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The statements and conclusions in this report have not been adopted or accepted by the Court, and constitute only the opinions of the Examiner. No portion of this report has been admitted into evidence. Several parties dispute the accuracy of the contents of this report. The publication of this report is without prejudice to the right of any party to challenge the statements contained in the report.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:	:	
	:	
	:	
FiberMark, Inc.,	:	Case No. 04-10463
FiberMark North America, Inc., and	:	*Chapter 11*
FiberMark International Holdings LLC	:	Jointly Administered
	:	

REPORT OF HARVEY R. MILLER, AS EXAMINER

WEIL, GOTSHAL & MANGES LLP
Attorneys for the Examiner
767 Fifth Avenue
New York, New York 10153
Telephone (212) 310-8000
Facsimile (212) 310-8007

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I.

PRELIMINARY STATEMENT AND OVERVIEW OF FIBERMARK AND THE CHAPTER 11 CASES

On March 30, 2004 (the "Commencement Date"), FiberMark, Inc., FiberMark North America, Inc., and FiberMark International Holdings LLC (collectively, "FiberMark" or the "Debtors") each commenced a case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Vermont (the "Court"). From that date, a state of war existed among FiberMark and its professional advisors – the law firm Skadden, Arps, Meagher & Flom, LLP ("Skadden") and the financial advisory firm Berenson & Company ("Berenson") – on one side, and Mr. Thomas A. Musante, a "work out" specialist and employee of AIG Global Investment Corp. ("AIG"), on the other side. On the Commencement Date, AIG was a holder of approximately $65 million or approximately 19% of principal amount of FiberMark's public notes. The commencement of the chapter 11 cases literally incensed Mr. Musante and his need to discipline FiberMark and its professionals thereafter permeated the administration of the chapter 11 cases. As a result, what appeared to be a simple, uncomplicated reorganization case with the primary goals of substantially reducing FiberMark's debt obligations and expeditiously emerging from chapter 11, soon evolved into a clash of personalities and philosophies.

Mr. Musante, a highly educated, articulate, non-practicing attorney with a degree in rhetoric, and the professionals that were engaged by the Statutory Committee of General Unsecured Creditors appointed in the chapter 11 cases (the "Committee") – the law firm Akin, Gump, Strauss, Hauer, & Feld, LLP ("Akin") and the financial advisory firm Chanin Capital Partners LLP ("Chanin") – operated on the premise that an admittedly insolvent debtor such as

FiberMark, had no economic stake in its reorganization. Therefore, the debtor should be totally subservient and responsive to the directions of its substantial creditors or its creditors' committee. Inasmuch as FiberMark and its professionals did not completely agree with the premise, as hereinafter more fully described, the chapter 11 cases were immediately shrouded in an atmosphere of stress, anger, distrust and accusations by Mr. Musante of professional misconduct by FiberMark's attorneys and financial advisors and ineptitude on the part of FiberMark.

These accusations often were supported by the Committee's professionals. They characterized the actions of FiberMark's professionals as "provocative," and the Office of the United States Trustee (the "U.S. Trustee") as "unmindful" because it had opposed the terms of the proposed engagement of the Committee's financial advisors under section 328 of the Bankruptcy Code. The U.S. Trustee also was criticized for failing to understand who "owned" FiberMark. Mr. Alex Kwader, the Chairperson/CEO of FiberMark, was considered incompetent and expendable, and the rest of the management was described as being without a clue as to what they were doing.

The conduct of Mr. Musante also caused disharmony among the members of the Committee. His desire for control and disrespect for the views of others resulted in a dysfunctional Committee and a perplexed FiberMark. In that environment, FiberMark elected to pursue (a) the adoption of a Key Employee Retention Plan and Severance Compensation Plan (the "KERP") to induce its employees to remain with FiberMark; and (b) a sale process as an alternative to an expeditious deleveraging of its public debt and emergence from chapter 11 as a stand-alone company. These actions, particularly the adoption of the KERP, had the effect of infuriating Mr. Musante. Mr. Musante had earlier indicated that there would be a FiberMark

KERP only over his dead body. FiberMark's actions also disappointed other members of the Committee and intensified the rancor and distrust among the parties.

Although a relative state of calm emerged in July 2004, after the resolution of the KERP litigation, a new force entered the scene that changed the dynamics of the cases. Until October, 28, 2004, Mr. Musante, on behalf of AIG, dominated the activities of the Committee. Indeed, to a large measure, Mr. Musante, with the support of the Committee's professionals, in effect, was the Committee. For the most part he was supported by Post Advisory Group, LLC ("Post"), the other noteholder creditor appointed to the Committee. Post was represented by Ms. Kathy Choi initially, and after October 1, 2004, by Mr. Gary Hobart. At the time Post became a member of the Committee, on April 7, 2004, it held approximately $51 million or approximately 15% in principal amount of FiberMark's public notes. Post acquired the notes in the distressed debt market during the first quarter of 2004 at an average cost of 50% of principal amount. Thus, AIG and Post together controlled approximately 35% of FiberMark's aggregate public debt, which totaled approximately $345,629,166 on the Commencement Date of the chapter 11 cases.

