UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

FILED
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U.S. BANKRUPTCY COURT
NEW ORLEANS, LA

IN RE	CASE NO.
OCA, INC., et. al. Debtors	**06-10179 (B)** Jointly Administered CHAPTER 11

OPPOSITION OF THE UNITED STATES TRUSTEE TO THE MOTION OF BANK OF AMERICA, N.A., AS ADMINISTRATIVE AGENT, FOR ENTRY OF ORDER DISBANDING OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS

The United States Trustee ("UST") objects to the Motion of Bank of American, N.A., as Administrative Agent ("BoA") for Entry of Order Disbanding the Official Committee of Equity Security Holders. Section 1102(a)(1) grants the UST the authority to appoint a n equity security holders committee as the UST "deems appropriate" and the UST acted within its grant of authority. Even if this court were to examine the appointment, the UST acted within its discretion in appointing a Committee of Equity Security Holders (Equity Committee), and there is nothing to suggest that the UST abused its discretion, or acted in an arbitrary or capricious manner.

1. **Background.**

The debtor and subsidiary companies filed voluntary petitions under Chapter 11 on March 14, 2006. On May 25, 2006, counsel for NightWatch Capital Advisors, LLC wrote to the office of the UST requesting the appointment of an official committee of equity security holders, indicating the willingness of NightWatch to serve on such committee and that time is of the essence, as the debtors had recently indicated their plan was to turn over to its secured lenders all of the equity of

OCA while providing a minimal and non-guaranteed distribution to shareholders. The UST solicited responses to the request from major constituencies, and asked that responses be forthcoming by June 2, 2006. On June 2, 2006, the Lenders through their counsel Mr. Goodman, and the UCC and debtors through counsel, responded by letter opposing the formation of an equity committee. The SEC and counsel for additional shareholders sent responses indicating their support of the formation of a committee. After analysis of the various positions of the parties, the record in the case, the applicable law, and after deliberation, the UST ultimately exercised its discretion and appointed an equity committee. Among other things, as will be discussed, the case is a large and complex case involving over 50 million shares of publicly traded stock. The support of the SEC carried weight, especially given the allegations of financial improprieties made by shareholders, and the debtors failure to make financial disclosures, resulting in the delisting of its stock. The case is proceeding at an accelerated pace, limiting the ability of constituencies to participate in the reorganization process and determine the core value of the debtor. Evidence existed from the debtors' pleadings and balance sheet that equity value and going concern value existed in the case. Given the speed with which the case was proceeding, the cost of the equity committee would likely not to be excessive. Additionally, the interests of equity holders were not represented by other constituencies. Under the circumstances, the case was one appropriate for the formation of an equity committee, to explore the value of the debtor, and the UST exercised its discretion under §1102(a)(1) and appointed the equity committee.

2. Under Section 1102(a)(1), the UST is given authority to appoint an Equity Committee as it "deems appropriate."

Section 1102 governs the appointment of committees and Chapter 11 proceedings, and states:

> "(a)(1) Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders *as the United States trustee deems appropriate.*"

As the comments to the section indicate, amendments made in 1986 in the Bankruptcy Judges United States Trustee and Family Farmer Bankruptcy Act of 1986 deleted subsection (c) of 1102, which provided for the court to appoint committees. The Act implemented a nationwide expansion of the United States Trustee program, which originally started as a pilot program.[1] Congress sought to bolster confidence in the bankruptcy system by separating administrative and judicial functions, transferring the courts' administrative role to the UST, to enable the court to better perform judicial tasks.[2] The administrative functions previously performed by the bankruptcy courts, including responsibility for appointing creditor and equity holders committees in Chapter 11 cases, were transferred to the UST. Specifically, Congress changed §1102(a)(1) so that the UST would appoint committees, and eliminated a reference to court appointment.[3] After the changes, the UST was granted under §1102(a)(1), the administrative function of the appointment of additional committees

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[1] Pub. L. No. 99-554, sec. 2331 (1986); H.R. Rep. No. 764, 99th Cong., 2d Sess. 18 (1986).

[2] *Richman v. Straley,* 48 F3d 1139, 1144 (10th Cir. 1995).

[3] 11 U.S.C. 1102, Historical and Statutory Notes, 1986 Amendments. "Subsec. (a)(1). Pub. L. 99-554, 221(1), substituted "under chapter 11 of this title, the United States trustee shall appoint" for "under this chapter, the court shall appoint" and added "and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate" following "secured claims."

of creditors as it "deemed appropriate" and the court was granted the power to appoint additional committees, if the UST declined to do so, under §1102(a)(2), if necessary to ensure "adequate representation." [4]

The "deems appropriate" standard of Section 1102(a)(1) is in contrast to the stricter standard found in Section 1102(a)(2), which governs the court ordered appointment of additional committees, where the UST has not appointed such a committee. Section 1102(a)(2) provides that "on request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders *if necessary to assure adequate representation of creditors or of equity security holders*. The United States trustee shall appoint any such committee." The wording of these sections is noted as it informs the case law. Cases which construe §1102(a)(2), and review the court's decision to appoint or not appoint an equity committee after filing of a motion of a party in interest, contain the requirement that the committee be necessary to ensure adequate representation, as this is specifically required by the Code. It is not, however, required where the UST acts under its administrative authority contained in § 1102(a)(1) to appoint additional committees as it "deems appropriate."

