JOINT MEETING

OF THE

DELAWARE BANKRUPTCY AMERICAN INN OF COURT

AND

THE BANKRUPTCY AMERICAN INN OF COURT (NEW JERSEY)

JUNE 15, 2010 AT 5:30 P.M.

CEREMONIAL COURTROOM
JAMES A. BYRNE COURTHOUSE
PHILADELPHIA, PA

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TAB 1

BENCH MEMORANDUM SUBMITTED IN SUPPORT OF REQUEST TO COMPEL THE *AD HOC* COMMITTEE TO COMPLY WITH FEDERAL RULE OF BANKRUPTCY PROCEDURE 2019

American Bankruptcy Inns of Court –
New Jersey Chapter

Cassandra Porter – Lowenstein Sandler, P.C.
Nicole Stefanelli - Lowenstein Sandler, P.C.
Lindi von Mutius – Flaster Greenberg, P.C.

Bench Memo Submitted on Behalf of Debtors-Appellants

INTRODUCTION

The above-captioned debtors and debtors in possession (collectively, the "Debtors"), as Appellants in this proceeding, hereby move this honorable Court (this "Motion") for entry of an order compelling each present and former member of the Steering Group of Prepetition Lenders (as reconstituted throughout the pendency of these Chapter 11 Cases (defined below), the "*Ad Hoc* Steering Committee") to comply with Rule 2019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").[1] In support of this request, the Appellants respectfully represent as follows:

Federal Rule of Bankruptcy Procedure 2019

Bankruptcy Rule 2019(a) provides, "in a chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 or 1104 of the Code, every entity or committee representing more than one creditor ... shall file a verified statement." Fed. R. Bankr. P. 2019 (2010). The "verified statement" shall set forth the following information:

> (1) the *name* and address of the creditor or the equity security holder;
>
> (2) 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;
>
> (3) a *recital of the pertinent facts and circumstances* in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the *name or names of the entity or entities* at whose instance, directly or indirectly, *the employment was arranged or the committee was organized or agreed to act*;
>
> (4) with reference to the time of the employment of the entity, the organization or the formation of the committee, or the appearance in the case of an indenture trustee, the amounts of the amount of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid thereof, and any sales or disposition thereof.

Id. (*emphasis added*).

[1] This memorandum relies on the following jurisdictional facts: (a) this Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334; (b) that this is a core proceeding within the meaning of 28 U.S.C. § 157(b); and that venue is proper in this district under 28 U.S.C. §§ 1408and 1409.

Bankruptcy Rule 2019 further provides "[t]he statement shall include a copy of the instrument, if any, where by the entity, committee ... is empowered to act on behalf of creditors." *Id.* A party's failure to comply with Bankruptcy Rule 2019 may result in the imposition of sanctions and refusal by a court to permit the offending party to be heard or otherwise participate in the case. Fed. R. Bankr. P. 2019(b).

FACTUAL AND PROCEDURAL BACKGROUND[2]

On February 22, 2009 (the "Petition Date"), the Debtors, other than Debtor Philadelphia Media Holdings LLC ("PMH"), commenced these voluntary cases (the "Chapter 11 Cases") by the filing of petitions for relief under chapter 11 of the Bankruptcy Code. PMH filed its petition for relief under chapter 11 of the Bankruptcy Code on June 10, 2009 and its chapter 11 case has been procedurally consolidated with the Chapter 11 Cases. The Debtors continue in possession of their properties and continue to operate their respective businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On March 2, 2009, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Creditors' Committee") in the Chapter 11 Cases.

The Debtors are parties to a Credit and Guaranty Agreement dated June 29, 2006 (the "Prepetition Credit Agreement"), which consists of a term loan in the original principal amount of $295 million and a senior revolving credit facility in the original stated amount of $50 million. *Debtors' Mot.*, ¶ 6.[3] Citizens Bank of Pennsylvania, the largest lender, serves as the administrative and collateral agent (the "Prepetition Agent"), in conjunction with several other Prepetition Lenders. The Debtors owe approximately $300 million under the Prepetition Credit Agreement. *Id.* Pursuant to the terms of the Prepetition Credit Agreement, creditors holding in excess of 50% of the Debtors' outstanding secured debt are authorized to direct the Prepetition

[2] The factual and procedural background for this bench memo are borrowed from *In re Philadelphia Newspapers, LLC, et al.*, Docket No. 09-11204. Some names have been changed.

[3] Full title: Motion of Debtors for Entry of an Order Compelling The Steering Group of Prepetition Lenders to Comply with Federal Rule of Bankruptcy Procedure 2019, filed on December 8, 2009 at Document No. 1507, *In re Philadelphia Newspapers, LLC, et al.*, Docket No. 09-11204(SR), referenced herein as ("Debtors' Motion").

Agent, to take certain actions on behalf of all the Prepetition Lenders. The *Ad Hoc* Steering Committee consists of lenders who assert that they are authorized to direct the Prepetition Agent to act on their behalf.

The *Ad Hoc* Steering Committee has filed several 2019 statements throughout this bankruptcy case. On April 15, 2009, counsel for the *Ad Hoc* Steering Committee filed an initial *Verified Statement of Counsel LLP Regarding Multiple Representations Pursuant to Fed. R. Bankr. P. 2019(a)* (Docket No. 355, the "Initial 2019 Statement"). In the Initial 2019 Statement, the *Ad Hoc* Steering Committee identified itself as being composed of a group of Prepetition Lenders holding approximately $140 million of the Debtor's unsecured debts. On May 27, 2009, counsel for the *Ad Hoc* Steering Committee filed the *Amended Verified Statement of Counsel LLP Regarding Multiple Representations Pursuant to Fed. R. Bankr. P. 2019(a)* (Docket No. 522, the "First Amended 2019 Statement"). In this statement, the *Ad Hoc* Steering Committee added Credit Suisse Candlewood Special Situations Fund LTD to its body, and removed McDonnell Investment Management LLC. The First Amended 2019 Statement acknowledged that the Prepetition Lenders held $149 million of the Debtors' unsecured debt. On December 3, 2009, counsel for the Steering Committee filed a second *Amended Verified Statement of Counsel LLP Regarding Multiple Representations Pursuant to Fed. R. Bankr. P. 2019(a)* (Docket No. 1483, the "Second Amended 2019 Statement"). In the Second Amended 2019 Statement, counsel to the *Ad Hoc* Steering Committee claimed that the Prepetition Lenders held $179 million of the Debtors' unsecured debt. Further, McDonnell Investments Management LLC was included and Wells Fargo Foothill removed from the list of *Ad Hoc* Steering Committee members.

The *Ad Hoc* Steering Committee contends that it constitutes "Requisite Lenders" under the Prepetition Credit Agreement, thereby empowering it to direct the Prepetition Agent to act on behalf of all Prepetition Lenders. The members of the *Ad Hoc* Steering Committee have never filed the required Rule 2019 disclosures. The Debtors have not been able to ascertain the exact

amount of debt held by the members of the *Ad Hoc* Steering Committee because no Bankruptcy Rule 2019 disclosures have been filed.

ARGUMENT

Appellants respectfully request the Court to enter an order: (a) compelling each present and former member of the *Ad Hoc* Steering Committee to comply fully with Bankruptcy Rule 2019, and (b) barring the participation of the *Ad Hoc* Steering Committee and its counsel in this case until all such disclosure deficiencies are fully remedied.

I. BANKRUPTCY RULE 2019 APPLIES TO THE *AD HOC* STEERING COMMITTEE

Bankruptcy Rule 2019 is derived from Rule 10-211, which in turn was derived from Section 209-213 of the Bankruptcy Act. This rule was created in response to abuse in "protective committees" in restructurings in the 1930s, which committees were controlled by the debtor or insiders. *In re Northwest Airlines Corp.*, 363 B.R. 701,707 (Bankr. S.D.N.Y. 2007) referencing "Report on the Study and Investigation of the Work Activities, Personnel and Function of Protective and Reorganization Committees," Securities and Exchange Commission (1937).

Bankruptcy Rule 2019(a) is clear in its requirement that *every entity or committee representing more than one creditor* shall file a verified statement complying with the requirements of Bankruptcy Rule 2019. The purpose of Bankruptcy Rule 2019, since its inception, is to protect debtors from creditors who form committees "with the purpose of obtaining leverage in the reorganization that would not be available to disparate creditors." *In re Premier Holdings, Inc.*, 423 B.R. 58, 61 (Bankr. D. Del. 2009). Although the composition and type of committees have evolved since Bankruptcy Rule 2019's early inception, its purpose remains vital.

In *Northwest Airlines*, the debtors moved to require an *ad hoc* committee of equity security holders to supplement its Bankruptcy Rule 2019 statement. *See Northwest Airlines*, 363 B.R. at 701. The debtors argued that the *ad hoc* committee's previous Bankruptcy Rule 2019 statement was inadequate in that it failed to disclose the amounts of claims or interests owned by

the members of the committee, the times when acquired, the amounts paid therefore, and any sales or other disposition thereof. *Id.* The *ad hoc* committee substantiated its decision not to supplement its Bankruptcy Rule 2019 statement by stating that although it was represented by the same firm, each individual committee member represented its own interests. *See Northwest Airlines* at 702. As Judge Raslavich noted in *Philadelphia Newspapers, Inc.*, "[t]he Court summarily dismissed this argument calling it a blithe attempt by the *ad hoc* committee to avoid complying with the rule." *In re Philadelphia Newspapers, LLC*, 422 B.R. 553, 558 (Bankr.E.D.Pa. 2010) citing *Northwest Airlines* at 703.

As in *Northwest Airlines*, in this case, the *Ad Hoc* Steering Committee is composed of "creditors holding similar claims, who have elected to consolidate their collection efforts...." Based upon the court's determination in *Northwest Airlines*, Bankruptcy Rule 2019, by its plain terms, applies to the *Ad Hoc* Steering Committee.

In *Washington Mutual,* the court held that a group of creditors holding similar claims, whose members had filed pleadings and appeared in debtors' jointly administered cases collectively qualified as an *ad hoc* committee for purposes of Bankruptcy Rule 2019. The court required the *ad hoc* group to comply with Bankruptcy Rule 2019 because it "provide[s] a routine method of advising the court and all parties in interest of the actual economic interest of all persons participating in the proceedings." *In re Washington Mutual, Inc.*, 419 B.R. 271, 278 (Bankr.D.Del. 2009). In the instant matter, Appellants are seeking exactly the type of disclosure identified in *Washington Mutual*. The type of interest each member has in the administration and outcome of this bankruptcy proceeding is important for this Court and Appellants to know because ad hoc or unofficial committees play an important role in reorganization cases. "By appearing as a 'committee' ... the members purport to speak for a group and implicitly ask the court ... to give their position a degree of credibility appropriate to a unified group with large holdings." *See Northwest Airlines*, 363 B.R. at 703.

