Hearing Date: August 25, 2004
Hearing Time: 10:30 a.m.
Hearing Location: Portland, ME

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:	
PEGASUS SATELLITE TELEVISION, INC., et al.,	Chapter 11
	Case No. 04-20878 (JBH)
Debtors.	
	(Jointly Administered)

JOINT STATEMENT OF THE WILMINGTON TRUST COMPANY AND BANK STEERING COMMITTEE IN SUPPORT OF THE DEBTORS' MOTION TO (I) APPROVE THE GLOBAL SETTLEMENT AGREEMENT AND (II) AUTHORIZE AND APPROVE IN CONNECTION THEREWITH A SALE, TRANSFER AND CONVEYANCE OF CERTAIN ASSETS OF THE DEBTORS TO DIRECTV, INC.

Wilmington Trust Company ("Wilmington Trust"), as the successor administrative agent for the various lenders (the "Junior Secured Lenders") under that certain Amended and Restated Term Loan Agreement, dated as of August 1, 2003, among Pegasus Satellite Communications, Inc., as borrower, and the lenders from time to time party thereto and the Bank Steering Committee (the "Bank Steering Committee"), comprised of the majority lenders under that certain Fourth Amendment and Restatement of Credit Agreement dated as of October 22, 2003, by and among Pegasus Media & Communications, Inc., as borrower, and the lenders from time to time party thereto (the "Senior Secured Lenders" and together with the Junior Secured Lenders, the "Secured Lenders"), by and through their undersigned counsel, hereby submit this statement in support (the "Statement in Support") of the motion (the "Settlement Motion") by the above-captioned debtors and debtors-in-possession (collectively, the "Debtors") for entry of an order (i) approving the global settlement agreement (the "Settlement Agreement") and (ii)

authorizing the sale (the "Sale") of certain assets (the "Satellite Assets") to DIRECTV, Inc., and respectfully state as follows:[1]

PRELIMINARY STATEMENT

It is almost beyond any rational debate that the Settlement Agreement is in the best interests of the Debtors and their creditors. Despite their best efforts, the Debtors have been unable to persuade this Court on their most basic arguments. Faced with the grim reality that their litigation strategy has failed and that their business will literally disappear in eleven days, the Debtors have made the wise decision to settle the litigation, sell their subscribers and related satellite television assets to the only logical purchaser, DIRECTV, and bring swift closure to their Chapter 11 proceedings.

The two possible alternatives available to the Debtors stand in stark contrast to each other. Absent the current settlement, which will yield theses estates approximately $875 million, the Secured Creditors would likely recover a fraction of their claims and unsecured creditors would be wiped out. On the other hand, the Settlement Agreement and Sale, if approved and consummated, will guarantee that all of the Debtors' secured creditors will be paid in full and that the majority of the Debtors' general unsecured creditors will receiver a significant recovery on their claims. Accordingly, the Settlement Agreement should be approved.

STATEMENT IN SUPPORT

I. The Settlement Agreement Should be Approved as Fair and Reasonable

1. Pursuant to Bankruptcy Rule 9019(a), this Court may approve a settlement if it finds that the settlement is fair and reasonable, and in the best interest of the debtor's estate and creditors. To approve a proposed settlement, the Court must determine that the settlement falls

[1] Terms not otherwise defined herein shall have the meanings ascribed to such terms in the Settlement Motion.

within the range of reasonableness and should look to factors including: (i) the probability of success in litigating the claim; (ii) difficulties associated with collecting the claim; (iii) the complexity, expense, inconvenience and delay of litigating the claim; and (iv) the interests of the creditors in settling the claim. See Protective Comm. For Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson, 390 U.S. 414, 424 (1968); see also In re Anolik, 107 B.R. 426 (D. Mass. 1989) (citing In re Lawrence Paperboard Corp., 52 B.R. 907, 909 (Bankr. D. Mass. 1985)).