For that reason, efforts to engraft the §1102(a)(2) standard requiring an additional committee only to ensure "adequate representation" should be given short shrift. Section 1102(a)(1) requires only that the UST, in the first instance, exercise discretion to appoint an additional committee where

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[4] 11 U.S.C. 1102(a)(1). Equity committees have been appointed in at least 30 cases across the nation since 2000. See 24-10 ABIJ 28 (December 2005)(listing cases where equity committees have been appointed). These cases include high profile bankruptcy cases such as Mirant, Corp., 03-46590 N.D. Tex.); Kmart Corp., (02-02474 N.D.Ill.) and LTV Steel Co. (00-43866 N.D. Ohio). An equity committee has also been appointed in smaller cases involving publicly traded securities, such as the case of American International Petroleum Co., (04-21332 WDLa.).

it "deems appropriate." To read §1102(a)(2) "adequate representation" standard into the section would be to read §1102(a)(1) out of existence.

3. Section 1102 does not contain any authority for a court to disband a committee that has already been formed.

BoA is unable to cite to any authority in the Bankruptcy Code or §1102 which permits a bankruptcy court to disband a committee that has already been appointed by the UST under §1102(a)(1), made in furtherance of its administrative duties. Instead, §1102(a)(2) permits the court to order the appointment of *additional* committees where the creditors are not adequately represented, and does not authorize the court to disband a committee that has been appointed. Section 1102(a)(4) permits the court to order the UST to change the membership of a committee that has already been appointed if the change is necessary to ensure adequate representation. Nowhere in the Code, however, is it contemplated that an already appointed committee be disbanded. Arguably, §105 does not provide this authority, as it does not authorize use of equity rights outside the confines of the Code.[5] Similarly, Bankruptcy Rule 2020, which the BoA relies, specifies that "A proceeding to contest any act or failure to act by the United States trustee is governed by Rule 9014." Rule 2020 merely prescribes that Rule 9014 notice and hearing requirements apply to challenges to UST actions under the Code, but does not confer any substantive rights, and cannot be used to abridge, enlarge or modify any substantive right.[6]

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[5] *In re Victory Markets, Inc.*, 196 B.R. 1 (Bankr. NDNY 1995)(section 105 cannot be used to grant the court authority to add unsecured creditor to appointed committee in disregard of clear language and meaning of bankruptcy statute and rules).

[6] Bankruptcy Rule 2020; Victory Market, 196 B.R.. at 4.

In re New Life Fellowship, Inc. the court specifically analyzed §1102(a)(1) in connection with a motion to disband a bondholder's committee formed by the UST .[7] The court held that "[i]n this case both the specific language and the legislative history of section 1102(a)(1) compel the conclusion that the court is without power to abolish the committee. First section 1102(a)(1) plainly and without any ambiguity grants the United States trustee the exclusive authority to appoint committees."[8] The court rejected the assertion that section 105(a) provides such authority, reasoning that exercise of section 105(a) should be limited to instances where it is tied to another Bankruptcy Code section and "not merely to a general bankruptcy concept or objective."[9] As such, the court held that 1102(a)(1) is absolute in its language and deprives the court of discretion concerning the appointment or abolition of committees, leaving no room for §105(a) to override the act of the United States trustee.

4. If review is appropriate, the standard of review is for abuse of discretion.

BoA asserts that review of the UST decision to form an equity committee is subject to *de novo* review, citing *In re Texaco.*[10] *Texaco* was decided under §1102(a)(1); however, is distinguishable on its facts, as it involved a change of circumstance that made the necessity of two committees of unsecured creditors unnecessary. In *Texaco*, the UST formed three committees: (1) the general unsecured creditors committee; (2) the Industry Committee, consisting of competitors

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[7] 202 B.R. 994 (Bankr. W.D.Okla. 1996).

[8] *Id.* at 996.

[9] *Id.* at 997, *citing* 2 Collier on Bankruptcy, 105.01 at 105-4 (15th ed. 1996).

[10] 79 B.R. 560 (Bankr. SDNY 1987).

of Texaco including Pennzoil, who held a large judgment against the debtor; and (3) the Equity Committee. After the debtor assumed oil and gas agreements and paid royalties, two members of the Industry committee resigned, and the debtor requested the Industry Committee be merged into the UCC.

The court determined that requests to change the membership or size of a committee may be made by the court, as part of a determination of the issue of adequate representation, and is made on a *de novo* basis after the administrative task of appointing the committee is performed by the UST. In view of the reduction of indebtedness to the industry creditors as a result of the assumption and the resignation of two members of the Committee, the court held it appeared that the need for the committee no longer existed, as future conflicts in Pennzoil receiving confidential information at meetings or being a disruptive force were now alleviated.[11] The court did not consider any factors normally associated with the formation of an Equity Committee in its decision, instead, its decision was based upon the passage of time and change in circumstance obviating the initial necessity for two committees of unsecured creditors.

Similarly, *In re Williams Communications Group, Inc.*[12], is also distinguishable. *Williams* involved a motion brought under §1102(a)(2) to appoint an additional committee after the UST had declined to do so. The court held that the standard of review when considering a motion brought to the court to appoint a committee after the UST declines to appoint the committee is *de novo*. As noted previously, §1102(a)(1) and (a)(2) are separate sections that apply in different situations. Section 1102(a)(1) concerns the UST administrative function of appointing committees as it deems

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[11] *Id.* at 567.