The *Ad Hoc* Steering Committee will likely present arguments as to why Bankruptcy Rule 2019 should not apply to them. One of these arguments will likely be that it is not a

"committee." It is irrelevant what the *Ad Hoc* Steering Committee calls itself. The Court must look beyond the "plain meaning" and Black's Law Dictionary's definition of the word "committee." In fact, when counsel for the *Ad Hoc* Steering Committee sought *pro hac vice* admission in these Chapter 11 Cases, they expressly sought authority to appear in order to "represent the Steering Committee of Secured Creditors." [*Docket Nos. 125, 126 and 127*]. Thus, despite the clear applicability of Bankruptcy Rule 2019 to each present and former member of the *Ad Hoc* Steering Committee, the *Ad Hoc* Steering Committee's Bankruptcy Rule 2019 Statements do not contain any of the information required by Bankruptcy Rule.

As stated in *Washington Mutual Inc., Northwest Airlines*, and Judge Raslavich's recent decision in *Philadelphia Newspapers*, this Court should look to the degree of influence the creditor group will have on the pending bankruptcy case. As Judge Raslavich noted, "the nub of the question is how the legislative history of Rules 10-211 and 2019 applies to the informal and *ad hoc* committees." *Philadelphia Newspapers, LLC*, 422 B.R. at 564. While, the types of committees present in the early twentieth century, no longer exist, they have been replaced by the *Ad Hoc* Steering Committee, who seeks to exercise influence over the administration of this bankruptcy estate in a similar fashion. When judged under this standard, the *Ad Hoc* Steering Committee in the instant action must certainly be subject to Bankruptcy Rule 2019.

II. THE DEBTOR'S REORGANIZATION WILL BE JEOPARDIZED IF THE *AD HOC* STEERING COMMITTEE IS NOT REQUIRED TO FOLLOW RULE 2019.

Contrary to the *Ad Hoc* Steering Committee's argument, it is not only the law firm purporting to represent the committee that must comply with Rule 2019 – it is the members themselves that must satisfy the disclosure obligations under the Bankruptcy Rule 2019. The *Ad Hoc* Steering Committee purports to have contractual authority to direct the Prepetition Agent to act on behalf of all of the Prepetition Lenders. Yet, the information required by Bankruptcy Rule 2019 remains unknown to this Court, the Debtors-Appellants and the balance of the Debtors' creditor constituencies.

The significance of the Bankruptcy Rule 2019 disclosure requirement in this case derives from the fact that the *Ad Hoc* Steering Committee has added and subtracted members from its group at will. It appears the members of the *Ad Hoc* Steering Committee rotate on and off as they buy and sell securities in the Debtors' businesses. For this reason, disclosure of the purchase price of the securities spent by the individual *Ad Hoc* Steering Committee members is imperative to understanding their interest in the Debtors' businesses and the Estates overall. For example, (i) how much the *Ad Hoc* Steering Committee owns or owned, (ii) when and at what price they acquired them, (iii) what they have sold or additionally purchased, (iv) when and (v) at what price, is critically important to the Court and parties in interest in assessing: (a) the true value of their claims; (b) the level and nature of their interests in these Chapter 11 Cases; (c) the bias and motivation behind the positions that they are taking before this Court; and (d) their credibility. One of Bankruptcy Rule 2019's purposes is to give "all parties a better ability to gauge the credibility of an important group that has chosen to appear in bankruptcy and play a major role." *Northwest Airlines*, 363 B.R. at 709.

Further, the *Ad Hoc* Steering Committee's argument that they do not wish to disclose confidential information as they are protected under Bankruptcy Code § 107(b)(1) is invalid. The purpose of Bankruptcy Code § 107(b)(1) is to protect a creditor from disclosing trade secrets, confidential research, development, or confidential information. *See* 11 U.S. C. § 107 (2010). Appellants, and courts, do not seek the disclosure of trade secrets and confidential research, but rather Appellants seek information to understand the basis of the *Ad Hoc* Steering Committee's influence over other Prepetition Lenders.

In fact, the Prepetition Lenders, and those who argue that Rule 2019 would force creditors to reveal sensitive information, are simply trying to hide the ball. During testimony before the Senate on amendments to Rule 2019, several witnesses testified that parties joining in a committee often have an interest in a debtor's failure because they have prearranged credit default swaps or bond trades. *See* February 5, 2010 Testimony of Honorable Robert E. Gerber, United States Bankruptcy Judge, Southern District of New York, on Amendments to Bankruptcy

Rule 2019 at 18, 30 available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Hearing_Feb_5_2010.pdf (last visited May 26, 2010). An *ad hoc* committee is not required to disclose specific trade dates, pricing, or even internal negotiations under the current iteration of Rule 2019. They are simply asked to provide a transparency on their claim in the proceeding. It would be dangerous to allow *ad hoc* committees of creditors to misrepresent themselves because courts would be asked to rule on creditor relief without knowing a party's true stake in the reorganization.

CONCLUSION

Rule 2019 was drafted to protect the reorganizing Chapter 11 debtor from creditors who may with to dismantle it and controvert the reorganization process. In this case, the *Ad Hoc* Steering Committee could not only sabotage reorganization, but claims to have the authority to direct the Prepetition Agent to act in its collective interest. This Court will be asked to rule on motions which a large collection of creditors support, and semantics aside, this Court should be furnished with transparency as it makes these decisions.

Wherefore, Appellants respectfully request that this Court enter an order compelling each present and former member of the *Ad Hoc* Steering Committee to comply with Rule 2019 of the Federal Rules of Bankruptcy Procedure.

TAB 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: PHILADELPHIA NEWSPAPERS, LLC, ET AL.
Debtors.

PHILADELPHIA NEWSPAPERS, LLC, ET AL.,
Appellants,

vs.

THE STEERING GROUP OF PREPETITION SECURED LENDERS,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPELLEES' BRIEF

Delaware Bankruptcy American Inns of Court

Attorneys for Appellees The Steering Group of Prepetition Secured Lenders

STATEMENT OF THE CASE[1]

The issue before the Court is whether a group of prepetition lenders represented by one counsel is an "entity or committee representing more than one creditor or equity security holder" under Rule 2019 of the Federal Rules of Bankruptcy Procedure.[2] The Bankruptcy Court, by focusing on the plain language of Rule 2019, held that the rule does not apply to the appellees, the Steering Group of Prepetition Lenders (the "Steering Group").[3] It determined that the Steering Group is not an "entity" because the group has no self-contained existence apart from its members. Bankruptcy Court Opinion ("Bankr. Ct. Op.") at 23. It also held that the Steering Group is not a "committee" because a committee is a smaller group formed by a larger group to carry out a purpose, whereas here the Steering Group was not appointed by or on behalf of a larger group, but rather is a self-selected group of creditors sharing the costs of one counsel. *Id.* at 24. It finally held that the Steering Group is not an entity or committee "representing more than one creditor" because the members of the group, though acting through one counsel, speak only for themselves and represent no one else. *Id.* at 24-25 and n.13. As such, the Steering Group's members "need not make the disclosures required under the rule." *Id.* at 25.

This Court should affirm the Bankruptcy Court's decision based on the plain language of Rule 2019. But if the Court concludes that the language of Rule 2019 is ambiguous, it nevertheless should affirm because the legislative history and policy concerns further demonstrate that Rule 2019 should not apply to the Steering Group.

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[1] Because this is an expedited appeal, the Court has permitted the parties to dispense with a more complete statement of facts, summary of argument and other briefing rules required by Fed. R. App. Proc. 28.

[2] Six bankruptcy courts have ruled on the issue of whether Rule 2019 applies to the members of unofficial or *ad hoc* groups – two follow *In re Northwest Airlines Corp.*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007), in holding that Rule 2019 applies to such groups (*see In re Washington Mut'l, Inc.*, 419 B.R. 271 (Bankr. D. Del. 2009) and the bench ruling in *In re Accuride Corp.*, Case No. 09-13449 (Bankr. D. Del. Jan. 22, 2010)) and three hold that the Rule does not apply (*see* bench ruling in *In re Scotia Dev. LLC*, Case No. 07-20027 (Bankr. S.D. Tex. April 18, 2007), and *In re Premier Int'l Holdings, Inc.*, 423 B.R. 58 (Bankr. D. Del. 2010)) and the bankruptcy court's opinion in this case.

[3] The Steering Group is comprised of nine secured lenders and is further described in the Statement of Relevant Facts below.

STATEMENT OF RELEVANT FACTS[4]

The Debtors are the publishers of Philadelphia's two major newspapers, *The Philadelphia Inquirer* and the *Philadelphia Daily News*. The Debtors bought the newspapers in 2006, in part with $295 million borrowed from a number of lenders (the "Prepetition Lenders") under a Credit and Guaranty Agreement. Appellee Steering Group consists of nine of these Prepetition Lenders that have joined to negotiate collectively with the Debtors and to minimize the expense of retaining separate advisors and counsel. The members of the Steering Group do not hold themselves out as representing any other Prepetition Lenders—indeed, all of the Prepetition Lenders are represented by Citizens Bank as agent under the credit agreement.

The Steering Group has no written agreement, bylaws or any document binding on the Prepetition Lenders that comprise the group, much less the Prepetition Lenders that are not part of the group. Although various Prepetition Lenders have joined and withdrawn from the group over the course of the bankruptcy cases, every pleading filed by counsel for the group has specifically identified the group's members at the time of filing. Moreover, each time the membership within the Steering Group changed, the law firm has amended its Rule 2019 statement. The Debtors never objected to these statements until almost one year into the bankruptcy cases—the same time at which the parties were engaged in litigation.

ARGUMENT

A. Under the Plain Meaning of Rule 2019, the Steering Group is Not an "Entity or Committee Representing More than One Creditor"

When the terms of a rule or statute are plain, the sole function of a court is to enforce the rule or statute, and the court need not, and should not, go any further. Bankr. Ct. Op. at 21 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

[4] For a complete summary of the background relevant to the issues before the Court, the appellees direct the Court to the Background section of the Bankruptcy Court's Opinion. *See* Bankr. Ct. Op. at 4-20.

Rule 2019 applies only to an "entity or committee representing more than one creditor or equity security holder." Fed. R. Bankr. P. 2019(a). Therefore, the determination of whether Rule 2019 applies to informal committees or steering groups turns on the interpretation of the terms "entity" and "committee," and the phrase "representing more than one creditor."

The Steering Group is not an "entity" because it does not have a separate legal identity apart from its members. Bankr. Ct. Op. at 22-23; Bankr. Ct. Op. at 23 n.11 The Bankruptcy Code defines an "entity" to include a "person, estate, trust, governmental unit and United States Trustee." Though the Steering Group is none of these things, because the definition is inclusive, the Bankruptcy Court also looked to the plain meaning of the word "entity" to determine the term's defining characteristic. *Id.* The Court properly concluded that in common usage, an entity is something that has a self-contained existence apart from others. *Id.* Here, the Steering Group has no self-contained existence separate from the group of which it is composed—no writing or agreement exists evidencing a separate entity. The group is a collection of creditors acting for themselves individually that have joined together to defray legal costs by acting through one counsel, not a separate identifiable entity.

Nor is the Steering Group a "committee" because it was not formed by a larger group. Because the Bankruptcy Code does not define the word "committee," the Bankruptcy Court looked to common usage. Citing to Black's Law Dictionary, the court found that to be a "committee," a group must be formed *by* a larger group, which can happen by consent of the larger group or by operation of law.[5] Thus, the Steering Group is not a committee because it was not appointed by any larger group; it formed itself. *Id.* at 24 (citing Black's, *supra*, 309-310).

