Hearing Date: December 16, 2004 at 1:00 p.m. (EST)
PORTLAND

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

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

REPLY OF WILMINGTON TRUST COMPANY TO RESPONSE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO MOTION OF WILMINGTON TRUST FOR PARTIAL SUMMARY JUDGMENT

Wilmington Trust, by and through its undersigned attorneys, hereby files this reply (the "Reply") to the Response of the Official Committee of Unsecured Creditors (the "Committee Response" of the "Committee") to the motion of Wilmington Trust for partial summary judgment (the "Summary Judgment Motion").[1] In support of this Reply, Wilmington Trust respectfully states:

I. THE COMMITTEE RESPONSE IS PROCEDURALLY DEFICIENT

1. As a threshold matter, the Committee Response is procedurally deficient since it fails to properly controvert the facts alleged in the Rule 56(b) Statement submitted by Wilmington Trust in connection with the Summary Judgment Motion by not addressing those facts directly in an "admit" or "deny" fashion. Maine Local Rule 56(e) states that "facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." As the recent

[1] Capitalized terms that are not otherwise defined herein shall have the meanings ascribed to such terms in the Summary Judgment Motion.

District Court decision in Azimi v. Jordan's Meats, Inc., 2004 WL 2278771, n. 1 (D. Me. Oct. 7, 2004) notes, under the proper application of Local Rule 56(e) facts contained in a party's statement of facts are deemed admitted where the other litigating party fails to respond by admitting, denying or qualifying those facts. See also Peterson v. Scotia Prince Cruises, Ltd., 2004 WL 1529300, *1 (D. Me. June 2, 2004) (facts not properly controverted are deemed admitted), report and recommendation adopted in part, rejected in part, 328 F. Supp. 2d 119 (D. Me. 2004). Accordingly, all facts set forth in Wilmington Trust's Rule 56(b) Statement are deemed admitted for purposes of the Summary Judgment Motion and prove conclusively that that the Junior Lenders faced a risk of loss and that the negotiation of the Global Settlement and the resulting prepayment of the Junior Term Loan were entirely voluntary acts undertaken by the Debtors with the full consent of the Committee.

II. THE COMMITTEE'S POSITIONS ARE IRRECONCILABLE AND JUDICIAL ESTOPPEL MUST APPLY

2. As the Committee accurately states in the Committee Response, for judicial estoppel to apply, the previous and current positions of the party must be diametrically opposed and, in fact, irreconcilable. See Committee Response at ¶22. As the Committee acknowledges, the First Circuit's application of the doctrine also "requires that the party being estopped have succeeded previously with a position directly inconsistent with the one it currently espouses." Lydon v. Boston Sand & Gravel Co., 175 F.3d 6, 12 (1st Cir. 1999) (internal citations omitted). The purpose of the doctrine, as stated by the Supreme Court in New Hampshire v. Maine, 532 U.S. 742, 743 (2001), is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." The

Committee's behavior is therefore exactly what the Supreme Court has stated that the doctrine of judicial estoppel is designed to thwart.

3. Did the Committee previously make myriad statements that the Global Settlement was the product of good faith, arms' length negotiations principally conducted by the Committee? Absolutely. See, e.g., Rule 56(b) Statement at ¶ 124. Was the Committee, who formally joined in the Debtors' motion for approval of the Global Settlement, successful in obtaining such approval? Absolutely. Was the Court's decision to approve the Global Settlement based in part on the voluntary nature thereof? Absolutely. See Rule 56(b) Statement at ¶ 157. Is the Committee now asserting that the Global Settlement was the product of coercion by the Secured Lenders? Absolutely. See Committee Response at ¶ 40. Are these two positions irreconcilable? Absolutely.

4. Similarly, did the Committee previously make myriad statements about the dire consequences facing creditors of the Debtors' estates in the event that the Global Settlement was not approved? Absolutely. See Rule 56(b) Statement at ¶ 123.1. Was the Committee, who formally joined in the Debtors' motion for approval of the Global Settlement, successful in obtaining such approval? Absolutely. Was the Court's decision to approve the Global Settlement based in part on the risks of loss to creditors of the Debtors' estates from the alternatives for recovery in the event that the Global Settlement was not approved? Absolutely. See Rule 56(b) Statement at ¶ 158. Is the Committee now asserting that the Secured Lenders never faced any risk of loss? Absolutely. See Committee Response at ¶ 29. Are these two positions irreconcilable? Absolutely.