[12] 281 B.R. 216 (Bankr. SDNY 2002).

appropriate, and §1102(b)(2) concerns judicial review of a motion by a party in interest for an additional committee based upon lack of adequate representation. Cases which discuss the review of a UST decision not to appoint a additional committee are reviewed under §1102(a)(2). This case is one reviewed under §1102(a)(1), and cases decided under (a)(2) are not applicable.

The only district court opinion which could be located which discusses the review of an court's order to disband a committee is *In re Mercury Finance Co.*,[13] where the district court of the Northern District of Illinois held that the bankruptcy court had the authority to review a decision regarding membership of a committee, but for abuse of discretion only and not *de novo*. In *Mercury*, the UST formed both an unsecured creditors committee and an equity committee. The decision to form an equity committee was in "light of acknowledge pre-petition fraud and questions as to Mercury Finance's value."[14] The equity committee was composed both a present equity holders who were litigants in the security fraud and shareholder derivative lawsuits and past equity holders with claims based on the securities litigation. Other shareholders filed a motion seeking that the trustee reconstitute or disband the membership of the equity committee, which challenged composition of a committee that combined current equity holders and holders of claims based on the securities litigation. The bankruptcy court held that it had authority to review the committee's constitution, and that no statutory authority existed for a blended committee of both creditors and equity holders, and dissolved the committee. Instead, the court ordered the UST to appoint two separate committees consisting of current holders of common stock and a second committee of litigants in the security fraud and shareholder litigation.

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[13] 240 B.R. 270 (N.D. Ill. 1999).

[14] *Id.* at 273.

On appeal, the district court reviewed the myriad of decisions discussing the standard of review of the UST administrative action, and concluded that §105(a) permits the court to review a UST decision regarding committee membership for abuse of discretion.[15] The district court held that §105 was not at odds with §1102 because the power of the UST to appoint committees contained an implicit limitation that it discretion was limited to the appointment of eligible creditors, and because §1102(a)(2) did not provide a remedy as it only permitted the court to address inadequate representation, and not improper representation.[16] "[Section] 105(a) allows the bankruptcy court to review the trustee's decision for an abuse of discretion (as opposed to conducting a de novo review), on the theory that the court cannot carry out the provisions of the Bankruptcy Code if the trustee abuses the discretion given to him by the Code. . . The authority to review the trustee's appointment under the abuse of discretion standard means that, if this court finds that the Trustee acted arbitrarily and capriciously in forming the combined committee, it can issue "any order necessary or appropriate to rectify the situation. . . "[17] Because a combined committee was not authorized by the Code, the bankruptcy court could dissolve the committee and order the appointment of separate committees. It is significant that the court did not simply eliminate equity from the committee; instead, two separate committees were formed.

The abuse of discretion standard in *Mercury* represents the standard used by a majority of courts in review of committee matters. Most of the case law discussing formation of an equity committee arises in other contexts, such as requests to change the membership of a committee. Like

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[15] *Id.* at 277.

[16] *Id.* at 277.

[17] *Id.* at 278.

most matters in bankruptcy, there is considerable disagreement among the courts as to the appropriate standard to be applied by the court in making its decision. One line, cited by the BoA, as shown in the *Texaco* case, holds that no deference is given to the UST decision. Another line, and a majority of cases, holds that deference is given to the UST decision, either through an abuse of discretion standard or an arbitrary and capricious standard.[18]

The abuse of discretion standard not only represents the majority position, it also is in keeping with the grant of discretion given the UST under §1102(a)(1) in appointing additional committees. The United States trustee has administrative authority over committee membership.[19] Should the court review the administrative action, applicable Fifth Circuit jurisprudence specifies tht administrative tasks are review using the abuse of discretion or arbitrary and capricious standard. [20] The abuse of discretion standard means that the decision of the UST to appoint a committee will not be disturbed unless it is shown that the trustee "acted in an irrational, arbitrary, or capricious manner,

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[18] Arbitrary and capricious standard: *See In re Venturelink Holdings, Inc.,* 299 B.R. 420 (Bankr. N.D. Tex. 2003); *In re Lykes Bros. Steamship Co., Inc.,* 200 B.R. 933, 939 (MD. Fla. 1996); *In re America West Airlines*, 142 B.R. 901 (Bankr. D. Ariz. 1992)(decision to remove committee member not overturned unless UST acted in arbitrary and capricious manner) Abuse of discretion: *See In re Fasmart,Convenience Store, Inc., 265 B.R. 427 (Bankr. E.D. Va. 2001); In re Pierce*, 237 B.R. 748 (Bankr. E.D. Cal. 1999); *In re Barney's Inc.*, 197 B.R. 431 (Bankr. SDNY 1996); *In re Columbia Gas System, Inc.*, 133 B.R. 174 (Bankr. D. Del. 1991)(refusal to appoint creditor to committee reviewed for abuse of discretion); *In re First RepublicBank Corp.*, 95 B.R. 58 (Bankr. N.D. Tex. 1988);

[19] *RepublicBank Corp.*, 95 B.R. at 60, citing H.R. Rep. No. 99-764, 99th Cong. 2d Sess. 28 (1986).