[5] The Bankruptcy Court's conclusion follows from the common meaning of the term "committee," not from its reliance on Black's Law Dictionary. Thus, in *Premier Int'l Holdings,* the Delaware Bankruptcy Court came to the same conclusion relying on a different dictionary. 423 B.R. at 65.

Finally, Rule 2019 does not apply to the Steering Group because it is not an entity or committee "*representing* more than one creditor". Bankr. Ct. Op. at 24-25 and n. 13 (emphasis added). To "represent" means to act on behalf of, to be a substitute for, or to speak for another by a deputed right. Bankr. Ct. Op. at 24-25 (quoting and adopting the reasoning of *Premier*, 423 B.R. at 65). Here, the Steering Group does not represent any persons other than its members; in fact, members are free to join and withdraw as they see fit (and have done so) and no member is bound by any decisions of the majority of the group. The Steering Group is agent to no one (unlike Citizens Bank, which is agent to all the Prepetition Lenders). At bottom, a group of individual creditors does not "represent" more than one creditor merely because the group consists of more than one creditor, as the appellants contend. Otherwise, any group of creditors taking a similar position in court would qualify as a "committee representing more than one creditor."[6] By failing to make this distinction, the appellants would read the phrase "representing more than one creditor" out of the statute, since by this logic, all committees would be "representing more than one creditor" solely by virtue of consisting of more than one creditor. Because committees by definition involve more than one person, this would render the word "representing" surplusage.

Thus, "under the plain meaning of the phrase 'a committee representing more than one creditor,' a committee must consist of a group representing the interests of a larger group with that group's consent or by operation of law." Bankr. Ct. Op. at 25 (quoting *Premier*, 423 B.R. at 65). This conclusion mirrors the views of the Rules Committee, which has proposed an amendment "*expressly* intended to *extend* coverage of the rule to a body such as the Steering Group." Bankr. Ct. Op. at 16 (original emphasis); Comment to Proposed Amendment to Rule

[6] For example, to hold otherwise might be to rule that any creditor filing a joinder to another creditor's objection has become a "committee" and is "represented" by that committee.

2019 ("In addition to an entity or committee that represents more than one creditor or equity security holder, the amendment *extends* the rule's coverage to committees that consist of more than one creditor or equity holder") (emphasis added).

Finally, the *Northwest* and *Washington Mutual* cases relied on by the appellants are distinguishable. The *Northwest* court was concerned that unsophisticated individual stockholders would believe that the *ad hoc* equity committee in that case represented the interests of all stockholders and so applied Rule 2019 broadly without conducting a plain meaning analysis. By contrast, here the Prepetition Lenders choosing not to be part of the Steering Group can look to the Agent to represent their interest in the bankruptcy case, and the Court applied the plain meaning of Rule 2019. Likewise, the *Washington Mutual* court was concerned that the *ad hoc* group apparently misled Judge Walrath as to whom it represented. *See Washington Mut., Inc.*, 419 B.R. at 275. Here, however, counsel listed the Steering Group members in each pleading that it filed in the bankruptcy case. In addition, the *Washington Mutual* court did not consider the same issue as is before this Court, that is, whether an *ad hoc* group like the Steering Group is an "entity or committee representing more than one creditor." Instead, it assumed that the answer to that question was yes and asked whether the group before it was an *ad hoc* committee.

B. The Legislative History Confirms that Rule 2019 Does Not Apply to the Steering Group.

Rule 10-211—the predecessor to Rule 2019—was enacted in the 1930's to regulate "protective committees" that dominated reorganizations at that time. *See Premier*, 423 B.R. at 66-72; *see also In re Phila. & Reading Coal & Iron Co.*, 105 F.2d 358, 359 (3d Cir. 1939) ("In too many of those proceedings it . . . appeared that unqualified and unrepresentative committees sought and obtained the right to represent defenseless security holders while actually working in

the interests of the debtor or other adverse parties"). These protective committees would solicit other similarly situated creditors to "deposit" their claim with the committee, thus giving the committee control over the bonds and authority to negotiate a plan. Over time, protective committees began to abuse the process in two ways. First, the process began to be controlled by, and for the benefit of, insiders. Committees were dominated by the company's prepetition investment banks working in concert with existing management, which effectively eliminated any way for dissenting creditors to participate or oppose a reorganization. Second, there was unequal treatment of holdout creditors: the return to depositing creditors was better than that of non-consenting creditors.

Rule 10-211 was adopted "to ensure that the inside group does not manipulate a prepetition committee to secure a dominant position in the reorganization and capture the emoluments of control." *Baron & Budd, P.C. v. Unsecured Asbestos Claimants Comm.*, 321 B.R. 147, 166 (D.N.J. 2005) (citations and internal quotation marks omitted). To do so, the rule sought to encompass groups, like protective committees, that truly represented other groups. *See In re CF Holding*, 145 B.R. 124, 126 (Bankr. D. Conn. 1992) ("The purpose of Rule 2019 is to further the Bankruptcy Code's goal of complete disclosure during the business reorganization process, and was designed to cover entities which, during the bankruptcy case, act in a fiduciary capacity to those they represent, but are not otherwise subject to the control of the court.").

Therefore, the legislative history does not support applying the rule to the Steering Group because it shows that Rule 2019 and its predecessor are meant to apply to committees that serve in a representative or fiduciary capacity to other groups. Today's informal and *ad hoc* groups "have none of the[] expansive powers" enjoyed and abused by the pre-code protective committees and do not represent other creditors. *Premier*, 423 B.R. at 73. They are individual

creditors that join together to share legal costs by hiring a single set of attorneys. Further, in August 2009, the rules Committee proposed amendments to Rule 2019 that, if approved, would extend the scope of Rule 2019's coverage. Bankr. Ct. Op. at 2-3 and nn. 4-5. The Committee proposes that Rule 2019 be "*expanded*" to cover "entit[ies] that represent[] more than one creditor or equity security holder, . . . [and] group[s] of creditors or equity security holders that act in concert to advance certain interests, even if [they] do not call [themselves] committee[s]." *Id.* at 3 (quoting the Committee Note). If every "group of creditors . . . that act in concert" already was covered by Rule 2019, as the appellants contend, there would be no need to amend the rule.

C. Policy Considerations Support the Conclusion that Rule 2019 Does Not Apply to the Steering Group

Rule 2019's requirement to disclose the time and price at which claims or interests were acquired, *see* Fed R. Bankr. P. 2019(a)(4), is of a particularly sensitive nature to the members of the Steering Group and many *ad hoc* committee members in other cases. "Rule 2019 asks for some information that is not essential and that may chill legitimate distressed debt investing." Letter from Judge Robert E. Gerber to Peter G. McCabe, Secretary, Advisory Comm. on Bankruptcy Rules (Jan. 9, 2009) at 4. If distressed investors are deterred from investing in the claims and interest of debtors, the markets for these securities will become less liquid. Less liquidity harms the original holders of the claims and interests by hindering their ability to "cash out" of the bankruptcy process, and negatively impacts debtors' ability to engineer solutions to the reorganization process. M. DeMarino, *Rule 2019: The Debtor's New Weapon*, 42 J. Marshall L. Rev. 165, 183 (2008) ("[H]edge funds increase secondary debt liquidity by offering complex and sophisticated solutions to the workout and reorganization process, and therefore, facilitate the goal of collective reorganization. Consequently, if [abuse of] Rule 2019 discourages hedge

fund involvement in bankruptcy, liquidity and efficiency in the secondary market will diminish, hampering the overall reorganization process.").

D. Application of Rule 2019 to the Steering Group Would Conflict with Provisions of the Bankruptcy Code and the United States Constitution

The Bankruptcy Rules may not frustrate a substantive right created by the Bankruptcy Code. *See* 28 U.S.C. § 2075 (providing that the Bankruptcy Rules "shall not abridge, enlarge, or modify any substantive right"). Application of Rule 2019 to the Steering Group would contravene the Steering Group members' rights under the Bankruptcy Code in three ways. First, the trading information sought by the Debtors would run afoul of section 107(b) of the Bankruptcy Code. *See* 11 U.S.C. § 107(b)(1) ("On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may . . . protect an entity with respect to a trade secret or confidential research, development, or commercial information . . . . "). The Debtors request disclosure of confidential and highly proprietary trading information that is protected under section 107(b), but the Debtors fail to provide a justification for disclosure of this confidential information. If required to make the requested disclosure, the confidential information may be used for an improper purpose. For example, the Debtors could use confidential pricing information to argue that any price obtained at the upcoming auction of the Debtors' assets is fair relative to the price paid by the Steering Group's members for their claims. No matter how used, the mere disclosure of the proprietary trading strategies will have a devastating effect on the members.

Second, preventing or conditioning the participation of the Steering Group on compliance with Rule 2019 would deny the Steering Group members' rights under section 1109(b) of the Bankruptcy Code. *See* 11 U.S.C. § 1109(b) ("A party in interest, including . . . a creditor [or] an equity security holder . . . may raise and may appear and be heard on any issue in a case under

this chapter."). Section 1109 does not condition participation or the right to be heard in a bankruptcy case on surrendering confidential information, so it is not appropriate for a Rule to purport to do so. Moreover, given that each creditor has the right under section 1109 to have its own counsel file joinders to another creditor's pleadings, it is unclear why the rights should be abridged just because one set of lawyers was jointly hired.

Third, applying Rule 2019 here would violate the Steering Group members' rights under the Fifth Amendment. U.S. Const. Amend. V ("No person shall be deprived of life, liberty or property without due process of law . . . "); *see also City of New York v. Quanta Res. Corp. (In re Quanta Res. Corp.)*, 739 F.2d 912, 922 (3d Cir. 1984) ("The rights of a secured creditor in the debtor's assets are 'property' subject to a 'taking.'"). The members of the Steering Group are secured creditors and an order granting the Debtors' request may deny them the opportunity to appear, to be heard and protect their property interests. Rule 2019 may not be applied in such a way to deprive the members of due process rights merely because they reasonably do not want the "price" of participation in the bankruptcy case to be surrendering proprietary confidential trading information.

CONCLUSION

For the reasons above, this Court should affirm the Bankruptcy Court's Opinion and Order.

Respectfully submitted,

Delaware Bankruptcy American Inn of Court

TAB 3

New Jersey/Delaware
Bankruptcy Inn of Court
Third Circuit Court of Appeals Special Mock Panel
June 15, 2010

Dana Kilpatrick owns a high speed delivery service operated from her home. Ms. Kilpatrick filed a chapter 7 case. Although she was in financial distress, she wanted to retain her most prized possession, a 2010 Lamborghini Balboni, which she used for business purposes. Debtor filed a Statement of Intention pursuant to Section 521(a)(2)(A) of the Bankruptcy Code stating her intention to "keep and continue to make payments on the vehicle."

Thirty days after her Section 341 meeting, Debtor sent to Sebring Finance, the purchase money lender on the vehicle, a signed Reaffirmation Agreement, using the approved form under the Local Rules of the Bankruptcy Court. Debtor had never missed a payment on the vehicle loan and continued to make timely payments. Sebring received these payments and cashed the checks, crediting the loan. However, Sebring never signed or returned the Reaffirmation Agreement.