2. These factors require the Court to balance the risk and expense of litigating the dispute against the benefit of the proposed settlement to the debtor's estate and creditors in determining whether a proposed settlement is reasonable. As the First Circuit noted, the bankruptcy court is expected to "assess and balance the value of the claim[s] . . . being compromised against the value . . . of the compromise proposal." Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995) (internal citation omitted). Furthermore, a settlement may be approved even though a particular party-in-interest could potentially achieve a greater recovery through continuation of the litigation, so long as the proposed settlement is reasonable. See In re Drexel Burnham Lambert Group, Inc., 134 B.R. 499, 506-07 (Bankr. S.D.N.Y. 1991) (approving settlement while noting that the only benefit of continued litigation was the "speculative and unpredictable prospect" of greater recovery later).

3. The Secured Lenders respectfully submit that the Court's application of the above factors, in light of the particular facts and circumstances surrounding this case, show that the balance overwhelmingly favors approval of the Settlement Agreement.

4. *Probability of Success of Cornerstone Litigation*. It would be an understatement to say that the probability of success in the current litigation (the "Adversary Proceeding") is extremely low. The Debtors have tried repeatedly to convince this Court of the merits of the

Adversary Proceeding and the Debtors have not been successful on any occasion. As this Court noted, "Pegasus' potential for success on the merits [of the Adversary Proceeding] is underwhelming, perhaps even less so" in that its stated goal is "the resurrection of dead [contract] rights." See Transcript of June 21, 2004 Hearing, Adversary Proceeding No. 04-2064. The District Court for the District of California previously reached the same conclusion on at least three separate occasions. Where the probability of success in litigation is so remote, courts should approve settlements providing a reasonable recovery. See In re Haase, 306 B.R. 415, 423 (B.A.P. 1st Cir. 2004) (holding that allowance of the compromise offsets the substantial burdens and risks that would have been encountered in further litigation); In re Continental Inv. Corp., 637 F.2d 8, 12 (1st Cir. 1980) (finding that while the interests of the majority stockholders are understandable, the trustee ought not to be forced to engage in protracted litigation at the expense of the estate when there is a demonstrably uncertain chance of success).

5. *Difficulty in Collection*. Even if one could somehow assume the remote possibility of success in the Adversary Proceeding, such success would only come at the end of many years of an extraordinarily expensive trial and appeal. It is equally clear that during this time the Debtors' subscriber base (and cash flow) would be (i) reduced to virtually nothing due to the competitive efforts of DIRECTV and (ii) eliminated altogether if DIRECTV is intent on halting programming services on August 31, 2004. See In re Receivership Estate of Indian Motorcycle Mfg., Inc., 299 B.R. 8, 20 (D. Mass. 2003) (provisionally affirming proposed settlement based on, among other things, trustee's representation that "the disputes . . . will prove costly and time consuming to litigate to a conclusion and will further delay distributions to creditors of the bankruptcy estates."); In re Drexel Burnham, 134 B.R. at 506 (upholding settlement rather than proceeding with litigation which was "fraught with convoluted issues, and

would indeed present a complex course for determination."). While "collection" is not difficult here, it is difficult to see how the estates — even if they are somehow successful in the Adversary Proceeding — could ever do better than the Settlement Agreement under these circumstances.

6. *Complexity of Litigation*. In evaluating this factor, most courts weigh the complexity of litigation as a reason to enter into a settlement because it translates into increased costs of resolution. Overly complex litigations are strongly disfavored as compared to reasonable settlements. See In re Anolik, 107 B.R. at 430 (approving settlement based on complex nature of litigation). Numerous complex disputes underlie the Adversary Proceeding and as discussed above, it would take years to resolve the multiple causes of action asserted by the Debtors at an expense of many millions of dollars in legal and other professional fees for the Debtors and other parties-in-interest, with a reduction in the value of the Debtors' saleable assets to virtually nothing in the process.