[20] *Id.*(court uses arbitrary and capricious standard to review UST action in appointing members to committee); *see Campos-Guardado v. I.N.S.*, 809 F.2d 285, 289 (5th Cir. 1987)(statute granting the Attorney General discretion is subject to the arbitrary and capricious standard of review by court).

clearly contrary to reason and not justified by the evidence."[21] No such showing can be made in this case. As discussed, the decision to appoint the equity committee was made after inquiry, based upon the record, and after examining relevant factors, including that the debtors are not hopelessly insolvent, and equity is not adequately represented.

4. Factors Considered

Most case law on the issue of whether an equity committee should be appointed consider the request under §1102(a)(2), in conjunction with a motion made to the court on the basis that a committee is needed to assure "adequate representation." [22] Because §1102(a)(2) is silent on what constitutes "adequate representation", courts consider a number of factors, including: (1) the number of shareholders; (2) the complexity of the case, and (3) whether the cost outweighs the interest of shareholders in adequate representation..[23] No one factor is determinative.[24] The third factor, the weighing of cost versus benefit, also entails an analysis of the debtor's insolvency, and other factors

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[21] *In re Fas Mart*, 265 B.R. at 431 (quoting *In re Pierce*, 237 B.R. at 754)(UST decision to substitute creditor).

[22] While the UST does not agree that review is appropriate under §1102(a)(2), many of the same standards may guide a decision made under §1102(a)(1), and a review of the standard is helpful.

[23] *E., g., In re Kalvar Microfilm, Inc.*, 195 BR 599, 600 (Bankr. D. Del. 1996); *In re Wang Laboratories, Inc.*, 149 B.R. 1, 2 (Bankr. D. Mass. 1992); *In re Mansfield Ferrous Castings, Inc.*, 96 B.R. 779 (Bankr. N.D. Ohio 1988). The appointment of an equity committee is discretionary, whose resolution is fact-driven and not amenable to bright-line tests. *In re Edison Bros. Stores, Inc.*, 1996 U.S. Dist. Lexis 13768 (D. Del. Sept. 17, 1996).

[24] *Kalvar, 199 B.R. at 600.*

affecting a cost analysis. "The court, however, must be guided by all the facts and not look exclusively to the issue of solvency."[25]

(A) Significant number of shareholders.

"When debt is widely held, official committee representation is usually necessary to insure that the shareholders are adequately represented."[26] The debtor's have filed a 23 page list of equity security holders.[27] The debtor's stock is publicly traded, with approximately 52, 501,612 of common shares.[28] Most of the shareholders are individuals, holding a small number of shares. When debt is widely held, committee representation is necessary to insure the shareholders are adequately represented.[29] This is true even where some shareholders are large or institutional shareholders exist because "the shareholders – in contrast to official committee members – do not have a fiduciary duty to represent the interests of other shareholders."[30] This factor weighs in favor of appointment of an equity committee.

(B) The size and complexity of the case. This is a complex case, involving over 50 jointly administered cases. The complexity is demonstrated when examining the docket sheet. The case was

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[25] *Mansfield Ferrous Castings*, 96 B.R. at 781.

[26] *Mansfield Ferrous Castings,* 96 B.R. at 781.

[27] Pleading 403.

[28] Exhibit "A" to voluntary petition.

[29] *Mansfield Ferrous Castings*, 96 B.R. at 781; *Beker*, 55 B.R. at 949(presence of 400 holders of small amounts indicates need for representation through an official committee having fiduciary responsibility of acting on their behalf); Baldwin-United Corp., 45 b.r. 375 (Bankr. S.D. Ohio 1983)(equity committee formed to assure adequate representation of 15,000 holders of common shares).

[30] *Id.*

filed on March 14, 2006, is less than four months old, yet has generated over 950 docket entries. Over 60 adversary proceedings have been filed in connection with the case. The case is jointly administered with over 50 affiliated cases. Three of the debtor's jointly administered subsidiary companies only filed on June 1, 2006, and schedules were filed for these entities on July 7, 2006. The debtors assets, by its own estimate, are in the range of between $73 to $115 million. It's operations are large and complex, as demonstrated by the number of jointly administered cases, and by the need for litigation to resolve lease and complex contract issues. This factor also weighs in favor of appointment of an equity committee.

(C). Whether cost of participation outweighs value.

In considering the third factor, costs of the committee, the court employs a balancing test to weigh the cost of the committee versus adequate representation concerns.[31] The debtor's solvency is an issue in weighing costs. [32] "The court, however, must be guided by all the facts and not look exclusively to the issue of solvency."[33]

(1) **Solvency of the debtor**. In considering solvency, the BoA urges the court to adopt a standard enunciated in the case *In re Williams Communications Group Inc.*,[34] that there must be "a substantial likelihood of a meaningful distribution." *Williams* is distinguishable, as it involved

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[31] *In re Wang Laboratories, Inc.*, 149 B. R. 1, 3 (Bankr. D. Mass. 1992).

[32] *Id.* at 3; *In re Beker Industries*, 55 B.R. 945, 950-951 (Bankr. SDNY 1985); *In re Emons, Indus.*, 50 B.R. 692, 694 (Bankr. SDNY 1985). The court is guided by all the facts and does not look exclusively at the issue of solvency in making its determination. *Mansfield Ferrous Castings*, 96 B.R. at 781 (considering appointment of committee of employees).