In due course, Debtor received her discharge. One month later, Sebring repossessed the vehicle. There is no allegation that the repossession process violated state law. There were no monetary defaults under the loan documents. The notice letter from Sebring to the Debtor indicated that the default upon which the repossession was based was the filing of a bankruptcy case, which violated the *ipso facto* clause in the note and security agreement.

Debtor filed a motion to hold Sebring in contempt for willful violation of the automatic stay and the discharge injunction and requested the Bankruptcy Court to require the return of the vehicle.

In the Bankruptcy Court, Judge Debra Tourwins, a visiting judge, held that the so-called "fourth option" continues to exist in the Third Circuit and was not negated by the 2005

BAPCPA amendments to the Bankruptcy Code. Judge Tourwins held that the Debtor tendered a proper reaffirmation agreement to the secured creditor, made regular payments that were accepted by the secured creditor and was not in default under the applicable loan documents, except for the *ipso facto* clause violation. Under the circumstances, Judge Tourwins determined that the "ride-through" option recognized by the Third Circuit in *Price v Delaware State Police, F. C. U. (In re Price),* 370 F.3d 362 (3d Cir. 2004) applied and the Debtor was entitled to a return of the vehicle and was entitled to retain the vehicle so long as payments continued to be made.

On appeal, District Court Judge Ray Poman, a visiting judge, overruled the Bankruptcy Court. Judge Poman held that BAPCPA amended the Bankruptcy Code to eliminate the "ride-through" option and, absent a properly executed and judicially approved reaffirmation agreement, as required by the Bankruptcy Code, the automatic stay did not apply and the secured creditor was entitled to repossess the vehicle based on a violation of the *ipso facto* clause.

The Third Circuit Court of Appeals Special Mock Panel for the New Jersey/Delaware Bankruptcy Inns of Court granted *certiorari.* The parties on appeal ask the Court to address the conflict between the opinions of Judge Tourwins and Judge Poman. In addition, both parties on appeal ask the Court to rule that the losing party on appeal must purchase dinner for the winning party after oral argument, pursuant to Section 105 of the Bankruptcy Code.

TAB 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE DANA KILPATRICK,
Debtor.

DANA KILPATRICK,
Appellant,

vs.

SEBRING FINANCE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

APPELLANT'S BRIEF

Delaware Bankruptcy American Inns of Court

Attorneys for Appellant Dana Kilpatrick

Dated: May 26, 2010

SUMMARY

Dana Kilpatrick ("Debtor") appeals a decision by the United States District Court for the District of Delaware interpreting certain amendments to the Bankruptcy Code (the "Code") made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). The District Court, reversing the Bankruptcy Court's decision below, held that BAPCPA eliminated the so-called "fourth option" (the "Fourth Option") recognized by this Court in Price v. Delaware State Police Fed. Cred. Union (In re Price), 370 F.3d 362 (3d Cir. 2004), under which individual creditors can, without effecting a redemption or reaffirmation, retain personal property subject to a lien by remaining current on their obligations and thereby have such liens "ride through" bankruptcy. Particularly, the court held that the chapter 7 discharge injunction did not prohibit the repossession by Sebring Finance ("Creditor") of Debtor's vehicle for failure to obtain a properly executed and judicially approved reaffirmation of the vehicle financing agreement, even though the Debtor timely stated her intention to retain the vehicle, was current on her payments, and her only default was under a clause in the Creditor's financing agreement making it a default for the Debtor to file for bankruptcy (a so-called "ipso facto" clause).

Relevant precedent and the plain language of the Code establish that: (i) the Fourth Option continues to exist post-BAPCPA, at least where a reaffirmation has properly been attempted by a debtor, regardless whether the creditor agrees; (ii) Debtor properly invoked it (and thus, had a right to retain her vehicle) by: (a) continuing to make timely loan payments; (b) timely stating her intention to retain the vehicle by making such payments; and (c) timely tendering Creditor a signed reaffirmation agreement conforming to section 524 of the Code and in the form provided by the Local Bankruptcy Rules (the "Local Rules"); and (iii) because Debtor properly and timely took the actions necessary to retain the vehicle, Creditor violated the discharge injunction by repossessing Debtor's vehicle based solely on an ipso facto default. Accordingly, Debtor respectfully requests

that this Court reverse the District Court's decision and remand the case with instructions that the Bankruptcy Court direct Creditor to return Debtor's vehicle and conduct an evidentiary hearing on damages incurred due to Creditor's violation of the discharge injunction.[1]

FACTUAL BACKGROUND

The Debtor owns a home-based high speed delivery services operation, and she bought a 2010 Lamborghini Balboni for use in the business. It appears that she bought the vehicle and began payments prior to the bankruptcy, and, most likely, in mid-2009, when such cars came to market[2], in repayment of a car loan from Creditor backed by a security interest in the vehicle. It is undisputed that she timely made all of her loan payments. As a result, when she filed for chapter 7 relief her loan balance was less than the purchase price and it was further paid down thereafter.

Upon filing for chapter 7, the Debtor filed a Statement of Intention pursuant to § 521(a)(2)(A) stating that she intends to "keep and continue to make payments on the vehicle." Thirty days after the Section 341 meeting, Debtor sent Creditor a signed Reaffirmation Agreement that complied with the Local Rules. Even though Creditor did not sign or return the Reaffirmation Agreement, it continued to receive timely payments from Debtor and credit them to the loan. In addition, nothing in the record or the decisions below establishes that Creditor filed timely a proof of claim in the Debtor's bankruptcy case and, thus, obtained allowance of such claim in accordance with Federal Rule of Bankruptcy Procedure 3002.

One month after Debtor's chapter 7 discharge, Creditor repossessed the vehicle. In its notice to Debtor, Creditor stated that, by filing for bankruptcy, Debtor violated the ipso facto clause in the security agreement. Debtor filed a motion to hold Creditor in contempt for willful violation

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[1] Appellant acknowledges that the automatic stay ceased to apply upon entry of Debtor's chapter 7 discharge. 11 U.S.C. § 362(c)(2)(C); In re Baker, 390 B.R. 524, 531 (Bankr. D. Del. 2008). Consequently, Appellant no longer asserts any stay violation claims.

[2] These vehicles were released in or about June 2009 with prices starting at $220,000. See http://www.egmcartech.com/2009/06/30/lamborghini-lp-550-2-valentino-balboni-pushes-550-hp-to-the-rear-wheels/.

of the automatic stay and the discharge injunction, requesting the Bankruptcy court to require the return of the vehicle[3]. The Court held for Debtor, citing to Third Circuit precedent recognizing the Fourth Option, reasoning that Debtor was not in default. On appeal, the District court reversed and this appeal to the Consolidated Inn of Court Panel followed.

ARGUMENT

I. THE "RIDE THROUGH" OPTION WAS LIMITED, BUT NOT ELIMINATED, BY BAPCPA

A. The Fourth Option is Well Established in the Third Circuit

Prior to BAPCPA, § 521 of the Code required the debtor to file with the clerk "a statement of his intention with respect to retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property." 11 U.S.C. § 521(2)(A) (2004) (emphasis added)[4]. On its face, the statute appeared to give a chapter 7 debtor three options with respect to encumbered property, namely: redeem, reaffirm, or surrender. In Price, 70 F.3d 362 (3d Cir. 2004), however, the Third Circuit recognized that § 521 did not preclude other options, including the "ride through" option whereby the debtor would retain the property while continuing to make timely payments. Id. at 372-373. In fact, the Court found that a "ride through" is not an exception at all, but, rather, "the norm of chapter 7 bankruptcy law." Id. at 372.

Reading pre-BAPCPA section 521(2)(A) in the context of the Code, the Court reasoned that § 521(2)(A) was intended to be *procedural*—essentially, a notice provision – and did not eliminate the *substantive* "ride through" option. Id. at 374. In finding this provision to be procedural, the court pointed to, among other things, former section 521(2)(C) which provided, in relevant part, that

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[3] The bankruptcy court's assertion of jurisdiction over the motion is not disputed. Cf. In re Milby, 389 B.R. 466, 468 (Bankr.W.D.Va. 2008) ("state court would have concurrent jurisdiction to make such a determination should the Bank attempt to exercise the ipso facto contractual provisions post-discharge").

[4] The section is now codified as § 521(a)(2)(A), as amended.

nothing in 521(2)(A) or (B)[5] "shall alter the debtor's or the trustee's rights with regard to such property under this title." Former 11 U.S.C. § 521(2)(C); Price, 370 F.3d at 372-74. Consequently, the court construed the words "if applicable" in former section 521(2)(A), taking into account its context in the Code, to simply mean that "*if*" the debtor chooses to redeem, reaffirm or claim property as exempt (i.e., if one of these elections "apply"), *then* that intention must be specifically stated. Id. at 370-371.

B. The "Ride Through" Option Remains Available Under BAPCPA if a Creditor Can Satisfy the Requirements of Code Section 362(h)

Although the BAPCPA amendments were extensive in many respects, they made no substantive changes whatsoever to former section 521(2)(A) [current § 521(a)(2)(A)], save one minor amendment to former section 521(2)(C) [current § 521(a)(2)(C)], which provides a limited exception to the four retention options available to a debtor. Where § 521(a)(2)(C) already stated: "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title," BAPCPA added merely the words: "except as provided in section 362(h)" 11 U.S.C. §521(a)(2)(C) (emphasis added).

It is a canon of statutory interpretation that Congress can be presumed to be aware of, and to adopt, a judicial interpretation of a statute when it reenacts that law without change or adopts a new law incorporating sections of the prior law. Lorillard v. Pons, 434 U.S. 575, 581 (1978). Moreover, in construing a statutory provision whose meaning is plain, Congress says in a statute what it means and means in a statute what it says. Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000). These canons of statutory construction direct this court to continue to honor the Fourth Option "except as provided in section 362(h)" – as the revised language is clear and no other

[5] Former § 521(2)(B) and current § 521(a)(2)(B) require a debtor to "perform his intention with respect to such property" as indicated in the statement of intention under subpart (A).

provisions of the Code are implicated. See e.g., In re Baker, 390 B.R. 524, 528, 530 (Bankr. D. Del. 2008).

II. POST-BAPCPA, THE "RIDE THROUGH" OPTION REMAINS AVAILABLE WHERE, AS HERE, THE SECTION 362(h) TENDER EXCEPTION IS SATISFIED

Section 362(h) was added in its entirety by BAPCPA. Section 362(h)(1) provides that the automatic stay is terminated, and encumbered personal property of the debtor ceases to be property of the estate, if the debtor fails:

> (A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender [it] or retain it and, if retaining such personal property, either redeem [it] . . . pursuant to section 722, enter into [a reaffirmation] agreement . . . , or assume [the] unexpired lease . . .; and
>
> (B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking such action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree . . . .

11 U.S.C. § 362(h)(1) (emphasis added).

Here, the Debtor filed her statement of intention to keep the vehicle and continued making payments on the car loan. While the statement did not expressly specify the intent to "reaffirm" the debt, her clear intention to continue making the payments on the loan, combined with her having signed and tendered to Creditor a reaffirmation agreement (using an approved local form) within the time period prescribed by 521(a)(2)(B), can only reasonably be construed as having expressed the intent to reaffirm the terms of the original agreement. Cf. In re Baker, 390 B.R. at 529 (debtors complied with § 362(h) where their statement of intention merely stated their intention to retain the collateral and make regular payments, and where they entered into a reaffirmation agreement that the court refused to approve), citing In re Bower, 2007 Bankr. LEXIS 2580, No. 07-60126, at *6, n2 (Bankr. D. Or. July 26, 2007) (defective statement of intention cured by debtor's timely execution

of reaffirmation agreement).

With respect to section 521(a)(2)(B)'s requirement that the Debtor timely take the action specified (which here would mean entering into a reaffirmation agreement) because she signed a reaffirmation agreement using the form under the Local Rules, and sent it to the Creditor, she qualifies for the exception to this rule added by section 362(h), which prevents creditors from abusing the reaffirmation procedure.[6] Under that exception, if the debtor specifies his or her intention to reaffirm the debt on the original contract terms, then no counter-signature from the creditor to the reaffirmation agreement is needed. See 11 U.S.C. § 362(h)(1)(B). Here, the Debtor timely tendered the agreement and, thus, can use the "ride through" option and keep her car.

That the Debtor's reaffirmation agreement was not approved by the Court is of no consequence. As the analysis of the Delaware Bankruptcy Court in Baker, 390 B.R. 524 (Bankr. D. Del. 2008) and (among others), the district court in Coastal Federal Credit Union v. Hardiman, 398 B.R. 161(E.D. N.C. 2008) make clear, judicial approval of a reaffirmation agreement is not an element of §§ 521(a)(2) and 362(h)(1). Id. at 166-188 (holding that limited "ride through" option remained in effect even after enactment of the BAPCPA). See also e.g., In re Chim, 381 B.R. 191, 198 (Bankr. D. Md. 2008) (citing other cases). In addition, section 521(a)(6) only requires the debtor to enter into a reaffirmation agreement but also does not specifically require the bankruptcy court's approval of the same. E.g., Baker, 390 B.R. at 529-530.

Indeed, in light of this strong body of precedent, the only two circuits to take up the question whether the Fourth Option survived BAPCPA have expressly confined their rulings to the facts before them, stating, in dictum, that § 521's three options of redemption, reaffirmation or surrender were exclusive only in the absence of a substantially compliant attempt at reaffirmation under § 362(h). See In re Jones, 591 F.3d 308, 311, 312 (4th Cir. 2010) ("Because [debtor] did not take

[6] See Price, 370 F.3d at 378 ("reaffirmation is viewed as a classic evil in bankruptcy law, and is dealt with in the Code so as not to exalt or enable it, but, rather, so as to regulate and scrutinize it, in light of its misuse").

any action to reaffirm or redeem, we have no occasion to address the 'back door ride-through' option that some courts have recognized where the debtor has substantially complied with §§ 521(a)(2) and 362(h) but has been frustrated in his effort to fully comply."); In re Dumont, 581 F.3d 1104, 1112 n.14 (9th Cir. 2009) ("Here, it is undisputed that [debtor] rejected an offer of reaffirmation. We need not address what might have been had [debtor] attempted to reaffirm only to be rebuffed by either [creditor] or the bankruptcy court.").

III. SECTIONS 521(a)(6) AND 521(d) ARE NOT APPLICABLE

Section 521(d), also newly added by BAPCPA, provides that, if a debtor fails to take the action specified under §§ 362(h) or 521(a)(6) , "nothing in this title shall prevent or limit the operation of" an ipso facto clause in the underlying agreement that has the effect of placing the debtor in default under the agreement "by reason of the occurrence, pendency, or existence of" a bankruptcy filing. 11 U.S.C. § 521(d). As explained above, the Debtor complied with section 362(h) and, therefore, Creditor cannot avail itself of the ipso facto clause due to an alleged violation that provision. With respect to the new (under BAPCPA) section 521(a)(6), that section provides that the debtor shall:

> (6) in a case under chapter 7 . . . in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either –
>
> (A) enters into an agreement with the creditor pursuant to section 524(c) . . . ; or
>
> (B) redeems such property . . .

11 U.S.C. § 521(a)(6) (emphasis added).

While section 521(a)(6), where applicable, will require the debtor specifically to "enter into" a reaffirmation with the creditor (a requirement not found in section 362(h)), it does not apply in this case. Section 521(a)(6) is a very narrow provision that apparently was drafted to curb

bankruptcy abuses and, thus, only applies where a creditor has "an allowed claim for the purchase price." 11 U.S.C. § 521(a)(6) (emphasis added); see also In re Blakeley, 363 B.R. 225, 229 (Bankr. D. Utah 2007). Here, Creditor did not have an allowed claim and, furthermore, such claim was not for the purchase price and, as such, section 521(a)(6) is irrelevant in this case.

Iconic principles of statutory construction articulated by our Supreme Court command that this court give full effect to the word "allowed" in the phrase "allowed claim" found in 521(a)(6). See Blakeley, 363 B.R. at 229; Anderson, 348 B.R. at 657. It is a court's "duty to give effective, if possible, to every clause and word of a statute," Anderson, 348 B.R. at 657 (citing Duncan v. Walker, 533 U.S. 167, 174 (2001)) – thus the word "allowed" must be given separate meaning. In addition, "[w]here Congress includes particular language in one section of a statute but omits it in another, it is generally assumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Blakeley, 363 B.R. at 229 (citing Keene Corp. v. United States, 508 U.S. 200, 208 (1993)). Here, Congress added the word "allowed" referring to "claims" in section 521(a)(6), but omitted the word "allowed" in reference to "claims" in a similar provision in Code section 362(h)(1) – this is no accident. See Blakeley, 363 B.R. at 229.

Although Creditor held a claim – it was not allowed. Section 502(a) of the Code generally requires the filing of a proof of claim as a condition of allowance and the Bankruptcy Rules specifically require that a creditor in a chapter 7 case must file a claim for it to be allowed. See 11 U.S.C. § 502(a), Fed.R.Bankr.P. 3002(a), (c). There is no record of Creditor filing a claim and thus, it could not have an "allowed claim" under the Code. Consequently, 521(a)(6) does not apply here.

In addition, Section 521(a)(6) requires that the allowed claim held by the creditor be for the "purchase price." The Blakeley court applied the plain meaning of the statute, holding that section 521(a)(6) "specifies that the claim be 'for the purchase price' and does not specify 'purchase-money security interest' or 'purchase-money obligation' which are terms of art used through both

commercial and consumer law as well as in the Bankruptcy Code." Blakeley, 363 B.R. at 229-30, 230 n. 7; see also, Hardimans, 398 B.R. at 180. Because Debtor timely made all of her payments she owed less than the purchase price, it was simply impossible for the Creditor to have a claim for the "purchase price" and, for this reason too, section 521(a)(6) simply does not apply to this case.

Debtor notes that certain courts have refused to accept the plain meaning of the words "allowed claim", In re Rowe, 342 B.R. 341 (Bankr. D. Kan. 2006), and "purchase price," In re Steinhaus, 349 B.R. 694, 706 (Bankr. D. Idaho 2006), under section 521(a)(6). Id. at 348-49. However, in order to ignore the plain meaning of a statute, the result suggested must truly be "absurd." Hartford Underwriters, 530 U.S. at 6. Because there are numerous plausible justifications for a literal interpretation of each phrase, a plain reading here cannot be absurd. For example, because the remedy of section 524(a)(6) is draconian, Congress may have insisted that only creditors with "allowed" claims be entitled to such relief. Similarly, as recognized by several courts, Congress may have intentionally decided to limit 521(a)(6) to claims for the "purchase price" to remedy filings by debtors who received "no down payment" financing immediately prior to bankruptcy and were using bankruptcy as an improper means to retain property for which they did not intend to pay. See, Hardimans, 398 B.R. at 180; Blakeley, 363 B.R. at 229.

IV. SINCE THE IPSO FACTO CLAUSE IN THE FINANCING AGREEMENT WAS UNENFORCEABLE, CREDITOR VIOLATED THE DISCHARGE INJUNCTION

The entry of the discharge terminated the automatic stay, and violations of the discharge injunction do not give rise to statutory damages. Baker, 390 B.R. at 524. However, courts use their inherent civil contempt power under section 105 to provide a remedy for such violations. In this case, directing Creditor to pay for the Debtor's dinner (and cigars, "if applicable") is more than appropriate.

CONCLUSION

Based on the foregoing, Debtor respectfully requests this Court to reverse the District

Court's ruling, and remand with directions to affirm the Bankruptcy Court's order requiring Creditor to return the vehicle to Debtor, and direct imposition of the requested sanctions.

Respectfully,

Delaware Bankruptcy American Inn of Court

Attorneys for Appellant

TAB 5

10-90210-BK

In the United States Court of Appeals for the Third Circuit

In re: DANA KILPATRICK,

Debtor.

DANA KILPATRICK,

Plaintiff-Appellant,

- vs -

SEBRING FINANCE INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF DEFENDANT-APPELLEE SEBRING FINANCE INC.

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PROCEDURAL AND FACTUAL HISTORY

Sebring Finance ("Sebring") is a secured creditor of Dana Kilpatrick ("Debtor" or "Appellant") by virtue of a certain Purchase Money Contract (the "Contract") for the purchase of a 2010 Lamborghini Balboni (the "Vehicle"). The Debtor filed a voluntary petition for relief under chapter 7 of title 11 of the United States Code (the "Bankruptcy Code") as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). After the Debtor received her chapter 7 discharge, Sebring repossessed the Vehicle providing written notice that the repossession was based upon the filing of the bankruptcy case, which violated the *ipso facto* clause in the note and security agreement. At the time of repossession, the Appellant was current on the installment payments due under the Contract. The Debtor filed a motion to hold Sebring in contempt for the willful violation of the automatic stay and the discharge injunction and requested that the United States Bankruptcy Court (the "Bankruptcy Court") order the return of the Vehicle.

In the Bankruptcy Court, Judge Debra Tourwins held that the so called "fourth option" continues to exist in the Third Circuit and was not negated by BAPCPA. The Bankruptcy Court held that the Debtor tendered a proper reaffirmation agreement to the secured creditor, made regular payments that were accepted by the secured creditor and was not in default under the applicable loan documents, except for the *ipso facto* clause violation. Under the circumstances, the Bankruptcy Court determined that the "ride-through" option recognized by the Third Circuit in *Price v. Delaware State Police, F.C.U. (In re Price)*, 370 F.3d 362 (3d Cir. 2004) applied and the Debtor was entitled to a return of the Vehicle and to retain the Vehicle so long as payments continued.

On appeal, United States District Court Judge Ray Poman (the "District Court") overruled the Bankruptcy Court. The District Court held that BAPCPA eliminated the "ride-through" option and, absent a properly executed and judicially approved reaffirmation agreement, as required by the Bankruptcy Code, the automatic stay did not apply and the secured creditor was entitled to repossess the vehicle based on a violation of the *ipso facto* clause.