7. *Paramount Interests of the Estate*. This factor naturally overwhelms all others in this case. The choice presented to the Debtors' estates is a stark one, which ultimately boils down to (a) receiving approximately $875 million in cash today coupled with the immediate cessation of litigation and its concomitant incurrence of professional fees, or (b) pursuing expensive litigation that likely has no chance of being successful and absolutely no chance of being resolved prior to August 31, 2004, when the Debtors could lose their ability to provide service to their customers, which destroys any chance of a meaningful recovery for creditors. The correct choice is a simple one and is logically supported by all creditor constituencies, save one rogue deeply subordinated unsecured creditor who holds a fraction of the entire unsecured

class. Put bluntly, either the Settlement Agreement is approved or the vast majority of creditors will recover virtually nothing.

II. The Terms of the Settlement Agreement Meet the Business Judgment Standard

8. A bedrock principle of corporate decision making is the business judgment standard, which also has been used by courts in this Circuit to determine whether a settlement satisfies the standards necessary for approval pursuant to Bankruptcy Rule 9019. In re Indian Motorcycle Mfg., Inc., 299 B.R. at 21 (substantial deference to the business judgment of a bankruptcy trustee is given when deciding whether to approve a settlement) (citing In re Indian Motorcycle, Inc., 289 B.R. 269, 283 (B.A.P. 1st Cir. 2003) ("Compromises are generally approved if they meet the business judgment of the trustee.")). There can be no question that obtaining a $875 million payment instead of relying on an all or nothing litigation strategy, which has failed repeatedly, is reasonable and is a sound exercise of the Debtors' business judgment.

9. The Debtors' actions — when put to the test of the business judgment standard — demonstrate that the Debtors' decision-makers have acted on an informed basis, in good faith and in the honest belief that their actions are in the best interests of the estates. The primary terms of the Settlement Agreement are reasonable and can be defended under the business judgment standard. Indeed:

- The aggregate cash purchase price of $875 million clearly is reasonable and becomes even more so when DTV's effective waiver of the Seamless Marketing Litigation judgment of approximately $63 million is considered.[2]

[2] D.E. Shaw's assertion that "payment" of the Seamless Marketing Litigation judgment prefers DTV to other creditors in this case is simply incorrect. Because the Seamless Marketing Litigation judgment is an obligation of Pegasus Satellite Television, Inc., it is structurally senior to the bulk of the obligations owed by the Debtors (including the subordinate notes held by D.E. Shaw), which were issued primarily at intermediate holding company levels. Accordingly, the Seamless Marketing Litigation judgment would need to be paid in full prior to any creditor at the Debtors' intermediate holding company levels to receive any recovery. Additionally, while the Settlement refers to the "payment" of the Seamless Marketing Litigation judgment, the Debtors are not required to go out of

When discounted to reflect the shorter duration of the Debtors' Member Agreements, the net purchase price, on a per subscriber basis, is greater than the same price offered by DIRECTV to other NRTC members. In addition, notwithstanding the various potential adjustments to the purchase price, the net purchase price will provide enough money to satisfy all secured claims and provide a substantial recovery to the vast majority of unsecured creditors.

- The sale to DIRECTV of the rights to the Satellite Assets is reasonable, as is entering into the Cooperation Agreement. Without such assets and support there would be no reason for DIRECTV to enter into the Settlement Agreement. Similarly, the Cooperation Agreement will help ensure a smooth transition and subscriber loyalty, plus the Debtors will be compensated for their assistance to DIRECTV pursuant to the Cooperation Agreement.

- The mutual releases are clearly reasonable. DIRECTV (and NRTC) cannot be expected to enter into the Settlement Agreement and still be subject to the cost and risk of litigation, no matter how remote the possibility of an adverse result would be. Alternatively, the Pegasus Non-Debtors cannot be expected to release claims against DIRECTV and NRTC and still be subject to the Potential Claims. Thus, in order to facilitate the consummation of the Settlement Agreement, the release of the Pegasus Non-Debtors is both reasonable and necessary. Additionally, the Debtors themselves are getting a release from the Pegasus Non-Debtors of approximately $28.1 million in pre-petition claims.

