

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In Re:	)	Chapter 11
	)	
WICKES INC.,	)	Case No. 04-02221
a Delaware corporation,	)	Jointly Administered
and	)	
GLC DIVISION, INC.,	)	Hon. Bruce W. Black
a Delaware corporation,	)	
	)	
	)	Hearing Date: <b>August 19, 2004</b>
Debtors.	)	<b>@ 1:15 p.m.</b>

**SURREPLY OF HSBC BANK USA, AS INDENTURE TRUSTEE,  
REGARDING MOTION OF THE AD HOC COMMITTEE OF SENIOR  
SECURED NOTES DUE 2005 FOR ENTRY OF PROTECTIVE ORDER**

HSBC BANK USA (“HSBC”), as Indenture Trustee, by its undersigned attorneys, submits this Surreply to the Reply of the Ad Hoc Committee of Senior Secured Notes Due 2005 (“Ad Hoc Committee”) in support of its Motion for Entry of a Protective Order (the “Motion”) and respectfully states as follows:

**INTRODUCTION**

1. As is set forth in detail below, the Ad Hoc Committee’s Reply to HSBC’s Objection to the Motion should be disregarded in its entirety, and its Motion should be denied. The Ad Hoc Committee’s Reply is replete with factual misstatements and mischaracterizations upon which the Ad Hoc Committee purports to rely for additional support of its Motion. These misstatements and mischaracterizations lend no support whatsoever to the Ad Hoc Committee’s request for relief and should be rejected by the Court as specious. Notwithstanding the Ad Hoc Committee’s continued efforts to interfere with the deliberations and actions of the Official Committee of Unsecured Creditors appointed in this case, there remains no legitimate basis for

the relief requested. Indeed, it is ever more apparent that this Motion is nothing more than a transparent litigation tactic and should be treated as such by this Court. Furthermore, the Ad Hoc Committee's request for entry of a protective order is a veiled attempt to obtain injunctive relief from this Court without the filing of an adversary proceeding in accordance with the requirements of the Federal Rules of Bankruptcy Procedure. For this reason alone, this Court must deny the Motion.

**THIS COURT SHOULD DENY THE AD HOC  
COMMITTEE'S MOTION FOR A PROTECTIVE ORDER.**

**HSBC Was Not a Party to the Exchange Agreement.**

2. Pursuant to the Indenture (the "1993 Indenture"), dated as of October 15, 1993, by and between Wickes, Inc., formerly known as Wickes Lumber Company ("Wickes"), as issuer, and Marine Midland Bank, N.A. (now known as HSBC), as indenture trustee, Wickes issued its 11-5/8% Senior Subordinated Notes Due 2003 (the "2003 Notes"), in the aggregate principal amount of \$100,000,000.00. *See* Declaration of Robert A. Conrad in Support of Objection of HSBC Bank USA, as Indenture Trustee, to Motion of the Ad Hoc Committee of Senior Secured Notes Due 2005 for Entry of Protective Order executed on June 30, 2004 ("Conrad Decl."), Ex. A (previously filed with the Court).

3. On December 20, 2002, Wickes entered into an Exchange Agreement (the "Exchange Agreement") with Contrarian Capital Management, L.L.C., Highland Capital Management LP, and First Honolulu Securities, Inc. (collectively, the "Noteholders"). All of the Noteholders are members of the Ad Hoc Committee (*See* Reply of Ad Hoc Committee, p. 1, n.1.) and are therefore in the best position to know the identity of the parties to and the terms of the Exchange Agreement. By the Exchange Agreement, Wickes and the Noteholders agreed to

exchange the existing notes held by the Noteholders under the 1993 Indenture for the same principal amount of Senior Secured Notes due 2005 (the “Exchange Offer”).

4. Contrary to the repeated assertions of the Ad Hoc Committee in its Reply that HSBC was a party to and, as such, negotiated the Exchange Agreement (the “Exchange Agreement”), ***HSBC was not and is not a party to the Exchange Agreement*** See Exchange Agreement dated December 20, 2002, annexed hereto as Exhibit A. Thus, the Ad Hoc Committee’s assertions are patently false, and any conclusions that the Ad Hoc Committee urges this Court to draw from these bald assertions are completely unwarranted.

5. HSBC’s contractual role in the Exchange Offer effectuated by the Exchange Agreement was as the ***Exchange Agent*** under an Exchange Agent Agreement by and between Wickes and HSBC dated December 2, 2002 (the “Agency Agreement”). See Exhibit B annexed hereto. Under the Agency Agreement, HSBC received specific instructions from Wickes to perform certain specified ministerial duties—and only those duties—attendant to the administrative effectuation of the Exchange Offer. By way of example of the circumscribed nature of HSBC’s role under the Agency Agreement, the Agency Agreement specifically provides, *inter alia*, that HSBC “shall not advise any person tendering Old Notes ... as to whether to tender or refrain from tendering all or any portion of Old Notes or as to the market value, decline or appreciation in market value of any Old Notes that may or may not occur as a result of the Exchange Offer or as to the market value of the New Notes; ...” See Ex. B at ¶ 14(f). There has been no allegation that HSBC violated this provision or any other provision of the Agency Agreement.

6. Most important, under the Agency Agreement, HSBC acted as an administrative agent for Wickes and owed no obligations or duties to the Noteholders in

connection therewith. The Agency Agreement specifically states: “*Without limitation of the foregoing, the parties hereto expressly agree that no holder of Old Notes shall have any right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.*” Because HSBC was not a party to the Exchange Agreement and performed simply ministerial tasks to facilitate the Exchange Offer, the Ad Hoc Committee’s request for relief in the form of constraining HSBC’s participation in the deliberations and actions of the Official Committee of Unsecured Creditors “concerning the 2005 Notes or the 2005 Noteholders” is wholly insupportable and should be rejected by this Court.