SUMMARY OF ARGUMENT

Prior to enactment of BAPCPA, the United States Court of Appeals for the Third Circuit (the "Third Circuit") held that debtors, who were current on their secured consumer loan installment payments, could retain collateral after discharge without either redeeming the collateral or reaffirming the debt. This "ride-through" option was eliminated by BAPCPA. Specifically, the post-BAPCPA §§ 521(a)(2) and 362(h) provide that the automatic stay is terminated by operation of law upon failure to reaffirm or redeem within thirty (30) days of the first date set for the debtor's meeting of creditors. Further, § 521(a)(6) provides that the debtor shall not retain possession of property without reaffirmation or redemption within forty-five (45) days of the first meeting of creditors. Finally, § 521(d) provides that the operation of a default-upon-bankruptcy clause shall not be prevented or limited by the Bankruptcy Code when the debtor fails to comply with §§ 362(h) or 521(a)(6). Therefore, the "ride-through" option no longer exists post-BAPCPA and it is clear that Sebring was free to proceed with enforcement of its security interest in the Vehicle in accordance with its contractual rights, including the Contract's default-upon-bankruptcy clause, without limitation by the Bankruptcy Code.

LEGAL ARGUMENT

In the bankruptcy context, this Court reviews factual findings under a clearly erroneous standard, and exercises plenary review over legal issues. *In re Montgomery Ward Holding Corp.*, 326 F.3d 383, 397 (3d Cir. 2003); *see also Universal Minerals, Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981).

I. The BAPCA Amendments Eliminated the "Ride Through" Option.

The District Court was correct when it held that BAPCPA eliminated the "ride-through" option. While a "ride-through" option existed prior to the enactment of BAPCPA, the plain language of the BAPCPA amendments and the caselaw interpreting BAPCPA have eliminated this option. Therefore, the Debtor cannot rely on the "ride-through" option to maintain possession of the Vehicle.

Section 521(a)(2)(A) of the Bankruptcy Code requires a debtor to file a statement of intention with respect to property that secures debt of the estate indicating the debtor's intent to either redeem such property or to reaffirm the debts secured by such property. 11 U.S.C. § 521(a)(2)(A). Prior to the enactment of BAPCPA, some courts, including this one, recognized that, in addition to the redeem or reaffirm options set forth above, a "ride-through" option existed which permitted debtors who were current on their installment payments to continue making payments and retain collateral after discharge without either redeeming the collateral or reaffirming the debt secured by such collateral. *See Price*, 370 F.3d 362 (3d Cir. 2004). This "ride-through" option, however, was not specifically enumerated in the Bankruptcy Code and the justification for allowing this option was eliminated as a result of the amendment of § 521(a)(2)(C) and the addition of §§ 521(a)(6) and 362(h) pursuant to the enactment of BAPCPA.

Section 521(a)(2)(C) of the Bankruptcy Code was amended by BAPCPA to provide that "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or trustee's rights with regard to such property under this title, *except as provided in section 362(h).*" 11 U.S.C. § 521(a)(2)(C) (emphasis added). Section 362(h) was added to the Bankruptcy Code by BAPCPA and provides that the automatic stay is terminated with respect to personal property of the estate if the debtor: (i) fails to file a timely statement of intention with respect to such personal property or fails to indicate in the statement that the debtor will either redeem the property or reaffirm the debt secured by the property; and (ii) fails to timely perform the action specified in the statement. 11 U.S.C. § 362(h). Further, § 521(a)(6) was added to the Bankruptcy Code by BAPCPA and provides that a debtor can only retain possession of property subject to a secured claim if the debtor, pursuant to a statement of intention: (i) enters into a reaffirmation agreement with the creditor holding a claim related to the secured property; or (ii) redeems the property. 11 U.S.C. § 512(a)(6).

The plain language of §§ 521(a)(2)(C), 362(h) and 521(a)(6) specifically eliminated the possibility of a post-BAPCPA "ride-through option." Instead, these sections make it clear that a debtor may only retain property that secures a debt in two instances: reaffirmation and redemption. This result is supported by caselaw from courts in this Circuit as well as other Circuits. *E.g., In re Jones*, 591 F.3d 308, 311-12 (4th Cir. 2010); *In the Matter of Dumont*, 581 F.3d 1104 (9th Cir. 2009); *In re Anderson*, 348 B.R. 652 (Bankr. D. Del. 2006).

For example, in *Jones*, the Court was faced with a situation very much like the case at hand. The Court conducted an analysis similar to that set forth above and found that the BAPCPA revisions significantly altered the landscape:

> "Sections 521(a)(2)(C) and 362(h) significantly alter the pre-BAPCPA analysis by explicitly requiring a debtor to either (1) redeem the property or (2) reaffirm the debt, in order to retain the property. If the debtor fails to so indicate, the stay terminates with respect to the property and the property will no longer be part of the estate."

Jones, 591 F.3d at 311 (citing *In re Cracker*, 337 B.R. 549, 550-51 (Bankr. M.D. N.C. 2006)) (emphasis added). In citing to § 521(a)(6), the Court also found that "[t]hat section provides that a debtor may not retain possession of personal property unless the debtor either reaffirms the debt or redeems the property, according to the statement of intention required by §§ 521(a)(2) and 362(h), within 45 days of the first meeting of creditors." *Id.* Therefore, the Court held that "BAPCPA amended Title 11 to eliminate the "ride-through" option...." *Id.*

In contrast, this Circuit recognized the "ride-through" option prior to the enactment of BAPCPA, based on a "plain language" interpretation of the applicable provisions of the Bankruptcy Code. *Price*, 370 F.3d at 374. In *Price*, the Third Circuit held that the "ride-through" option existed, basing its holding, in part, on § 521(a)(2)(C) which, prior to BAPCPA, read: "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or trustee's rights with regard to such property under this title." *Id.* BAPCPA modified § 521(a)(2)(A) and added the language "except as provided in section 362(h)" to § 521(a)(2)(C), as well as a new provision – § 521(a)(6). Because these sections limit a debtor's rights with respect to property by only allowing a debtor to retain personal property by redeeming or reaffirming, a plain language analysis of

BAPCPA's applicable provisions clearly nullifies the Third Circuit's holding in *Price* and requires a finding that the "ride-through" option no longer exists.

II. The Ipso Facto Clause in the Contract is Enforceable.

The District Court correctly held that the *ipso facto* clause in the Contract was enforceable. *Ipso facto* clauses in contracts are enforceable if a debtor fails to take the necessary steps to reaffirm or redeem. *Anderson*, 348 B.R. at 659. Since the Debtor defaulted under the *ipso facto* clause by filing for bankruptcy protection and failed to take the proper steps to protect her interest in reaffirming the loan backed by the Vehicle, the *ipso facto* clause in the Contract is enforceable.

Prior to the enactment of BAPCPA, a "default-on-filing" clause (or *ipso facto* clause) in an installment loan contract was generally held to be unenforceable. *Anderson*, 348 B.R. at 659 (citing *In re Boring*, 346 B.R. 178, 180-81 (Bankr. N.D. W.Va. 2006)). These cases, however, have been partially overruled by BAPCPA's addition of the following language to § 521 of the Bankruptcy Code:

> (d) if the debtor fails timely to take the action specified in subsection (a)(6) of this section or in paragraphs (1) and (2) of section 362(h), with respect to property...nothing in this title shall prevent or limit the operation of a provision in the underlying...agreement that has the effect of placing the debtor in default under such...agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of a debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

11 U.S.C. § 521(d). Thus, based on the plain language of the Bankruptcy Code, *ipso facto* clauses, such as the one present in this case, are enforceable.

This result is further supported by the *Anderson* decision. In *Anderson*, the debtors wished to retain their vehicle and filed a statement of intention to reaffirm the debt secured by the vehicle. *Id.* at 654. Despite that statement, the debtors continued to make payments pursuant to the loan but never offered the creditor an affirmation agreement. *Id.* Subsequently, the creditor repossessed the vehicle. The debtors argued that the repossession was inappropriate because they were not in payment default but merely defaulted under an *ipso facto* clause, which they asserted was unenforceable. *Id.* at 659. The Court relied on § 521(d) of the Bankruptcy Code holding that "the Debtors' argument is without merit because the BAPCPA amendments made such clauses enforceable in these circumstances." *Id.*

The plain language of § 521(d) and the *Anderson* Court's holding both support the District Court's decision in this case. The Contract contained an *ipso facto* clause which was triggered by the Debtor's bankruptcy filing. Additionally, the Debtor failed to properly reaffirm the debt by taking the appropriate actions required by Bankruptcy Code to reaffirm the debt. Therefore, Sebring was allowed to repossess based on the Debtor's default under the *ipso facto* clause.

III. Debtor Failed to Take the Steps Necessary to Maintain Protection of the Automatic Stay.

The District Court correctly held that Sebring was entitled to repossess the Vehicle because the Debtor failed to take the actions necessary to reaffirm the debt and maintain the protection of the automatic stay. The burden is on a debtor to see a reaffirmation agreement through to execution and failure to do so results in termination of the automatic stay. *See In re Cowgill*, 2008 WL 4487669, at *4 (Bankr. N.D. Oh. 2008) (citing 11 U.S.C. § 521(a)(2)(B)). While the Debtor did try to comply with

Bankruptcy Code's requirements by sending Sebring a reaffirmation agreement, the reaffirmation agreement was never executed by Sebring and the Debtor did not take the necessary steps to maintain protection of the automatic stay. Therefore, the automatic stay was terminated and Sebring was entitled to repossess the Vehicle.

When a creditor refuses or fails to sign a reaffirmation agreement provided by a debtor, the debtor must amend the statement of intention to indicate the debtor's willingness, and a creditor's refusal to enter into a reaffirmation agreement. If not, the automatic stay is terminated. *See Id.* (citing 11 U.S.C. § 362(h)(1)(B)).

In *Cowgill*, the debtor indicated on his statement of intention that he would reaffirm a debt secured by his vehicle. *Id.* at *1. The debtor also sent letters to the creditor indicating his intention to do so but took no further action and the creditor repossessed the vehicle. *Id.* The debtor argued that he performed the duties required of him in order to effectuate a reaffirmation and that the creditor had the burden of preparing the reaffirmation agreement. *Id.* at *3. The Court disagreed, and held that the duty of performance of the reaffirmation agreement was on the debtor. *Id.* at *4. The court further held that because the debtor failed to amend his statement of intention to indicate any refusal on the part of the creditor, the debtor failed to comply with the Bankruptcy Code, resulting in termination of the automatic stay. *Id.*

The facts in the case at hand are analogous to those in *Cowgill*. Here, the Debtor intended to reaffirm the loan secured by her vehicle and made this intention clear by sending the reaffirmation agreement to Sebring. Sebring, however, never signed the reaffirmation agreement and Debtor was thus required to amend her statement of intention to indicate her willingness to reaffirm and Sebring's refusal to do so. The

Debtor failed to take this step and thus lost the protection of the automatic stay. Therefore, Sebring was entitled to repossess the Vehicle. The revisions to the Bankruptcy Code by BAPCPA, as noted above, leave the Court with no other options under the facts of this case.

CONCLUSION

For the reasons set forth herein, Sebring respectfully requests that this Court affirm the ruling of the District Court.

