor ("Financial Advisor") in the performance of its duties under 11 U.S.C. § 1103.
 - 1.10 *Resignations.* A member resigning from the Committee shall give written notice of such resignation to the United States Trustee and to Counsel. In the event a member transfers or assigns to any non-affiliate of such member more than 50% of its prepetition unsecured claims against the Debtor, said member shall disclose the transfer to the Committee and, subject to consultation by Counsel with the United States Trustee, such event may effect the member's resignation from the Committee. In the event a member ceases to hold a prepetition unsecured claim against the Debtor, said member shall disclose the transfer to the Committee and, subject to consultation by Counsel with the United States Trustee, such event shall effect the member's resignation from the Committee. Any actions taken by the Committee after transfer of more than 50% of a Committee member's claims against the Debtor, but before notice of such transfer being given to the Committee, shall not be affected except that they shall be subject to reconsideration by the remaining Committee members.
 - 1.11 *Replacements.* Upon the resignation or removal of a member, the Committee, in its discretion, may recommend a replacement to the United States Trustee, or the Committee may refrain from recommending a replacement. Until a vacancy on the Committee is filled (if ever), the Committee may perform all of its functions with its reduced membership.
2. *MEETINGS AND ACTIONS BY THE COMMITTEE*
- 2.1 *Calling and Notice.* Meetings of the Committee may be called by either the Chairperson or Counsel, or upon the request of a majority of the members of the Committee. Notice by telephone, telecopy, or e-mail as provided in Schedule I of the time and place of each meeting of the Committee shall be given to each member and its counsel reasonable under the circumstances in advance of such meeting. No notice of an adjourned meeting need be given, other than by an announcement at the meeting at which the adjournment is taken and by reasonable notice (under the circumstances) to any members who were not present at such meeting. The Committee shall try to determine in writing at each meeting when the next meeting shall be; if not, notice may be given orally, by telephone or otherwise.

- 2.2 *Place of Meetings, Meetings by Conference Call.* Meetings of the Committee may be held by telephone or in person, or by combination thereof. Meetings of the Committee shall be held at such place designated by the Chairperson or Counsel, or as otherwise selected by a majority of the Committee.
- 2.3 *Special Meetings.* Special meetings may be called by the Chairperson or by Counsel on at least twenty-four (24) hours prior notice by telephone, mail, telecopy, telex, or e-mail to each member, provided that if essential the Chairperson or Counsel may call a special meeting on shorter notice. If such notice is by telephone it shall be confirmed by telegram, telecopy, telex, or e-mail. The primary purpose for the special meeting shall be set forth in the notice.
- 2.4 *Emergency Action.* In emergencies, action may be taken by Committee vote without a special meeting provided that the Chairperson determines, upon consultation with Counsel, that the situation requires emergency action. In such cases, votes may be obtained by polling members on the issue by telephone, telex, telecopier, or e-mail. Polling may be conducted by the Chairperson, Counsel, or an agent or employee of such persons. Such a vote shall be effective if a good faith effort is made to reach and consult with each representative of the members of the Committee or their designated alternates with respect to the proposed action, and if prior to the taking of such action, at least three (3) members of the Committee approve the action, which approval shall be confirmed in writing to the Chairperson who determined that emergency action was required. The Chairperson who determined that emergency action was required or his designee shall provide prompt notice of any such emergency action to each member who has not given approval, which notice shall be confirmed in writing.
- 2.5 *Persons Present At Meetings.* Due to the potentially sensitive, non-public nature of subjects that may be discussed by the Committee and the possibility of detrimental effect to the Debtor, the estate and all of the creditors in this case if there should be public dissemination of such discussions, meetings of the Committee shall not be open to persons other than members of the Committee, their designated representatives or alternates and designated counsel, and professionals employed by the Committee, provided, however, that the Committee, by affirmative vote of a majority of its members may, for special, limited purposes, permit other persons to attend.
- 2.6 *Meeting Agendas.* An agenda for scheduled meetings shall be prepared by the Chairperson and Counsel, taking into account suggestions by members. If feasible, a proposed agenda will be circulated to each member reasonably (under the circumstances) in advance of each Committee meeting.
- 2.7 *Quorum; Attendance at Meetings.* A majority of the Committee shall constitute a quorum for the transaction of business at any meeting. A quorum may include members attending by telephone or e-mail.
- 2.8 *Voting.* Each member shall be entitled to one vote and may vote in person or by telephone.

- 2.9 *Conflicts of Interest.* In the event that any matter under review or consideration by the Committee shall involve a conflict of interest with respect to any member, that member shall immediately inform other members of the Committee of the conflict. The member shall not vote on the matter but may participate in the discussion unless excluded by vote of a majority of the members then present and not subject to such conflict of interest. A determination of the existence of a conflict of interest shall be made by a majority of the members present and not subject to the alleged conflict of interest, upon advice of Counsel; *provided*, this by-law does not preclude any member from requesting the Bankruptcy Court to determine the existence of a conflict of interest.