5. Has Wilmington Trust satisfied the standards for the imposition of judicial estoppel on the Committee with respect to the issues of the voluntary nature of the Global Settlement and the risk of loss faced by creditors of the Debtors' estate, including Wilmington Trust? Absolutely. Is the Committee's latest "about face" on these issues driven by the exigencies of the circumstances in order to garner a greater recovery for its senior bondholder constituents? Absolutely.

6. The Committee's dramatic backflip is a textbook example of what the First Circuit termed "self-serving self-contradiction." Patriot Cinemas, Inc. v. General Cinema Corp., 834 F. 2d 208, 213 (1st Cir. 1987). The Committee cannot deny that it promoted the Global Settlement as voluntary (and indeed as the best offer available after vetting the alternatives through EchoStar and Rainbow DBS) and that it made statements that demonstrated a risk of loss to all creditors in the event that the Global Settlement was not approved. Indeed, such statements are now deemed admitted since the Committee failed to properly controvert the Rule 56(b) Statement. Nevertheless, the Committee now tries to recharacterize its very own statements as "irrelevant" (Committee Response at ¶2), "isolate[d]" (Committee Response at ¶ 21), taken out of context and utterly unrelated to its newfound positions on these matters. This is wrong. The Committee's sudden sea change, when coupled with its glib denials that it has reversed itself, more than meets the standard for judicial estoppel. Indeed, not only has the Committee played fast and loose with the Court, it has wasted estate assets and this Court's time by trying to deny the undeniable. The Committee's conduct is the very definition of "flagrant misuse of the courts," and should be immediately recognized as such. See Committee Response at ¶ 21.

III. <u>LAW OF THE CASE APPLIES AND IS DETERMINATIVE</u>

7. As the Committee cannot escape its own words in the application of judicial estoppel, it similarly cannot escape those of the Court with respect to the application of the doctrine of law of the case. In addition to many other findings on the voluntary nature of the Global Settlement, the Court put it bluntly when it held that:

> "I can readily and confidently find that the evidence before me demonstrates by a preponderance, and I would say by substantially more than a preponderance, clearly and convincingly, that the [sic] evidence has demonstrated that the settlement was negotiated, proposed and entered into by the parties without collusion, in good faith, and from arms'-length bargaining positions, much of the time with fists at the ends of those arms … ."

Rule 56(b) Statement at ¶ 157; Court's Ruling, Tr. of H'rg on Sale Motion, Day Two, Docket No. 655 at 91. The law of the case doctrine requires a court to respect and follow its own rulings made at a prior stage in the same case. There is little more to be said on this topic than that the Court plainly found the Global Settlement to be voluntary.

8. Similarly, the Court made numerous rulings in connection with the denial of the Debtors' multiple efforts to promote the cornerstone litigation that reflected the worthlessness of the litigation and the dire consequences to be faced by the estate if the August 31, 2004 deadline passed without some resolution. <u>See</u> Rule 56(b) Statement at ¶ 40.3, 52, 53. Most lethal to the Committee's latest position, however, are the Court's findings regarding the bleak alternatives to the Global Settlement when it granted approval thereof, which were critical components of approving relief under sections 105, 363 and 1146(c) of the Bankruptcy Code and Bankruptcy Rule 9019:

- I think it would – it would be expecting too much and completely unrealistic to see how beyond August 31st in the absence of some arrangement with DIRECTV the value of the subscriber base could be preserved and marketed over time, and again, I'm satisfied that within those time constraints whether or not the signal was gonna be cut off, the creditors committee and – did a real admirable job in marketing those assets and trying to get the best deal they could. (Rule 56(b) Statement at ¶ 158; Sale Hr'g Tr., Day Two, Main Case Docket No. 655 at 93).