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TAB 6

PART ONE

The Honorable Thomas L. Ambro

Practice Pointers for Appearing in Front of the Third Circuit

Oral Argument

Oral argument takes place after all briefs have been filed with the court, usually no less than one month and no more than four months thereafter. It is the last step in the process before the case is "submitted" to the court for decision. In most federal circuits, only a percentage of appeals filed are calendared for oral argument, and in some cases that percentage is as low as ten percent of the cases decided on the merits. These busy courts have elaborate screening mechanisms to try and ensure that the cases that are scheduled for argument are at least potentially meritorious. They do not wish to give argument time to cases that can be resolved without "full" review.[1]

Oral argument is not simply a restatement of the arguments in the briefs. If the court is prepared ("hot"), the judges enter the argument fundamentally familiar with the briefs. The discussion will quickly focus on the critical issues presented by the case. The court will not tolerate a recitation of the facts and will start firing questions at the advocate very quickly. Argument is also an opportunity for the members of the court to get clarification of your position if they believe it is not clearly or fully set-out in your brief.

If the judges have not reviewed the case before argument (a "cold" court), argument must also introduce the court to the facts of the case and the issues presented. This type of argument will have fewer questions and will focus more on fundamental understanding of the case.

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[1] Federal Rule of Appellate Procedure 34 expressly authorizes circuit courts to establish rules which authorize panels to dispense with oral argument if the panel concludes unanimously, after examination of the briefs and record, that argument is not needed.

PREPARATION

Regardless of the type of court you are faced with, and you may not know this until you are facing them, there are certain basic rules of preparation:

1. KNOW YOUR CASE: The privilege of appearing before an appellate court carries with it the responsibility to know your case. You will not help the court decide the case if you do not truly understand the ramifications of your position or if you are not able to answer questions about the record and the law with precise and well considered answers. You are the expert on the case and your presentation should show it. This requires complete familiarity and sophisticated understanding of everything that appears in the record and in the relevant case and statutory law. If you cannot explain the entire case to someone in detail without referring to any notes, you do not know your case well enough to argue it. You should have the record and copies of all relevant cases and other material available at all times while preparing for an argument. As questions arise in your mind regarding the facts or the law you should resolve them immediately.

2. KNOW YOUR STRENGTHS AND WEAKNESSES: A realistic understanding of the relative merit of your case is an absolute prerequisite to a good argument. To prepare a convincing presentation you must be able to see the case through the eyes of your audience, a neutral and detached decision maker. Almost every decision requires the court to weigh competing factors and decide which factors are paramount in a given situation. It is a rare case where all factors point in favor of one side and you should not be afraid to acknowledge that there is a downside to your position, if it exists. Most judges want to explore the relative strengths and weaknesses of your case and to be effective you must determine the best reasons why your strengths outweigh your weaknesses. This requires thought and preparation and critical appraisal of your own position.

3. KNOW THE RAMIFICATIONS OF WHAT YOUR ARE ASKING THE COURT TO

DO: Though your interest begins and ends with your own case, the court has far more global interests. Because of stare decisis and the precedental effect of our decisional law, appellate courts must always be sensitive to the effect any decision will have on other cases. Thus, if you are arguing that the police did not wait a reasonable time before forcibly entering a house to search because they only waited twenty seconds, you can be sure that the court will be looking for a decision which anticipates cases where the police wait for shorter and longer periods of time. You can also be sure that at least one judge will ask you what amount of time would be reasonable, "twenty-one seconds," "twenty-two seconds," .....? You must think long and hard and perfect your best answer, and it will not do to tell the court that the hypothetical is not reasonable because it is not the facts of your case.

4. PRACTICE, PRACTICE, PRACTICE and this means ALOUD: The hallmark of a good argument is fluidity. The advocate glides from question to question, answering them well and with seemingly little effort, and weaves a coherent argument although constantly interrupted by questions. Though the argument seems spontaneous, it is anything but that. The advocate answers the questions effortlessly because he or she has already considered the questions and developed answers to them. The advocate weaves a coherent argument despite numerous questions because he or she has had several practice sessions and has developed a sense of how things can fit together in a number of different scenarios. Practice aloud, combining moot courts and talking to yourself because you think and talk in different manners. You do not have time to be searching for the right words any more than is absolutely necessary when you are in the heat of an argument.

5. SUBMIT YOUR PROPOSED ARGUMENT TO THE SCRUTINY OF OTHERS: Advocates are often thrown off guard if a judge sees a situation differently than either side has perceived it. This forces the advocate to rethink the point in the middle of the argument and this rarely can be pulled off cleanly. The best way to avoid this is to explain

your argument to other people and see how they react. If they say they do not understand your points or disagree with your characterization of the case, do not dismiss their views as uninformed. The chance that a judge might reach the same conclusions is too great and you should change your plans accordingly unless you are absolutely convinced that your approach is correct.

6. VIDEOTAPE YOURSELF AND LOOK AT THE TAPE: Most people hate to do this, but it will give the best insight into how a judge will see and hear you. You cannot help but learn and improve from this process. "Uhm", "Uh" and other thought pauses are easier to get rid of if you are conscious that you are using them and videotape will certainly bring it to your attention.

7. UPDATE RESEARCH: Do this until the day of argument - only infrequently will you come up with something, but it may be pivotal.

8. DEVELOP A CLEAR SENSE OF HOW TO BEGIN THE ARGUMENT AND WHERE YOU WANT TO GO AND HOW LONG YOU WANT TO SPEND ON DIFFERENT POINTS: Extra effort should be spent honing the first few sentences of your argument. The most nervous point is at the beginning and you want to make sure you retain eye contact and do not trip over your words as you get started. First impressions count a great deal. Depending on the case, you may want a bold introduction or you may want to build up to a major point. You may want to say something provocative if you want to attract attention and start getting questions right away, but in some cases you may want to set the stage a little more. In any event, knowing exactly what you want to do will make your start smoother and you will be sure to engage the court right away. From there on, it is best to be flexible - know what you want to cover and the points that you must make, but do not be wedded to a script or a specific order because questions from the court will likely derail your plans anyway. Finally, remember that time is finite and the court is not going to give you extra time because you have not covered all of your points. It is your

responsibility to manage your time and to sense when you need to move on or speed up.

You must also remember that you are not required to argue all issues that you raised in your brief. Let sleeping dogs lie because you will certainly get bitten if you argue a weak issue that has been decimated by your opponent in his or her brief.

9. DETERMINE WHAT YOU WANT TO BRING TO THE LECTERN: Eye contact is critical to a good argument - it shows you are not afraid of the court or your position and it also provides you with valuable information - the judges' body language tells you how your argument is being received. Notes at the lectern distract you from maintaining eye contact and may even force you into reading - a cardinal sin. Nevertheless, particularly in complex cases, you may need some material in front of you. If at all possible, keep it to one page with large type (outline of major points, quotes you might need, cites you might need). Remember that you can keep the joint appendix on the desk next to you and reach for it should a question arise that requires you to consult the record.

10. PREPARE IN ADVANCE: No matter how you have survived college and law school exams, you cannot prepare for an argument by doing an all-nighter. Little should be left to the day before the argument because a critical factor is making sure that you have internalized and are comfortable with your arguments. Last minute ideas are rarely well-reasoned and more rarely well-executed. A good night's sleep before an argument is essential even if it is fitful sleep.

THE DAY ARRIVES

1. SHOW UP EARLY, APPROPRIATELY DRESSED AND GROOMED: Oral argument is a solemn occasion. You dare not be late, so make sure you are early. This means leaving enough time to get there even if your car breaks down on the Rock Creek Parkway. Conservative dress is required because it is in keeping with the solemnity of the occasion.

2. BRING ALL NECESSARY PAPERS WITH YOU: Do not leave anything in the office that there may be a need to consult during the argument.

3. BRING A COLLEAGUE WITH YOU TO ASSIST WITH MATERIALS AND TO ALERT YOU IF YOU MAKE A MISTAKE OR MISS SOMETHING: A lot happens during an argument and you will likely need some assistance from someone who is familiar with the case. The court may ask where something is located in the record and it is a lot better if you do not waste precious argument time looking it up yourself.

4. DO NOT PANIC: You are prepared and have a right to address the court about the case. Don't worry about the nervousness - it's normal and will go away when you get up to argue.

5. INTRODUCE YOURSELF TO THE CLERK AND SIGN-IN: When you get to the court room let the clerk know you are there. In most courts, you must tell the clerk how much time you will reserve for rebuttal (appellant's counsel only) and when you want to be warned that time is running out - the usual approach is a five minute warning.

6. WAIT: Courts usually hear three or four cases a morning and you often must wait one or two hours before it is your turn.

7. GO: When it is your turn approach the lectern, adjust it to your height, look the court straight in the eye and begin with MAY IT PLEASE THE COURT. This protocol is observed in almost every court. Other formalities may follow. In some courts, you are expected to introduce yourself and who you represent. In other courts, the presiding (senior) judge will call you to the lectern by name. In the latter case, it is redundant to introduce yourself - "We will hear from Mr. Smith" "Thank You Judge Jones, my name is John Smith". Rather, you can say "Thank you Judge Jones. . . May it please the Court . . ."

8. SPEAK UNLESS SPOKEN TO: Start your argument but stop mid-syllable if a judge starts to speak. This is courtesy, but it is also essential because you must LISTEN very carefully to make sure you understand the question. If you do not LISTEN, you will

not necessarily understand the question and you will then invariably answer inadequately. Listen, make sure you understand the question and only then formulate the answer and give it. If you do not understand the question, you may so indicate, but you cannot clarify the situation by asking questions yourself.

9. ANSWER QUESTIONS DIRECTLY EVEN IF IT HURTS: Lawyers have an annoying habit of not admitting or conceding anything that weakens their position even if the point is indisputable. This is a silly attitude because evasiveness only heightens the judge's sense that the weakness is pivotal. Answer yes or no questions with yes or no answers no matter how much they hurt, and then explain further why the point is not critical in your case.

10. MAINTAIN A COMFORTABLE DEMEANOR AND SPEED: Credibility is a key part of an argument and you want to have a style that is as "natural" as possible. To be effective, one need not have a booming voice and an aggressive demeanor. If those traits do not come to you naturally, do not affect them for an argument - it will seem strained and hurt you.

11. BE FIRM BUT RESPECTFUL: Do not be afraid of the judges or back-off simply because they disagree with you. Only concede that which you wish to concede and otherwise hold your ground without attacking the judge. Never let your ego get in your way - keep a cool head and remember that this is your client's case, not your own.

12. MAKE SURE YOU MAKE YOUR POINTS: A critical part of oral argument is convincing the court that the result you advocate is the fair result. The relative equities and competing policy concerns must be addressed. If you represent the appellant, it is particularly important that you convince the court that something went wrong below that requires remedial action. You want to make sure that, in the heat of argument, you do not lose sight of these goals and leave a significant equitable factor out. A checklist is often helpful that you can rundown before you sit down to make sure all vital points have been

addressed.

13. IF YOU FINISH EARLY, SIT DOWN: No court requires you to use all of your time. If you have finished your argument, do not carry forward with additional points - just say "If there are no further questions, this concludes my argument." If no questions arise say "Thank you" and sit down.