3. *ACTION BY THE COMMITTEE*

- 3.1 *Action of Meeting.* Action by the Committee at a meeting shall require the (i) affirmative vote of, or (ii) the clear establishment of a position by, a majority of the quorum of the members participating in the meeting. A Chairperson shall tally and record the votes of members of the Committee with respect to any matter and the tally shall be final.
- 3.2 *Subcommittees.* The Committee may form an Executive Committee and such subcommittees as may be appropriate in the Committee's discretion, to serve at the Committee's pleasure, with such powers and duties as the Committee may determine, consistent with these by-laws and the provisions of 11 U.S.C. § 1103.
- 3.3 *Counsel.* Counsel shall act at the request of the Committee or a subcommittee, together with such implementing duties as are set forth in these by-laws or as may be requested by the Committee.
- 3.4 *Financial Advisor.* Financial Advisor shall act at the request of the Committee or a subcommittee, together with such implementing duties as are set forth in these by-laws or as may be requested by the Committee.
- 3.5 *Authority of Chairperson.* Without prior Committee action or consent, the Chairperson, after consultation and with the advice of Counsel for the Committee, shall be empowered to consent to or otherwise act upon relatively minor court matters, which may include (i) requests by any parties in interest for the entry of court orders involving amounts not greater than \$10,000 per item and not greater than \$50,000 in the aggregate, between meetings, and (ii) other court matters not readily susceptible of monetary evaluation which, in the judgment of the Chairperson, upon advice of Counsel, are considered to be in the normal course of business. The Committee shall be advised of any court matters so acted upon the Chairperson.

In special, unexpected situations, action may be taken by the Chairperson on behalf of the Committee without a meeting, provided, however, that the Chairperson determines, after consultation with Counsel, that such action is absolutely vital to the interests of the Committee and provided, further, that the Chairperson shall first make a good faith effort to poll the members of the Committee concerning the matter at issue, as provided in paragraph 2.4, above.

As authorized by the Committee, the Chairperson or Counsel shall speak for the Committee, and the Chairperson shall at all times on behalf of the Committee provide instructions to Counsel, Financial Advisor, or other professionals retained by the Committee. Counsel, Financial Advisor, and other professionals retained by the Committee are authorized to act on the advice and instructions of the Chairperson.

4. *CONFIDENTIALITY, REMOVAL FROM THE COMMITTEE, AND MISCELLANEOUS.*

- 4.1 *Confidentiality.* All non-public information, documents and matters of whatever nature and kind disclosed to the Committee or generated by the professionals or agents employed or retained by the Committee, as well as the matters discussed at Committee meetings and the minutes thereof, are confidential, and each member of the Committee shall use its best efforts not to disclose or reveal such information to third parties, except that a member may share any such information, documents, and matters with its attorneys and affiliates; provided that any such information, documents, and matters shall not be used by any such person for any purpose whatsoever except in connection with the conduct of the business of the Committee; and provided further that the person or entity receiving such disclosure agrees to be and is bound by these rules of confidentiality. Upon request, the Committee may allow information, documents, and matters made known to a Committee member, or developed by the Committee during and in connection with the case, to be used by a Committee member in connection with the case. Any such authorization shall be in writing and shall be signed by the Chairperson.
- 4.2 *Removal from Committee Participation Due to Breach of Confidentiality.* In the event that the Committee determines by majority vote that one of its members has knowingly and intentionally breached the confidentiality duties and obligations associated with membership on the Committee, then the Committee may determine to impose an appropriate sanction. The sanction may include, but is not limited to, (a) private censure in the minutes of the Committee, (b) after consultation by Counsel with the United States Trustee, preclusion of the member from participating in some or all of the activities of the Committee, (c) requesting that the member voluntarily withdraw from the Committee, or (d) petitioning the United States Trustee and/or the Bankruptcy Court to remove the member from the Committee for cause.
- 4.3 *Amendments.* These by-laws may be amended, repealed, or adopted by the vote of a majority of the entire Committee. Each member shall execute these by-laws. This document may be executed in counterparts.
- 4.4 *Continuing Right of Members to Act in Individual Capacity.* While all Committee members acknowledge that they are acting in a fiduciary capacity as defined by law, nothing contained herein shall: (a) prevent any member from (i) exercising or seeking to enforce or protect any of its rights as an individual creditor or other party-in-interest or (ii) taking any actions or enforcing any rights in respect of any security interests such member may have in property of the Debtor; or (b) otherwise affect the ability of any member to act in its capacity as an individual creditor or other party-in-interest as it may deem appropriate.

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- 4.5 *Officers.* A Chairperson of the Committee shall be elected by the Committee and shall serve until either (i) his, her, or its successor shall be elected by the Committee, or (ii) he, she, or it resigns.
- 4.6 *Minutes.* There shall be no secretary of the Committee. In lieu thereof, Counsel shall keep the minutes of all meetings of the Committee and Subcommittees. The minutes shall be circulated to all members of the Committee or Subcommittee, as the case may be, for their review, and shall be adopted by a majority of the members of the Committee or Subcommittee, as the case may be, present at the meeting which is the subject of such minutes. Subject to changes approved by the Committee or Subcommittee as the case may be, the minutes generally shall be limited to a concise statement of the action taken at a meeting and a brief statement of any significant items discussed by the Committee or Subcommittee, as the case may be, without detail. The minutes shall list the members present and voting, but not the specific vote of any members, their counsel and the Committee's professionals. Each recipient agrees to maintain the confidentiality of the minutes and of the matters transpiring at the Committee meetings.
- 4.7 *Media Relations.* Communication of Committee views to media shall be made only by the Chairperson or Counsel, and only to the extent specifically authorized by the Committee.
- 4.8 *Expenses.* Reasonable expenses of the Committee and of Committee members or alternate representatives incurred in connection with Committee business may be submitted to Counsel for reimbursement by the Debtor on a periodic basis consistent with the Bankruptcy Code and Bankruptcy Rules. Reasonable expenses shall include expenses for attendance at meetings by the respective representatives or alternates, and shall include reasonable and necessary expenses incurred for telephone calls, transportation, hotel, food, cabs, and related expenses. Requests for reimbursement of expenses shall be itemized and reasonably detailed and include receipts when practicable. Copies of requests for reimbursement of expenses filed with the Court shall be sent to Members.

Adopted on _____,

[INSERT SIGNATURE BLOCKS FOR COMMITTEE MEMBERS]

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