[33] *Mansfield Ferrous Castings*, 96 B.R. at 781.

[34] 281 BR 216 (Bankr. SDNY 2002).

a case where all constituencies, including the UST and SEC, opposed the appointment of an equity committee and the debtor was hopelessly insolvent, as its liabilities exceeded assets by billions of dollars, both on the debtor's balance sheet and the schedules.[35]

Like most matters in bankruptcy, case law takes differing approaches when considering the question of solvency in the context of appointment of an equity committee. A more prevalent, and better reasoned view, is that the debtors need not be "hopelessly insolvent."[36] Instead, the economic indicators should demonstrate that value exists for shareholders and that they are not "out of the money."[37] This is a more lenient standard than the "substantial likelihood" standard espoused by the BoA, and requires a showing only that there is a reasonable chance that the debtor is solvent. Instead, "where the debtor is even marginally solvent, shareholders have a meaningful interest in the outcome of the case, and should have the benefit of equity committee representation, despite the cost."[38]

The not hopelessly insolvent approach is logical, considering that requests for appointment of an equity committee, as in this case, come only weeks or months after the case is filed, and at a time when little information exists as to the debtor's future performance and financial structure. It is unreasonable to require those requesting appointment of an equity committee to prove valuation questions, or that the enterprise value of the debtor exceeds the valid claims existing against it at so

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[35] *Williams*, 281 B.R. at 221.

[36] *Wang,* 149 B.R. at 3.; *Emons*, 50 B.R. at 694; *see In re Exide,* 2002 U.S. Dist. LEXIS 27210 (D. Del. 2002); *see also* 24-10 ABIJ 28 (December 2005).

[37] *In Re Mansfield Ferrous Castings Inc.,* 96 BR 779, 781 (Bankr. N. D. Ohio 1988); *see also Emons Indus.* , 50 BR 692, 694 (Bankr. SDNY 1985).

[38] Looking Out for Shareholders: the Role of the Equity Committee in Chapter 11 Reorganization Cases of Large, Publicly Held Companies, 68 Am. Bankr. L.J. 295, 299 (Summer 1994).

early a stage in the proceedings. Instead, valuation is a matter generally considered at confirmation, and should not be done in connection with expedited consideration of a motion to disband before the parties have an opportunity to gain any meaningful information regarding the structure of the debtor and its finances. It should also not come at a time when the equity committee has not yet retained a financial advisor, and has only a limited opportunity to conduct any meaningful analysis of the financial structure of the debtor. If solvency must be proven prior to appointment of an equity committee, then the UST must determine solvency at the very early stages of a case, when little or conflicting financial data is put forth, and would effectively limit appointment of equity committees to only those cases where solvency could be established from the outset, effectively writing the "deems appropriate" language of §1102(a)(1) out of existence.

Courts look at a number of factors to determine whether or not the debtor is "hopelessly insolvent." It is not a simple matter of examining the balance sheet, [39] but is determined based upon a "confluence of factors."[40] Courts may review the debtor's balance sheet, the trading values of its stocks and publicly traded debt, [41] and the book and market value of the debtor's assets.[42]

The financial data available in the case indicates that the debtors are not hopelessly insolvent. Prior to the bankruptcy filing, the debtors were delinquent in filing periodic public reports with the

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[39] *Wang*, 149 B. R. at 7.

[40] *Williams,* 281 B.R. at 222.

[41] *Id.*

[42] Appointing Equity Committees, Insolvency is One of Severl Factors Courts will Consider in Making Determination, 8/9/2004 NYLJ 9, 11.

SEC.[43] It's initial pleadings with this court indicated that the debtors had $545,220,000 in assets and $196,337,000 in debts.[44] It's first day motions stated that "for the projected fiscal year ending December 31, 2005, the Debtors project cash revenue and cash EBITDA of $359.3 million and $22.8 million, respectively" while its debt to senior secured lenders totaled $91.7 million.[45] The debtors comparative balance sheet in the monthly operating report for the period April 1 to April 30, 2006, filed on June 1, 2006, indicates that debtors have assets of $464,636,111 and liabilities of $194,292,290 as of April 30, 2006. The monthly operating reports indicate that the debtors have positive cash flow and that revenues exceed expenses, excluding depreciation. While the debtors stock has been delisted, it continues to trade at positive values. The debtors schedules reflect assets of $86,902,730. Notably, the schedules are the first instance where the debtors have stated they are underwater.[46] At the time the Equity Committee was appointed, the debtor's disclosure statement did not contain exhibits disclosing its financial condition. The recently filed exhibits to the Disclosure Statement indicates value of between $73 and $115 million.[47] The high end of this value exceeds the amount of BoA debt, and the projected allowed debt of unsecured creditors.

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[43] 8-K report dated June 7, 2005, attached.

[44] Exhibit "A" to voluntary petition.

[45] Motion for Order Under Fed. R. Bankr. P. 1015(b) Directing Joint Administration.

[46] See Amresco, Inc., No. 01-35327 (Bankr. N.D. Tex. Sept. 7, 2001). Amresco reported shareholder value until after the bankruptcy petition, but reported it was insolvent in the schedules. "The Court agrees with FALP that the integrity of the bankruptcy process dictates tht shareholders receive an explanation of what happened and determine whether they have value to be realized.. . "

[47] Disclosure Statement, Pleading 784, Exhibits D-2 and D-4.