- It is reasonable for the Debtors to make payments to DIRECTV and NRTC for outstanding service obligations. The Debtors have been and are continuing to receive services from DIRECTV and NRTC and it is only fair that they get compensated for such services. Plus, such amounts are offset by approximately $16.8 million in patronage distributions added to the purchase price.

- The agreement for PCC to act as a stalking horse in the sale of the broadcast television assets to PCC is also reasonable, especially considering that the $75 million initial offer is subject to higher and better offers and that PCC will not receive a breakup fee if the offer is topped.

III. The Terms of the Settlement Agreement Satisfy the Debtors' Fiduciary Obligations

10. The Settlement Agreement also must be viewed in light of the Debtors' fiduciary obligations to creditors, which overwhelmingly require entry into the Settlement Agreement. It is well established that once a corporation files for chapter 11, its management becomes a

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pocket to satisfy the judgment, such that the net recovery to the Debtors' estates remains at the $875 million purchase price.

fiduciary of its creditors and, as a result, has an obligation to refrain from acting in a manner which could damage the estate or hinder a successful reorganization. Credit Lyonnais Bank Nederland N.V. v. Pathe Communications Corp., 1991 WL 277613 (Del. Ch. Dec. 30, 1991). In fact, once a corporation is insolvent, the interests of its stockholders are not as significant as those of creditors. See In re Petit, 182 B.R. 69 (Bankr. D. Me. 1995) (finding that a debtor's main duty is to protect and conserve property in its possession for the benefit of its creditors, not equityholders); In re Healthco, 208 B.R. 288, 300 (Bankr. D. Mass. 1997) (holding that, upon insolvency, the "rights of creditors are paramount").

11. This Court is well aware that the Debtors would have liked nothing more than to pursue their litigation against DIRECTV. However, to their credit, the Debtors have acted with their creditors' best interests in mind. Rather than wagering the equivalent of a lottery ticket on the outcome of the Adversary Proceeding, the Debtors have kept their creditors' interests in mind and made the proper (indeed only) choice; i.e. to settle before $875 million in value vanishes on August 31, 2004.

IV. The D.E. Shaw Laminar Portfolios, L.L.C. Objection Should be Overruled

12. The objection (the "D.E. Shaw Objection") by D.E. Shaw Laminar Portfolios, L.L.C. ("D.E. Shaw") is nothing more than a thinly veiled attempt by a disgruntled deeply subordinated creditor to extract a payoff for disrupting the settlement process. It is quite telling that D.E. Shaw stands alone in its objection to the Settlement Motion. Indeed, the Committee, of which D.E. Shaw is a member, helped negotiate the terms of the Settlement Agreement and is a party to the Settlement Agreement. Despite D.E. Shaw's representations, this Court should not be fooled into thinking that D.E. Shaw is a large creditor because it holds 36.7% of the subordinated notes due 2007. Indeed, D.E. Shaw holds less than 5% of all unsecured claims,

which consist of approximately $800 million in senior notes and $126 million of subordinated notes, and the notes held by D.E. Shaw contain express provisions providing for their subordination to over $1.4 billion in total debt. In any event, D.E. Shaw's arguments are easily dispensed with.

13. *An Auction is Unnecessary*. A debtor's duty in a Chapter 11 case is to maximize value for creditors. Generally, that requires an auction, but not always. In these cases, an auction could destroy, rather than increase value. For starters, despite D.E. Shaw's assertion to the contrary, an auction would be a waste of time. There can be no real dispute that DIRECTV is the only legitimate bidder for the Debtors' assets. The satellite broadcasting industry is extremely consolidated and thus there are only two theoretical bidders other than DIRECTV: Echostar Communications Corporation ("Echostar") and Cablevision Systems Corporation, which recently entered the satellite broadcasting market with a high definition product know as "VOOM." Neither of them, however, have expressed any interest in acquiring the Satellite Assets despite being contacted by the Committee and the Debtors. Indeed, Echostar has followed the Debtors' proceedings very carefully and could have expressed interest in the Satellite Assets at any time in the weeks since the Debtors filed for bankruptcy. In addition, if either party desired to submit a bid, they are of course free to do so at any point up to the hearing to approve the Settlement Agreement. At that point this Court could rule upon a real — as opposed to illusory — issue of whether such bid could be pursued.