- The settlement was accurately characterized by Mr. Nyhan when he said it was either embrace this deal or litigate. (Rule 56(b) Statement at ¶ 159; Sale Hr'g Tr., Day Two, Main Case Docket No. 655 at 93).

- [The Global Settlement was] the best alternative for preserving the value of the Purchased Assets for the benefit of the Debtors, their respective estates and creditors. (Rule 56(b) Statement at ¶ 161; Global Settlement Order, Docket #504 at 5).

9. Again, the law of the case doctrine requires a court to respect and follow its own rulings made at a prior stage in the same case and there is little more to be said other than that the Court held that all creditors faced a risk of loss if the Global Settlement was not approved.

10. Despite the Court's findings, the Committee counters with the hopeless assertion that the Court did not actually rule on the specific issues of the voluntary nature of the Global Settlement or the risk of loss to creditors in the absence thereof (and prior to the Global Settlement when the Debtors' cornerstone litigation was repeatedly destroyed). Like every other assertion made by the Committee, its convenient interpretation of the law of the case doctrine is also just plain wrong. The doctrine of law of the case does not require a "*ruling*" by the Court because law of the case includes matters that have been decided by threshold issues within a larger holding. While a decision is certainly required by the law of the case doctrine, "the decision of an issue need not be express to establish the law of the case. *Implicit decision suffices* . . . . " Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, Jurisdiction And Related Matters, Chapter 13 (H.) § 4478 (updated 2004) (emphasis

added). Accordingly, even if the Committee could demonstrate that the Court did not explicitly rule on the issues of the voluntary nature of the Global Settlement and the risk of loss to creditors – something that the Committee simply cannot do – the Court's decision to approve the Global Settlement carried with it the necessary implications that the Settlement was voluntary, because the ruling included a finding that the Global Settlement "was negotiated, proposed and entered into by the parties without collusion, in good faith, and from arms'-length bargaining positions," (Rule 56(b) Statement at ¶ 157) and that the Global Settlement represented "the best alternative," (Rule 56(b) Statement at ¶ 161) thus averting a potential loss from pursuing a quixotic litigation strategy.[2]

IV. <u>NONE OF THE POINTS RAISED BY THE COMMITTEE CREATES ANY ISSUE OF MATERIAL FACT</u>

11. All of the other points raised in the Committee Response are similarly without merit and fail to create any genuine issue of material fact with respect to whether the Global Settlement was voluntary and whether the Junior Lenders faced a risk of loss prior to the Court's approval of the Global Settlement. Indeed, the Committee's double talk about the issues and ignorance of the Court's decisions borders on the sanctionable as it has only served to increase expenses to the Debtors' estates.

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[2] Apparently, under the Committee's version of the law of the case doctrine, the Court would had to have used the precise wording employed by the Committee in its Response and Opposition to the Prepayment Motion in order for the doctrine to apply. The law is not so rigid in its application that it does not recognize the use of synonyms.

A. **Voluntariness**

12. With respect to the issue of voluntariness, the Committee misses a critical and fundamental fact: the actual prepayment of the Junior Term Loan with the proceeds of the Asset Sale under the Global Settlement was entirely voluntary. The prepayment itself was accomplished through an affirmative motion of the Debtors that was joined in by the Committee and was pursued on an emergent basis. See Docket Nos. 538, 555. Thereafter, Wilmington Trust agreed to receive the prepayment in a stipulation with the same parties. Actions don't get much more voluntary than an affirmative motion on an emergent basis and a consensual stipulation.

13. As noted above, the Global Settlement also was entered into voluntarily. Despite ample opportunity, allegations of coercion by the Secured Lenders were never raised in these cases before the Committee did so in their objection to the Prepayment Motion. If, in fact, Wilmington Trust had actually attempted to coerce the Asset Sale and the subsequent prepayment of the Junior Term Loan, surely some mention of it would have been made in the voluminous pleadings, contained in three separate cases, that have chronicled these chapter 11 cases. The events the Committee relies on in order to demonstrate the involuntary nature of the sale all happened well before the hearings on the Global Settlement were held in this Court. At any time during those hearings, the Committee had the opportunity to bring any allegations of coercion if it desired.[3] Such allegations of coercion, if substantiated, might have even led to the

[3] This situation is analogous to the circumstances in New Hampshire v. Maine, 532 U.S. 742, 744 (2001), when the materials relied upon by the state of New Hampshire in forming its subsequent position were available at the time it formulated its previous position. This matter should be dealt with in a similar fashion, by disallowing the subsequent, inconsistent position.