The true financial picture of the debtors is difficult to determine, but the debtors are not "hopelessly insolvent." Instead, equity is marginally "in the money." A reasonable chance exists that the debtor is solvent, and equity is entitled to explore the extent it is solvent, especially in a case such as this, where the proceeding has been put on a fast track, and the plan calls for cancellation of over 50 million shares of debtors' common stock.

(2) **Timing of the request for a committee**. Other factors, such as timing of the request for a committee, favor appointment of the equity committee. While the debtors cases are less than four months old, and in three cases, less than two months old, the main bankruptcy case is moving at a rapid pace. The pace at which the case is progressing hampers an investigation into the finances of the debtor. On March 30, 2006, the debtor's requested a bar date to file claims of May 15, 2006.[48] Schedules and statement of financial affairs were filed only after multiple extensions of time were granted to the debtor. Schedules were not filed until May 5, 2006, which was just days before the original bar date to file claims. Debtor filed its Joint Disclosure Statement and Plan on May 23, 2006, just prior to the §341 meeting of creditors. The plan filed proposes to cancel more than 50 million shares of stock in OCA, with equity holders receiving an Equity Deferred Payment after Silver Point receives $115 million and another payment after Silver Point receives $150 million.

At the time the request to appoint an equity committee was received, the bankruptcy case was just over two months old, prior to or coincident with the §341 meeting for the original petitioning debtors,[49] and weeks prior to the §341 meeting for the three newly filed and procedurally consolidated

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[48] This date was ultimately extended to June 2, 2006.

[49] The oral request for an equity committee was made in the days prior to receipt of the written request.

cases. In a normal proceeding, there would be no question that the request came early in the case. Debtors and SilverPoint have fast tracked the case, seeking confirmation less than four months after the initial petitions were filed. It can hardly be said that equity has sat on its rights. Opportunity still exists for input in the plan negotiation and confirmation process.

(3) The cost of the Committee. Given the rapid rate the case is progressing, even given the hourly rate of compensation awarded the attorneys for the Equity Committee, it is unlikely that fees will be generated for a substantial period of time. Additionally, all fees of the Equity Committee are at risk, as they are subject to objection should it ultimately be demonstrated that no value resulted as a result of the Equity Committee participation in the case.[50] The cost of the Equity Committee in a case moving at the speed of this proceeding should not be a determinative, or even a major, factor in the court's analysis.

(4) Shareholders are not adequately represented by other parties. BoA asserts that equity is already adequately represented by the debtor , the UCC, or by NightWatch or other large institutional investors. NightWatch cannot represent the class of shareholders, where shares are widely held. Even large institutional shareholders or shareholders with sufficient resources to protect themselves do not adequately represent other shareholders because they do not have the fiduciary duty to represent other shareholders.[51] Similarly, the debtor or its management cannot adequately look after shareholder interests. The debtor and its management are subject to conflicting concerns, and do not adequately look after shareholders interests.

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[50] *Wang*, 149 B.R. at 4.

[51] *Beker,* 55 B.R. at 949.

> One conflict arises from the fact that, under the absolute priority rule, creditors of a debtor of marginal solvency have first priority over shareholders to virtually all of the value of the company. Thus, arguably, the debtor's directors and management owe a fiduciary duty to creditors (who are legally entitled to receive that value) instead of shareholders (who are not), and must manage that value for their benefit. . . . Another conflict can arise from the desire of directors and management to retain their jobs and maximize their compensation.[52]

For similar reasons, the UCC does not effectively represent equity. The UCC's interest is in obtaining the maximum possible distribution to its own constituency.

The purpose of an official equity committee is to ensure that equity's interests are not overlooked. [53] The committee structure enables a debtor to negotiate with numerous parties in interest, by providing a centralized body to meet with.[54] In complex cases, such as this one, absent the committee structure, it is unlikely that a large body of affected parties will have a voice.

5. BoA lacks standing to bring the motion to disband.

Bank of America, as an oversecured creditor/ administrative claimant whose claims will be paid in full, lacks standing under Article III of the Constitution and various prudential requirements to seek dissolution of the Equity Committee.[55] Accordingly, this Court lacks jurisdiction to hear Bank of America's motion.

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[52] 68 Am. Bank. L.J. at 301.

[53] *See* 115 H.R. Rep. No. 595, 95th cong. 2d Sess. 220 ('[t]he purpose of a business reorganization case is to restructure business finances to continue to operate, provide employment, pay creditors and produce a return for equity).

[54] *In re Finley Kumble*, 85 B.R. 13, 17 (Bankr. SDNY 1988).

[55] Plan and Disclosure Statement; Disclosure, article V; Final Order Authorizing Postpetition Financing, pg. 20-21.