14. There are, however, good reasons why no party has stepped forward. Specifically, there are significant cost and structural barriers which would prevent any party, other than DIRECTV, from acquiring the Debtors' assets. Through DIRECTV's symbiotic relationship with the Debtors, DIRECTV already has a significant amount of vital subscriber

information and currently provides satellite services to all of the Debtors' subscribers. Accordingly, any alternative bid would have to be based on the total amount of subscribers actually transferred to such bidder. This reality makes any alternative offer illusory — it will take a significant amount of time to determine the exact number of transferred subscribers and it is very unlikely that subscribers, who currently receive service from DIRECTV, will switch to a new provider who requires installation of new equipment, with new channel lineups at essentially the same monthly cost. Making it even more unlikely that the Debtors' current subscribers would ever obtain satellite services from an alternative provider is the fact that, DIRECTV, who is free to compete with the Debtors, but has thus far refrained from doing so with all of its resources, could advertise to existing customers after August 31 directly through each subscribers' television set.

15. In addition, even if another bidder emerged, the attendant transfer costs and delays would be tremendous. All customers would require new equipment formatted for the new provider. With approximately 1.1 million subscribers at stake, this would not only be expensive — necessarily driving the price of any potential bid down — but exceedingly time-consuming. On the other hand, DIRECTV can seamlessly transition the Debtors' subscribers to its system with little or no expense or disruption in broadcast services. It is also not entirely clear what assets the Debtors have to "auction." A significant portion of their assets is a result of proprietary information that the Debtors cannot sell without the consent of DIRECTV. DIRECTV would obviously not consent to the sale of such proprietary information by the Debtors, especially to a DIRECTV competitor. Rather than a spirited auction, the likely result of a "higher bid" would be protracted litigation over what assets, if any, the Debtors have to sell.

Of course, if the Debtors lose this battle, they will likely have lost both that bid and the current $875 million offer they can attain today.

16. The cases cited by D.E. Shaw to support the notion that an auction is required are factually inapposite to this case because not surprisingly they do not address the situation where a debtor's assets will disappear in ten days' time. As discussed below, in the face of an exigent circumstance, such as the imminent danger that the value of a debtor's assets will be irreparably harmed (and in this case disappear altogether), courts routinely grant motions to sell assets without an auction.

17. *The Releases are Completely Reasonable*. D.E. Shaw's argument that "hidden value" is being given up by the Debtors pursuant to releases among the parties borders on laughable. To date, the Debtors have spent millions litigating the Adversary Proceeding against both DIRECTV and NRTC without success. It would be pointless for DIRECTV and NRTC to enter into the Settlement Agreement and not require general releases from the Debtors and the Pegasus Non-Debtors. DIRECTV cannot be expected to pay for the Satellite Assets and still be subject to the Adversary Proceeding, even though an adverse judgment is unlikely. Indeed, without such releases there would be no deal and DIRECTV would be free to effectively shut down the Debtors' operations on August 31, 2004. At that point, the Debtors' assets would be virtually worthless, the Secured Creditors would recover only a fraction of their claim and the unsecured creditors would be wiped out.

18. The Pegasus Non-Debtors' releases are also required to consummate the Settlement Agreement. As a condition for DIRECTV and NRTC to enter into the Settlement Agreement, each requires a general release from the Pegasus Non-Debtors. Thus, the participation and support of the Pegasus Non-Debtors is critical to realizing the benefits of the

Settlement Agreement. Accordingly, in exchange for releasing DIRECTV and NRTC, it is only fair that the Debtors release the Pegasus Non-Debtors from the Potential Claims — whose successful outcome is anything but assured. Without such releases there simply would be no deal. Clearly, $938 million of value to the Debtors' estates today is worth far more than an uncertain recovery from chasing the Potential Claims, which recovery would be further reduced by the concomitant legal expenses required to pursue them.