**HSBC Owed No Special Duties to the Holders of the 2005 Notes prior to an Event of Default under the Indentures.**

7. Following the Exchange Offer, pursuant to the Indenture dated as of February 26, 2003, by and between Wickes, as issuer, and HSBC, as indenture trustee (the “2003 Indenture”), Wickes issued its Senior Secured Notes Due 2005 (the “2005 Notes”) in the aggregate principal amount of \$42,833,000.00. *See* Conrad Decl., Ex. B.

8. Contrary to the unsubstantiated contentions of the Ad Hoc Committee, the Trustee under the 2003 Indenture owed no heightened or fiduciary duty to the holders of the 2005 Notes at the time the 2005 Notes were issued. The 2003 Indenture specifically provides as follows:

Section 7.01. Duties of Trustee:

(a) *If an Event of Default has occurred and is continuing*, the Trustee shall exercise such of the rights and powers vested in it by this Indenture and use the same degree of care and skill in its exercise thereof as a prudent Person would exercise or use under the circumstances in the conduct of his own affairs.

(b) *Except during the continuance of an Event of Default:*

(1) The Trustee need only perform only those duties as are specifically set forth in this Indenture, the [Trust Indenture Act] and the Collateral Documents and no

covenants or obligations shall be implied in this Indenture, the [Trust Indenture Act] or the Collateral Documents against or that are adverse to the Trustee.

*Id.* at § 7.01(a) and (b) (emphasis added).

9. The terms of Section 7.01 of the 1993 Indenture are virtually identical to those of Section 7.01 of the 2003 Indenture. *See* Conrad Decl., Ex. A at § 7.01.

10. The terms of the 1993 Indenture and the 2003 Indenture are consistent with the provisions of the Trust Indenture Act of 1939, 15 U.S.C. § 77aaa *et seq.* (“TIA”). Under TIA, an indenture qualified thereunder “shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to provide that, prior to default (as such term is defined in the indenture): (1) the indenture trustee shall not be liable except for the performance of such duties as are specifically set out in the indenture; ...” TIA, § 315(a)(1). In addition, TIA provides, “The indenture trustee shall exercise *in case of default* (as such term is defined in such indenture) such of the rights and powers vested in it by such indenture, and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.” TIA, § 315(c) (emphasis added).

11. It is self-evident that no Event of Default as defined under the 2003 Indenture could have occurred and been continuing at the time of the Exchange Offer in December 2002, because the 2003 Indenture was not yet in existence, nor was there an Event of Default as defined in the 1993 Indenture at the time of the Exchange Offer in December 2002. Indeed, no Event of Default ever occurred under either Indenture until December 15, 2003, when Wickes was unable to pay the outstanding principal amount due on the 2003 Notes which matured on that date. Wickes’ bankruptcy filing followed shortly thereafter on January 20, 2004. As set forth at length in HSBC’s Objection, following the bankruptcy filing, HSBC immediately sought the appointment of a successor trustee under the 2003 Indenture, and Wickes appointed

The Bank of New York to serve as successor trustee thereunder a short time thereafter on February 11, 2004. Accordingly, the Ad Hoc Committee's unilateral creation of a fiduciary duty owed by HSBC to its members during any time relevant to the Exchange Offer or, for that matter, at any time relevant to the Motion, is fictitious and should be rejected by this Court.

**The Relief Sought by the Ad Hoc Committee Is Injunctive in Nature and Cannot Be Granted without the Institution of an Adversary Proceeding.**

12. Without complying with the Rules of this Court, the Ad Hoc Committee has asked for the extraordinary relief of entry of a court order that would interfere with HSBC's ability to function as a duly appointed member of the Official Committee of Unsecured Creditors. Specifically, the Ad Hoc Committee has requested the following sweeping relief: "[T]he Ad Hoc Committee seeks entry of a Protective Order ... (ii) requiring HSBC to recuse itself from any discussions, votes or other interaction among the Unsecured Committee concerning the 2005 Notes or the 2005 Noteholders." *See* Motion at p. 3. Calling it a "Protective Order" does not make it so. What the Ad Hoc Committee seeks is an order from this Court enjoining HSBC from carrying out its duties as a member of the Official Committee of Unsecured Creditors. It is axiomatic that, under the Rules of this Court, the entry of such relief requires no less than the institution of an adversary proceeding. *See* Fed. R. Bankr. P. 7001(7) and 7065. The Ad Hoc Committee's attempt to shoehorn an injunction into a protective order is unavailing and should be rejected by this Court.

## **CONCLUSION**

WHEREFORE, HSBC respectfully requests entry of an order (i) denying the Motion and (ii) granting such other and further relief as the Court deems just and proper.

Dated: New York, New York  
August 17, 2004

HSBC BANK USA,  
As Indenture Trustee

By: /s/ Todd M. Kaye  
One of its Attorneys

Susan Barnes de Resendiz (#90785380)  
Todd Kaye (ARDC #6280333)  
GARDNER CARTON & DOUGLAS LLP  
191 N. Wacker Drive  
Suite 3700  
Chicago, Illinois 60606-1698  
Telephone: (312) 569-1000  
Fax: (312) 569-3000  
Email: [sderesendiz@gcd.com](mailto:sderesendiz@gcd.com)

and

Tina Niehold Moss  
PRYOR CASHMAN SHERMAN & FLYNN LLP  
410 Park Avenue  
New York, New York 10022  
Telephone: (212) 421-4100  
Fax: (212) 798-6355  
Email: [tmoss@pryorcashman.com](mailto:tmoss@pryorcashman.com)