REBUTTAL ARGUMENT

DO NOT REHASH YOUR OPENING ARGUMENT: Many lawyers try to restart their opening argument and repeat it on rebuttal. Judges are wary of this and will stop a lawyer if this becomes apparent. Rebuttal is the opportunity to address new points raised by the other side or by the court during the argument by the other side. Confine your comments accordingly, paying particular attention to new points raised by the judges (your opponent does not have a vote). Try to end a rebuttal on a strong dramatic note: "What this case comes down to is ...."

ORAL ARGUMENT PREPARATION CHECKLIST

GOALS FOR ORAL ARGUMENT

In order to understand your goals in preparing for oral argument at the appellate stage, you must understand the judges' goals for oral argument. Particularly in an era when argument is scheduled only when the judges think it is appropriate, it is critical that you have some sense of their expectations. Remember that preparing for argument is time-consuming for judges as well as litigants. The court has calendared the case for argument because at least one judge thinks the case is complicated and may require a published opinion and possible reversal of the lower court decision. Try to gauge what has caught the court's interest. You must decide what the pivotal issues are and get to them as quickly as possible. Generally speaking, at least one judge will be well-prepared, and it is unlikely that you will be up at the podium for long before questions start flying from the bench. Remember, judges want their questions answered and you want questions because they reveal the court's concerns, expose the court's perception of the pivotal issues in the case, and offer you an opportunity to persuade them of the merits of your position.

Therefore, your goals for oral argument should be to address the judges' concerns and to present a coherent theory of why you should prevail in the appeal. It is your job to clarify any questions that the judges have about what actually happened in this case (the facts and procedural history), what would have happened had certain facts been different (hypotheticals), and what the implication of a win for your side would be for future cases (the impact of the case). While you are clarifying these points by answering the judges' questions, you must also affirmatively present a sound theory of why you should prevail. You must have absolute command of the record and of the relevant legal precedent in order to accomplish these goals.

The following is a practical guide to help you succeed in reaching these goals. It is a general reference for normal situations although the circumstances of any particular case may require strategic changes.

WHAT TO DO WELL BEFORE THE ARGUMENT

Be very familiar with the briefs and the record – read and reread them.

Know the standard of review by heart and be able to apply it comfortably to your case. Understand what would happen to the case under alternative standards of review.

Understand why the issues you are arguing are appealable. Tab the Appendix at the points at which the issues were preserved for appeal at trial, where objections were lodged, where the issues were raised by counsel below, and where the district court ruled on those issues.

Do quick summaries of the most important cases. Include bases for distinguishing your opponent's cases. While questions about opinions in other cases is more common in moot court competitions than it is in cases, you should be very familiar with the decisions that are relevant to your case. Even if questions do not arise, you may want to use the decisions yourself.

Check to see whether any cases relied upon by you or your opponent have been subsequently affirmed or reversed.

If, in the course of preparing for argument, you discover significant or controlling cases that postdate the briefs or that were overlooked in the briefs, decide whether to serve these citations upon the court via a FRAP 28(j) letter. You cannot cite to newly discovered cases at oral argument unless you have filed a 28(j) letter with the court. You should also check to see if the court has any local rules that supplement 28(j) and make sure you follow them.

Anticipate all possible questions and draft answers to them in your head or on paper. You must practice these answers out loud.

Anticipate hypotheticals that the judges may pose and practice your answers to them out loud.

If the court discloses the judges who will be on your panel in advance of the oral argument you should do some additional research. Find out what you can about them from supervisors, colleagues, and judicial almanacs. Review decisions by these judges on similar issues if you have time.

Observe arguments in the court where you will be arguing. If you know your panels try to observe those judges. If the panel membership is not disclosed, you should observe as many of the judges on the court as possible. It is a decided advantage to be familiar with the judges and your physical surroundings so that the room, the judges' voices, and their physical appearance are not new to you on the day that you argue. Familiarity with your surroundings improves your ability to hear, understand, and focus on the questions you will be answering.

Schedule multiple moots with your supervisors. The mooting process is the key to executing a good oral argument.

Practice for your moots by talking with your supervisors, colleagues, and friends about the issues in the case. Talking about the case is the best way to overcome your nervousness about presenting an oral argument.

Draft an outline of your argument. Practice it on your own and in mooting sessions. Reformulate the argument based on how it sounds when you practice and on your supervisors' critiques in mooting sessions. Remember that your argument outline may differ from the order in which you presented the issues in the briefs – this is a judgment call based on what you think is the most effective order for oral advocacy, which can differ from written advocacy.

Practice the argument out loud with an eye to your time limit. Keep in mind that questions from the court will consume much of your alloted time. Force yourself to conceptualize and articulate answers to questions in as concise a manner as possible. Listen for what phraseology is most comfortable and effective.

Remember that you should welcome questions from the judges because you want to know what concerns they have and because you want to be able to address their concerns. Don't shy away from questions.

Practice your argument out loud with an ear to tone. Be cordial and reasonable at the same time that you are an advocate for your position. This takes practice! When addressing the judges it is appropriate to use "Your Honor" or "Your Honors." You need not refer to judges by their name but it is certainly permissible to do so if you are sure of pronunciation and who you are addressing.

Answer yes/no questions with a direct yes or no. Then explain your position. Don't hedge on a yes/no question, even if a direct answer appears to hurt your position. Take the punch with a yes or no, then offer an explanation of why the point does not hurt your position. Evasive responses to direct questions are annoying and destructive of your credibility.

Think about what you want to take to the podium for the moots and the actual argument:

> One idea is to compile a three ring binder that includes the following documents separated by tabs:
>
> -your argument outline;
> -anticipated questions and answers;
> -your summaries of the most important cases;
> -copies of any significant and controlling cases - one or two at most;
> -copy of the statute at issue, if any;
> -copy of the district court decision from which the appeal lies;
> -copy of any truly significant part of the record such as the indictment or disputed jury instruction.

In addition to the notebook, you will want to bring an Appendix, marked with tabs, to the podium.

> Another idea is to organize a file folder as follows:
>
> On the left side of the file folder, tape your one-page oral argument outline, with all references to relevant Appendix cites noted. Tab your Appendix for these noted cites. On the right side of the file, tape index cards up the page, overlapping each other all but a half-inch. Each index card is for a case or a statute. On the visible half-

inch of the card, write the name of the case or the statute. Then, flip it up. On the opposite site, quote verbatim the relevant passages of text, and add any factual background necessary. When a judge directs you to a particular case or statute, you simply need to flip up the right card and quote the relevant passages for the court. In the file itself, you place the few most crucial cases, highlighted, and in order.

Regardless of what you bring to the podium, it should never interfere with your maintaining eye contact with the judges. The need to look down to refer to written material should be very limited.

WHAT TO DO THE DAY BEFORE ARGUMENT

Make sure that you know where the courthouse and courtroom are. You will want to check them out beforehand if you can. Figure out how long it will take you to get there for the argument – always plan on heavy traffic and other hurdles in terms of your timing.

Review or skim the entire record, your argument, and all relevant cases. Then relax.

Get a good night's sleep. It is really important to be fresh and alert so that you can think well on your feet in response to questions.

WHAT TO DO THE DAY OF ARGUMENT

Do whatever you can to make yourself feel sharp – wake early, exercise, eat a good meal, etc.

Dress conservatively. Black or blue suits are safe for women and men. You don't want the judges distracted by your attire.

To bring to court on the day of the argument:

- documentation showing that you are authorized to argue;
- documentation regarding when and where the argument is being heard;
- your argument binder or file folder;
- copies of the briefs and joint appendix;
- copies of the most important cases;
- copy of the entire record on appeal.

Get to court early. As you wait in the courtroom for your case to be called, you can: 1) run your argument through your mind from memory; or 2) listen to the judges' questions in the other cases to get a sense of the judges.

Jot down the names of the judges on a pad of paper as they appear from left to right so that you

know who is asking which questions.

WHAT TO DO WHEN YOUR CASE IS CALLED FOR ARGUMENT

If you are counsel for the appellant, you will argue first. Once the case is called, you will be expected to approach the podium promptly. Place the materials that you are not bringing to the podium on the counsel table and walk to the podium.

As counsel for the appellant, you will want to reserve time for rebuttal. The mechanics for doing this vary with the particular courts. In some courts, you let the clerk know in writing or orally before the argument date how much time you want to reserve. In other courts, you state at the beginning of your oral argument how much time you want to reserve. You will need to discover the local practice which may require other things to be done, particularly in a multi-party case.

Whether you waive the reserved rebuttal time will be a judgment call for you and your supervising attorney in light of the particular circumstances, i.e., what counsel for the appellee argued, whether appellee made any factual or legal misrepresentations in its argument, and whether new concerns were raised by the judges in their questioning of counsel for the appellee. Generally, you will only waive rebuttal if the court has fully dismantled your opponent's case on its own.

While your opponent is arguing, do not show any reaction with facial gestures, body movements, or otherwise. Remain composed and listen carefully to the judges' questions. Take notes on their questions and be able to address in your argument the most pressing questions raised by the judges and the most important issues raised by your opponent.

Take a quick moment to compose yourself before beginning your argument.

Begin your argument by saying, "May it please the Court, (if the presiding judge has not called you to the podium by name) my name is _____.
I represent _____ in this appeal."

Although you will probably be nervous in anticipation of the argument, once you actually get into the argument, you will forget your nervousness. Have your first paragraph of argument memorized and maintain eye contact with the judges throughout this introduction. There are a variety of strategies for how to start an argument. As a general matter, the introduction should attract the attention of the judges and not be an empty formality. In many cases when you are appearing before a "hot" (prepared) court, you can move right to the heart of the argument - "the district court erred because _____" or "the district court decided this case correctly because _____." When making your legal argument, you must have an excellent command of the facts and be able to apply the appropriate legal standard to those facts. Nevertheless, oral argument is not the same as written advocacy and you must appreciate the difference. Oral argument builds on the briefs, focuses on perceived weaknesses in your position and you want to convince the court "why" you should win.

Stand firmly. Don't fidget or use hand gestures – it is distracting.

You will probably have an inclination to speak faster than usual because you are nervous. Resist this impulse. Speak slowly and enunciate clearly. Try to be natural.

When the judges ask questions, stop speaking immediately and listen. The key is to LISTEN carefully. If you do not understand a question, do not fake it. Instead, say, "Your Honor, I don't think I understand the question." But do not overdo this. Don't assume that it is a question that you have heard in mooting sessions. An attorney who does not listen to questions and who does not answer them directly will quickly irritate the judges.

If needed, take a moment to think of your response to a question. If it is a new question that you had not anticipated, don't begin to answer it without thinking about the consequences of your answer.

After you answer a question, return to your argument. Do not stand there waiting for another question. The most skilled oral advocates fluidly answer all the judges questions and also guide the argument through their own prepared outline. They are able to weave a point in their outlines into an answer to a question. Don't be rigid about your outline: it is important to answer every question the judges have and to give them the feeling that you are addressing their questions fully. Make sure that you hit every crucial point of your outline.

You need not take up all of your allotted time. If your argument is over, conclude. The judges will appreciate that you are not wasting their time.

One way of concluding your argument is to say, "If there are no further questions, this concludes my argument." Alternatively, you may choose to take a bold stand by saying, "What this case comes down to is _____." Whatever you choose to do, your conclusion should be very brief.