19. *Rather than Effect a Sub Rosa Plan, the Settlement Agreement Removes Impediments to the Formal Plan Process*. D.E. Shaw's assertion that the Settlement Agreement is a sub rosa plan and must only be pursued in the context of a plan of reorganization ignores the reality that time is of the essence and that a plan will follow the sale. Tellingly, D.E. Shaw's objection does not once mention the fact that the Debtors' entire business will, absent the Settlement Agreement and Sale, literally disappear on August 31, 2004. Since this fact eviscerates any argument they have, D.E. Shaw surely chose to pretend that it does not exist.

20. In order to consummate the Settlement Agreement in as expeditious a manner as possible and avoid the shut-down of the Debtors' satellite business, the Debtors' subscribers must be transferred to DIRECTV pursuant to section 363 of the Bankruptcy Code. Indeed, were there ever a paradigm for a rapid sale of assets free and clear of all liens and encumbrances pursuant to section 363 of the Bankruptcy Code, this is it.

21. It is well established that pre-confirmation sales of the majority of a debtor's assets are permissible when a "sound business purpose" dictates such action. Stephens Indus., Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986) (finding a sound business purpose to sell an asset where the asset was unprofitable and the debtor *faced the prospect of ceasing operations and losing necessary licenses without the sale*)(emphasis added). See also Comm. of Equity Sec.

Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring evidence to justify finding of good business reason to sell assets outside plan); Stern v. Mass. Alcohol Beverage Control Comm'n (In re J.F.D. Enters.), 183 B.R. 342 (Bankr. D. Mass. 1995) (finding exigent circumstances existed to proceed with non-ordinary course sale); In re Naron & Wagner, Chartered, 88 B.R. 85, 90 (Bankr. D. Md. 1988) (determining that an emergency is a good business reason for a debtor to sell all or substantially all of its assets prior to confirmation of plan of reorganization or even prior to filing of plan); In re Coastal Industries, Inc., 63 B.R. 361 (Bankr. N.D. Ohio 1986) (same); In re Mesta Machine Co., 30 B.R. 178 (Bankr. W.D. Pa. 1983) (holding that the sale of all or substantially all assets prior to submission of plan of reorganization is permissible *where there is imminent danger that assets will be lost if a sale is not promptly completed*)(emphasis added).

22. The subscriber sale easily satisfies this test. On August 31, 2004, the Debtors will lose the right to provide satellite services to their customers and their businesses will become worthless. It is impossible between now and August 31 to formulate, solicit, confirm and consummate a plan of reorganization or liquidation. Due to these facts, the Debtors, the Committee, DIRECTV, NRTC, and the Pegasus Non-Debtors have engaged in arms' length negotiations and proceeded in good faith to reach a consensus on the Settlement Agreement and its core subscriber sale, while there is still a subscriber base to sell. Quite simply, there can be no more sound business purpose.

23. The instant settlement is not a sub rosa plan of the type disapproved in Braniff, the principal case cited by D.E. Shaw. Pension Benefit Guaranty Corporation v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 500 F.2d 935 (5th Cir. 1983). In Braniff, the airline debtor proposed to sell all of its assets, including airplanes, terminal leases and landing slots, to

another airline in return for travel scrip, unsecured notes, and profit sharing in the new airline. Id. at 939. The underlying agreement (the "PSA") required that the travel scrip be used in the debtor's reorganization, and the scrip could only be issued to certain employees, shareholders, and unsecured creditors. Id. The terms of the PSA also dictated that secured creditors had to vote their deficiency claim in favor of any proposed plan that the creditors' committee supported. Id. at 940. Further, the debtor and its officers, directors, and secured creditors were to receive a broad release of all claims by all parties. Id.