Global Settlement being rejected, or its approval postponed. If the Global Settlement were indeed the product of coercive tactics, it would be highly unlikely that the Debtors and Committee would have argued so fervently for its approval.

14. Interestingly, like the Committee, D.E. Shaw Laminar Portfolios, LLC ("D.E. Shaw"), one of the two parties who objected to the Global Settlement, and a member of the Committee, never argued that the Global Settlement was forced upon the Debtors through the coercive, behind the scenes actions of the Secured Lenders. Rather, D.E. Shaw principally objected on the grounds that a true auction was never conducted and therefore there were no measures in place to ensure that the highest possible purchase price was obtained from DIRECTV. One would think that as a member of the Committee, D.E. Shaw would have been apprised of the purported coercive actions by the Secured Lenders and, if true, would have mentioned such tactics at the sale hearing as yet another reason to delay the Global Settlement and extract value from senior creditors. Yet D.E. Shaw – and no other party for that matter – makes not a single mention of the alleged pressure being exerted upon the Debtors and Committee by the Secured Lenders at the hearings to approve the Global Settlement. This omission is surely not a coincidence and speaks volumes.

15. Furthermore, assuming that the Unfiled Joint Motion posed a threat to the Debtors and Committee, that threat was clearly empty and ineffectual. A draft of the Unfiled Joint Motion was in the Committee's possession on July 7, 2004 (Rule 56(b) Statement at ¶58-59) and the Committee devoted a grand total of 2.1 hours of review time to it – hardly a significant

amount of time for something that allegedly pressured the Debtors, DIRECTV and the Committee into cutting a deal against their will.[4]

16. Indeed, as if it wasn't clear enough from the Committee's own words in pleadings and statements before the Court that the Global Settlement was primarily the voluntary product of the Committee's efforts, a review of Akin Gump's time records during the period from June 24, 2004, the day after the all-hands' meeting at Paul, Weiss, Rifkind, Wharton & Garrison (at which counsel for Wilmington Trust was present), through July 30, 2004, the date the Global Settlement was executed, conclusively demonstrates that representatives of Akin Gump and the Debtors' counsel, DIRECTV and/or its counsel participated in at least 14 separate, in-person meetings and negotiations regarding the Global Settlement. See Rule 56(c) Opposing Statement of Material Undisputed Facts with Additional Material Facts (the "Rule 56(c) Statement"), Ex. B.[5] Despite the frenetic pace of these negotiations, the attorneys at Akin Gump nevertheless appear to have provided updates regarding the Global Settlement to the Committee members, singly or as a group, on no less than 17 separate occasions between June 25, 2004 and July 30,

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[4] In fact, to be successful in its pursuit of the Unfiled Joint Motion, Wilmington Trust would had to have (i) filed it, which it intentionally did not do because it did not want to interfere with the Committee's negotiation of the terms of the Global Settlement (See Rule 56(b) Statement at ¶ 101), (ii) divested the Debtor of its exclusivity, (iii) altered the language of section 363 of the Bankruptcy Code and Bankruptcy Rule 9019, which limit relief thereunder to the "trustee," and (iv) overcome the inevitable objection by the Committee. This legal Hail Mary pass was without clear precedent and can hardly be characterized as the threat which brought all other constituents in the case to their knees.

[5] The Rule 56(c) Statement is being filed contemporaneously with this Reply. See also Statement of Fees for Services Rendered and Expenses Incurred by Akin Gump Strauss Hauer & Feld LLP, Co-Counsel to the Official Committee of Unsecured Creditors of Pegasus Satellite Television, Inc., et al. for the Period June 2, 2004 to June 30, 2004, Ex. B, Main Case Docket No. 423; Statement of Fees for Services Rendered and Expenses Incurred by Akin Gump Strauss Hauer & Feld LLP, Co-Counsel to the Official Committee of Unsecured Creditors of Pegasus Satellite Television, Inc., Et. Al. for the Period July 1, 2004 to July 31, 2004, Ex. B, Main Case Docket No. 523.