To have standing, Bank of America must satisfy three standards: (1) Constitutional (Article III), (2) prudential, and (3) statutory.[56] Statutory standing of creditor as a "party in interest" under section 1109(b) of the Bankruptcy Code does not eliminate the Constitutional and prudential requirements for standing.[57] Thus, not every party in interest in a bankruptcy case will have standing on every issue.[58] "'Because there is no precise definition of the phrase party-in-interest, courts are to make this determination on a case by case basis.' [citations omitted]. 'An entity may be [a] real party in interest and have standing in one respect while he may lack standing in another respect.' [citations omitted]. '[T]he right to appear and be heard is not the same as standing and § 1109(b) does not necessarily mean that every party in interest can seek relief on every issue....The determination [of] whether an entity qualifies as a party in interest should be made within the specific reorganization process context for which the determination is sought.' [citations omitted]. In that regard, it is appropriate for a court to examine the motivation of the party asserting party-in-interest standing. [citations omitted]."[59]

Under Article III, standing depends on the existence of three elements: "First, the plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest which is (a) concrete and particularized, [citations omitted] and (b) 'actual or imminent, not 'conjectural' or 'hypothetical,''

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[56] *In re A.P.I., Inc.*, 331 B.R. 828, 856-860 (Bankr. D. Minn. 2005); *Baron & Budd, P.C. v. Unsecured Asbestos Claimants Committee*, 321 B.R. 147, 157-58 (D.N.J. 2005); *In re Tascosa Petroleum Corp.*, 196 B.R. 856, 863-4 (D.Kan.1996).

[57] *A.P.I*, 331 B.R. 856-860 (section 1109(b) does not eliminate required Constitutional or prudential analysis const or prudential analysis, *citing Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 8 (2000); *Matter of James Wilson Associates*, 965 F.2d 160, 169 (7th Cir. 1992) (1109(b) not intended to replace other limitations on standing); *Tascosa Petroleum*, 196 B.R. at 863-4; *Matter of Rimsat, Ltd.*, 193 B.R. 499, 502 (Bankr. N.D. Ind.1996) (The right to be heard under section 1109(b) is not the same as standing).

[58] *Rimsat*, 193 B.R. at 502 (Bankr. N.D. Ind.1996).

[59] *In re E.S. Bankest, L.C.*, 321 B.R. 590 (Bankr. S.D. Fla. 2005) (quote).

[citations omitted]. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the court.' [citations omitted]. Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be "redressed by a favorable decision.' [citations omitted]." *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560-61 (1992) (emphasis added).

Apart from the constitutional mandate, the Supreme Court recognizes other limits "on the class of persons who may invoke the courts' decisional remedial powers."[60] These prudential limitations principally concern whether the litigant (1) asserts the rights and interests of a third party and not his or her own, or (2) presents a claim arguably falling outside the zone of interests protected by the specific law invoked. Both are grounds to deny standing.[61]"The party invoking federal jurisdiction bears the burden of establishing [standing].... [citations omitted]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."[62]

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[60] *In re Newcare Health Corp.*, 244 B.R. 167, 170-71 (1st Cir. BAP 2000), *quoting Warth v. Seldin*, 422 U.S. 490, 499 (1975).

[61] *Newcare Health*, 244 B.R. at 170-71, *citing Benjamin v. Aroostook Medical Center, Inc.*, 57 F.3d at 104; *Tascosa Petroleum*, 196 B.R. at 863-4 (no standing to assert third party rights); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 644 (2d Cir.1988) ("The prudential concerns limiting third-party standing are particularly relevant in the bankruptcy context. Bankruptcy proceedings regularly involve numerous parties, each of whom might find it personally expedient to assert the rights of another party, even though that other party is present in the proceeding and is capable of representing himself."); *In re Martin Paint Stores*, 199 B.R. 258, 264-65 (Bankr. S.D.N.Y. 1996) (explaining prudential limitations regarding third party rights and zone of beneficiaries protected by statute and collecting citations).

[62] *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Reported cases reveal that it is not uncommon for courts to apply constitutional and prudential principals to deny standing in bankruptcy cases to parties who are otherwise "parties in interest" under section 1109(b) of the Bankruptcy Code. A consistent theme is these cases is that the moving or objecting party lacks injury because its claim or interest would be unaffected by the relief sought. This is often true for oversecured creditors (such as Bank of America) whose claim will be paid in full regardless of the relief granted or denied. Similarly, the same can be true for those at the other end of the priority ladder. Unsecured creditors or equity holders who are far out of the money may lack standing with respect to matters only affecting those who are likely to receive distributions from the estate.[63]

For example, courts deny standing to object to issues related to disclosure statements or confirmation of plans where the objector's claim or interest would be unaffected by granting the objection. A typical case is *In re United Chemical Technologies, Inc.*, where the court found a Bank with secured claims to lack standing to object to the treatment of claims of various unsecured creditors, because the treatment of the unsecured creditors had no effect on the treatment of the Bank's own claims.[64] Other regular bankruptcy events in which standing is denied to someone who is

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[63] *E.g., National Tel. Co., Inc. v. O'Brien*, 450 F.Supp. 815, 817 (D. Conn. 1978). ("Whether the banks' status as secured creditors is preserved is of no financial interest to the present plaintiffs, who are stockholders of the debtors. If the banks' security interest is invalidated, the priority of the banks will be demoted to that of a general creditor. However, both secured and general creditors have higher priority than stockholders. Thus, invalidating the banks' security interests could not benefit the stockholder plaintiffs. Consequently, they lack standing to seek an order invalidating the security interests of the banks.").