24. However, the Fifth Circuit found that that such arrangement essentially dictated the terms of a plan of reorganization and could not be authorized under section 363 of the Bankruptcy Code. The Fifth Circuit reached its holding since (i) the restrictions in the PSA on the travel scrip changed the "composition of Braniff's assets" and under certain circumstances the travel scrip would have to be forfeited, (ii) the provision in the PSA dictating how votes were to be cast deprived creditors of their voting rights and (iii) the releases were over-broad in that they went beyond the scope of what was necessary to effectuate the proposed settlement agreement. Id. at 939-40.

25. Here, the settlement does not dispose of all claims against the Debtors, nor does it restrict the rights of creditors to vote as they deem fit on a proposed reorganization plan. The Settlement Agreement simply proposes to liquify the Debtors' primary assets while they still have value and release potential litigation claims belonging to the Debtors which are necessary to accomplish the sale and distribute the proceeds under a plan of reorganization to be filed by the Debtors as quickly as possible.

26. In addition, the liquification of the Satellite Assets and the cessation of the attendant litigation thereto should have the effect of clearing away substantial obstacles to

reorganization. Unlike in Braniff, the Debtors are not dictating the terms of a plan by way of this disposition, nor does the disposition elevate the interest of one group of creditors over other creditors. Nothing in this transaction violates the holding of Braniff, since nothing mandates any particular vote by a particular creditor or group of creditors when a plan of reorganization is presented. See also In re Drexel Burnham Lambert Inc., 130 B.R. 910, 926 (S.D.N.Y. 1991) (finding that the resolution of certain litigation claims, which eliminated one of the most significant hurdles standing in the way of resolution of the chapter 11 cases, was a building block for a forthcoming plan and did not act as a "de facto plan"). In the absence of the Settlement Agreement, there could be no plan and indeed, no successful and prompt resolution of the Debtors' cases. Thus, rather than a sub rosa plan, the Settlement Agreement is a necessary step toward preparation and ultimate confirmation of a plan. See In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 983 (Bankr. N.D.N.Y. 1988) (stating that an asset sale can "provide an expeditious avenue for the transfer of property in exchange for a reasonable consideration if in the best interests of the estate and the prospects of confirming a plan to serve as the vehicle to do so appear dim or far in the future"). Absent the Settlement Agreement and Sale, there will likely be no plan because there will be no assets to distribute or restructure around.

27. Additionally, as discussed above, the total loss of value on August 31, 2004 requires the immediate sale of the Debtors' core assets. In In re Condere Corporation, 228 B.R. 615, 629-30 (Bankr. S.D. Miss. 1988), the debtor's asset sale was determined not to be a sub rosa plan since the debtor was able to demonstrate a sound business justification for selling its assets before a plan was confirmed based on its inability to confirm a plan during the eleven months that it was in reorganization, and based on the depreciating nature of its assets. Thus, like the

situation faced by the debtors in Condere and other cases cited herein, the Debtors' exigent circumstances clearly require approval of the Settlement Agreement.

28. As a deeply subordinated creditor, D.E. Shaw is out of the money unless the Debtors obtain more than approximately $1.3 billion for their assets. Such a scenario is simply not going to happen in this case. As a purchaser of unsecured subordinated notes, D.E. Shaw knew that its notes were behind approximately $1.3 billion in senior obligations. Although the high interest rate was the return for the risk that D.E. Shaw assumed in buying the subordinated notes, faced with the reality of non-payment (precisely the risk D.E. Shaw knowingly undertook) D.E. Shaw has chosen to launch a litigation strategy for the sole purpose of holding up the settlement process in the hope of extorting money from senior creditors. Such a strategy must not be condoned by this Court, and the only realistic basis for recovery in these cases is that the Settlement Agreement and Sale must be approved.

CONCLUSION

For the foregoing reasons, the Secured Lenders request that the Court deny the D.E. Shaw Objection and enter an Order granting the relief sought in the Settlement Motion and such other and further relief as this Court deems appropriate and just.

Dated: August 20, 2004

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