2004. <u>See</u> Rule 56(c) Statement, Ex. B. In addition, numerous additional teleconference calls occurred during this period between counsel to the Committee, the Debtors and DIRECTV – all with zero participation by, and only cursory updates to, Wilmington Trust. <u>See</u> Rule 56(c) Statement, Ex. B.

17. While the Committee seems to be arguing that the influence of the Junior Lenders led to shortened negotiations with DIRECTV, this is belied by not merely the large number of meetings and calls attended by counsel to the Committee, as described above, but also the fact that the Debtors represented that the Global Settlement was the "best deal" that could be obtained. <u>See</u> Rule 56(b) Statement at ¶ 97. The Committee itself represented that the Global Settlement was "in the best interests of these estates, are fair and provide **maximum** value for the estates," <u>See</u> Rule 56(b) Statement at ¶ 151-52 (emphasis added). If the Global Settlement provided the maximum value to the Debtors' estates and was truly the best deal available, it is inconceivable that the impact of the alleged coercion was anything other than *de minimis.*

B. <u>Risk of Loss</u>

18. It is also unquestionable that a risk existed that the Junior Term Loan would not be paid in full prior to the Court's approval of the Global Settlement. Again, the Committee's denials of this point are specious. As the Committee made abundantly clear in the hearings to consider the Global Settlement, DIRECTV was the only feasible buyer for the Debtors' assets. <u>See</u> Rule 56(b) Statement at ¶ 99, 138, 139, 147. The Committee even stated, in the Committee Support Motion, that "[t]he stark reality, however, is that the Debtors cannot obtain the value that they will receive pursuant to the Global Settlement from any other entity. First and foremost, **the**

market for the Satellite Assets is remarkably limited." See Rule 56(b) Statement at ¶ 79 (emphasis added). Precisely because the Debtors' options were so limited and their leverage over DIRECTV was practically nonexistent, it was never a foregone conclusion that agreement would be reached with this sole potential purchaser, especially as the August 31st deadline approached.

19. There were at least three distinct outcomes possible for these chapter 11 cases: the Debtors could have continued to pursue their ill-fated cornerstone litigation; they could have negotiated with DIRECTV but failed to agree on terms or close before the August 31 deadline; or, as happened, they could reach a deal with DIRECTV. In addition, statements made by the Debtors up until July 8, 2004 show that they were determined to press the "cornerstone litigation" strategy as long as possible. See, e.g., Committee Response at ¶ 40. However, the Committee states that the Debtors "never had a real choice" to pursue the cornerstone litigation. See Committee Response at ¶ 15. This selective amnesia ignores the time, effort and expense the Debtors poured into the pursuit of this strategy, long past the point of diminishing returns. The Debtors did not change their tactics until their mounting defeats had finally convinced them of the wisdom of settling with DIRECTV; in fact, **the Debtors are the only party in this proceeding who actually changed their mind about the Global Settlement**. They progressed from preferring litigation to preferring settlement, just in time to argue for the approval of the Global Settlement at the hearings scheduled for that purpose. Those hearings provide the source for the quotes that the Committee attempts to use to support the idea that the Debtors "shared the view that the sale of the Satellite Assets was the only possible outcome for the Debtors in these cases." See Committee Response at ¶ 55. While the Debtors may well have shared this point of

view once the deal was done, they were of a distinctly different mindset earlier in the case. See Rule 56(b) Statement at ¶ 116, 137. In any event, during this uncertain period in the case, the Junior Lenders were never assured that a deal would get done by the August 31st deadline.