[64]. *In re United Chemical Technologies, Inc.*, 196 B.R. 716, 726 (Bankr. E.D. Pa. 1996); *e.g., In re Scioto Valley Mortg. Co.*, 88 B.R. 168, 171 (Bankr. S.D. Ohio 1988) (A creditor only has standing to object to the adequacy of a disclosure statement as to its own class and not as to the adequacy of the statement as it affects another class, *citing, In re Adana Mortgage Bankers, Inc.*, 14 B.R. 29, 30 (Bankr. N.D. Ga. 1981); *In re Paradise Springs Associates*, 165 B.R. 913. 920-921 (Bankr. D. Ariz. 1993) (fully secured creditor lacked standing to object to plan on basis

otherwise a party in interest include assumption and assignment of leases,[65] objections to discharge[66] and settlements.[67] If the objecting party's claim or class is not affected, standing is denied.

In this case, Bank of America's standing is deficient on three Constitutional and prudential grounds. First, as matter of Constitutional standing, Bank of America fails to show how, as an oversecured creditor with a sizeable equity cushion, it is adversely affected by formation of the Equity Committee. For instance, formation of the Equity Committee does not alter or impair Bank of America's claim or the collateral that secures it or diminish the likelihood of repayment. Formation of the Equity Committee, whose interests are at the polar extreme from Bank of America's has absolutely no adverse effect on Bank of America. Bank of America's desire to control or influence the course of this case is not a recognized interest for standing purposes.

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of absolute priority rule because secured creditor had no unsecured claim to which absolute priority rule would pertain); *Corestates Bank, N.A. v. United Chemical Technologies, Inc.*, 202 B.R. 33, 48 (E.D. Pa. 1996) (adopting bankruptcy court's reasoning that secured creditor lacked standing, but vacating on other grounds); *In re New Midland Plaza Associates*, 247 B.R. 877, 892, 894-5 (Bankr. S.D. Fla. 2000) (fully secured creditor lacked standing to object to plan's classification of a claim it did not hold or on basis of absolute priority rule because secured credor's claim not affected); *In re Computer Optics, Inc.*, 126 B.R. 664, 666-67 (Bankr. D.N.H. 1991) (oversecured creditor lacked standing to object to plan on basis of best interest of creditors test, because its secured claim not affected); *In re American Solar King Corp.*, 90 B.R. 808, 827 n.35 (Bankr. W.D. Tex. 1988) (creditors unaffected by another creditor's change of vote on plan lacked standing to object to change); *In re Keck, Mahin & Cate*, 241 B.R. 583, 596 (Bankr. N.D. Ill. 1999) *citing In re B. Cohen & Sons Caterers, Inc.*, 124 B.R. 642, 646-47 (E.D.Pa.1991).

[65] *In re ANC Rental Corp.*, 278 B.R. 714, 719 (Bankr. D. Del.) (Creditors with no interest in the contract to be assumed and assigned lacked standing to object to debtor's decision to do so); *see also In re ANC Rental Corp., Inc.*, 277 B.R. 226, 231-32 (Bankr. D. Del. 2002); *Matter of James Wilson Associates*, 965 F.2d 160, 169 (7th Cir. 1992) (mortgagee lacked standing to enforce rule requiring debtor to assume or reject leases within 60 days).

[66] *In re Berman*, 100 B.R. 658, 659-660 (Bankr. E.D.N.Y. 1988) (secured creditors, whose security would not be affected by grant or denial of debtor's discharge, did not have Constitutional standing to object to grant of discharge).

[67] *In re Patriot Co.*, 303 B.R. 811, 815 (8th Cir. BAP 2004) ("In order to have standing to object to proposed settlement, stockholder was required to establish a real possibility that a successful objection to the motion to compromise would have resulted in a surplus.").

Second, to the extent that the existence of the Equity Committee could have an adverse effect on the interests of parties in interest in these cases, it is on unsecured creditors, whose claims, unlike Bank of America's oversecured claims, are unlikely to be paid in full. Thus, in addition to failing to show a constitutionally recognized injury, Bank of America fails the prudential standing requirement that the injury it alleges be its own and not a third party's (*e.g.*, not unsecured creditors'). Notably, unsecured creditors have not objected to appointment of the Equity Committee. Bank of America lacks standing to raise third party rights, especially when those parties themselves have chosen not to do so.

Third, and for congruous reasons, Bank of America fails the prudential requirement that it's interest be among those that section 11 U.S.C. § 1102 is intended to protect. Formation of an equity committee is intended to protect the interests of equity security holders. Any injury to Bank of America as a secured creditor falls outside the zone of interests addressed by 11 U.S.C. §1102.

Conclusion

For the reasons set forth, the United States Trustee requests that this Court deem this objection good and sufficient and enter an order denying the Motion of Bank of America to Disband the Equity Committee, and for all other and further relief to which it may be entitled.

Respectfully submitted,
R. MICHAEL BOLEN
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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE	CASE NO.
OCA, INC., et. al. Debtors	**06-10179 (B)** Jointly Administered CHAPTER 11

Certificate of Service

The undersigned certifies that on the 17th day of July, 2006, he served or caused to be served a copy of the Opposition of the United States Trustee to the Motion of Bank of America, N.A. as Administrative Agent, for Entry of Order Disbanding the Official Committee of Equity Security Holders to the parties listed on Exhibit "A" attached hereto and in the manner set forth on Exhibit "A".

s/MARY S. LANGSTON
Mary S. Langston
Assistant United States Trustee

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