20. Furthermore, DIRECTV's initial purchase offer was flatly and immediately rejected by the Debtors—the only party with the power to accept such a deal. See Rule 56(b) Statement at ¶ 13. Elementary principles of contract law dictate that an offer remains open until it is either accepted, rejected, revoked or expires by its own terms. See John D. Calamari, Joseph M. Perillo, The Law of Contracts 25, 30, 87 (4th ed. 1998). A subsequent offer by DIRECTV was similarly rejected by Chaim Fortgang, Esq., and Mr. Gary Singer, both members of the Committee, at the June 23rd meeting at the offices of Paul, Weiss, Rifkind, Wharton & Garrison, despite the fact that neither the Committee nor the Secured Lenders even had authority to accept such offer, since the Debtors were still in possession and well within their exclusive period to file a plan (and the Global Settlement was in essence a *sub rosa* plan as it provided for the transfer of substantially all of the Debtors' assets). See Hansen Decl., attached as Ex. A to the 56(c) Statement. Thus, the term sheet presented by the Committee as evidence of a *bona fide* offer is entirely baseless because none of the people to whom the offer was presented had the power to accept it. Additionally, the offer, by its own terms, stayed open only until June 25, 2004. Neither the Debtors nor the Committee could have known whether DIRECTV would extend such offer or if the offer would, in fact, expire on that date. That it was ultimately extended is immaterial; at the time, without the benefit of hindsight, the outcome of DIRECTV's offer was wholly unpredictable — just as it was up until the Court approved the settlement given the objection to the sale and the subsequent litigation by D.E. Shaw.

21. The Committee's contention that the exclusion of the Junior Lenders from the negotiations is somehow proof that the Junior Lenders knew that there was no risk of loss is stunning. The Committee even provides an email from Richard Krasnow, Esq., counsel to DIRECTV, that conclusively demonstrates that this exclusion existed and was deliberate. How could the Junior Lenders be expected to know that there was no risk of non-payment when they were totally excluded from the settlement negotiations? Additional emails show that Wilmington Trust continually requested information about the closed-door discussions, and received nothing but vaguely-worded assurances in return. See Rule 56(b) Statement, Ex. B. Locked out of negotiations and deprived of information, the Junior Lenders were given little comfort.

22. The risk of loss for the Junior Lenders was especially pronounced in light of their subordinate position in the Debtors' capital structure and the tenuous nature of their security interest. First, the Junior Lenders' security was nothing more than a second-priority lien on the common stock of an intermediate holding company, Pegasus Media & Communications, Inc. See Credit Agreement at 15-16, filed as Exhibit A to the Prepayment Motion, Docket No. 622; see also Affidavit of Ted S. Lodge, President, Chief Operating Officer and Counsel of Pegasus Satellite Communications, Inc. in Support of First Day Motions, Docket No. 20 at 14, 19 and Ex. A. Had the Debtors not reached an agreement with DIRECTV before the August 31st deadline, the Debtors' biggest asset, their subscriber base, would have become worthless, as shown by testimony at the hearings on the Global Settlement. See Rule 56(b) Statement at ¶ 97. If this devaluation had occurred, the alternative would have been the liquidation of the television station assets by the Senior Lenders, which assets are now being bid on by PCC at $75 million. Clearly,

the liquidation would not have provided nearly enough to pay the over $400 million in structurally and contractually senior claims of the Senior Lenders in full, to say nothing of the DIRECTV's $62 million judgment, which also was structurally senior to the claims of the Junior Lenders. Besides this shortfall, as second lien holders only, the Junior Lenders would have had to yield the responsibility for controlling the liquidation process to the Senior Lenders. The obvious risks inherent in this "alternative" left the Junior Lenders with little confidence that they would be repaid.

V. COMMON SENSE IS A VALID ARGUMENT

23. Finally, because this Court, like all bankruptcy courts, is a court of equity, it is endowed with equitable powers as described in 11 U.S.C. § 105, and arguments relying on the principles of equity, common sense and the underlying basic logic of a situation may and should be considered. The Committee's denial of the applicability of common sense speaks volumes.

CONCLUSION

24. For the foregoing reasons, Wilmington Trust hereby respectfully requests that this Court deny the Committee Response in its entirety and enter judgment finding that (i) there was a very real risk of loss faced by Wilmington Trust prior to the Debtors' sale of their subscriber base on August 27, 2004, and (ii) the Global Settlement and prepayment of the Junior Term Loan were entirely voluntary in nature.

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