As the chapter 11 cases moved into the summer of 2004, the Committee became aware that Silver Point Capital, L.P. ("Silver Point"), a distressed debt trader, had accumulated a large position in FiberMark's public notes. At the suggestion of the Committee's attorneys, Akin, Silver Point was invited to become a member of the Committee. By reason of the resignation in June 2004 of E.I. DuPont de Nemours & Company ("DuPont"), the Committee had been reduced to four members: AIG, Post, Wilmington Trust Company ("Wilmington") as Indenture Trustee for both the public notes, and Solutions Dispersions, Inc. ("SDI"), a trade creditor holding a claim of approximately $50,000. The Committee's attorneys wanted to avoid

the appointment of another trade creditor to the Committee and recognized that because of its accumulated holdings, Silver Point would be a major player in the reorganization process. Silver Point was amenable to becoming a member of the Committee provided that it would not be restricted from continued trading in FiberMark's notes and claims. As a consequence, on October 19, 2004, the Court entered an "Order Approving Specified Information Blocking Procedures and Permitting Trading In Securities Of the Debtors Upon Establishment Of A Screening Wall (the "Trading Order"). Attached hereto as Exhibit A is the Trading Order. The entry of the Trading Order facilitated the appointment of Silver Point as a member of the Committee on October 28, 2004. At the time of its appointment, Silver Point held approximately $115 million or 35% in principal amount of FiberMark's public notes.

The emergence of Silver Point as the largest creditor of FiberMark, and as a member of the five person Committee, significantly changed the chapter 11 playing field. Even one month prior to Silver Point's appointment to the Committee, Post expressed concern that it and AIG should work together so that Silver Point did not get effective control of FiberMark. As a result, the primary focus of the chapter 11 process soon shifted from the formulation of the terms of a plan of reorganization to the arena of corporate governance. The terms of a plan of reorganization were quickly imposed upon FiberMark, subject to the Committee's approval of a plan supplement encompassing the corporate governance of the reorganized FiberMark to be filed five days prior to the confirmation hearing (the "Plan Supplement"). FiberMark and the Committee agreed that the resolution of corporate governance issues should be left to AIG, Post and Silver Point (the "Big 3") as an intercreditor subject. Thus, FiberMark, Wilmington and SDI, initially, were not participants in the intercreditor discussions and negotiations. FiberMark, as a debtor and debtor-in-possession acting *qua* Trustee delegated whatever responsibilities it

had for the formulation of corporate governance provisions of a reorganized FiberMark to the Big 3.

Negotiations among AIG, Post and Silver Point during the months of November and December of 2004 focused on their respective rights and obligations as putative stockholders and proposed new secured debt noteholders of a reorganized FiberMark. In the context of the substantial position held by Silver Point that, in the Fall of 2004, equaled the combined holdings of AIG and Post, plus the probability of continued trading by Silver Point pursuant to the Trading Order, AIG and Post focused their efforts on minimizing Silver Point's controlling shareholder rights to enhance their respective holdings.

The negotiations during this period among the Big 3 became increasingly fractious and strained. Chaim Fortgang, Esq., an independent consultant engaged by Silver Point, became its lead representative. Mr. Fortgang is an internationally recognized reorganization expert who had practiced as a pre-eminent attorney representing creditors for over 30 years. He is well known for his intelligence, aggressiveness and self-confidence. He also has been described as abrasive and domineering. The mixture and interaction between Mr. Musante and Mr. Fortgang, who never met in person, was explosive and resulted in high decibel confrontation and disagreement. As a consequence, during the latter part of December, Mr. Musante elected to change the venue of the discussions of the Plan Supplement from an intercreditor environment to a Committee issue. The level of distrust, strife and anger among Messrs. Musante, Fortgang and Hobart had increased exponentially since the end of November 2004.

As more fully set forth below, the efforts of Messrs. Musante and Hobart to use the Committee as the vehicle to impose upon Silver Point all of their proposed corporate

governance provisions for the reorganized FiberMark were rejected by Silver Point. In an effort to salvage the deteriorating situation and forge an armistice, in January 2005, FiberMark reappeared on the scene and informed the parties that it would not pursue the prosecution of a plan unless it was unanimously supported by the Committee.

However, Mr. Musante pressed forward with his strategy of using the Committee to impose the AIG and Post sponsored Plan Supplement on Silver Point. As Committee Chairperson, with the support of the Committee's attorneys, he caused a Committee vote on that Plan Supplement on January 13, 2005. AIG, Post and SDI voted in favor, Silver Point voted against, and Wilmington abstained. Because of FiberMark's position not to pursue a cramdown plan and its desire for unanimity, at least among the Big 3, a stalemate had occurred. The reenergized FiberMark then attempted to act as an "honest broker" to bring the parties together.

To induce Silver Point to resume negotiations, Skadden suggested that AIG introduce a new representative to interact with Mr. Fortgang. AIG agreed. An in person meeting was arranged for Monday, January 24, 2005 at the offices of Skadden in New York City. Mr. Musante did not attend the meeting because of travel problems. Substantial progress appeared to have been made during the day-long meeting which was punctuated by breakout sessions to apprise Mr. Musante of the state of negotiations and to enlist his views. Mr. Fortgang was described as being constructive and flexible. However, no agreement was reached on that day. During January 25, 2005, Mr. Fortgang was encouraged to and did communicate with Mr. Gregory Braun, the Portfolio Manager at AIG responsible for the FiberMark position. As a result of those discussions between Messrs. Fortgang and Braun, an agreement in principle on the corporate governance provisions was reached as between AIG and Silver Point. Post was not a party to the meeting and the discussions, but did not appear to be opposed to the process. The

agreement was reported to the Court by Skadden on January 27, 2005 and the confirmation hearing of FiberMark's proposed plan was continued to February 28, 2005 to enable the parties to document the agreement. Skadden was charged with preparation of the documents. Unfortunately, as the documentation proceeded and Skadden disseminated drafts of the various instruments, issues erupted that revived the pre-January 24 environment of distrust and acrimony.

During this period Mr. Musante and others became aware, because of statements made by Mr. Fortgang, that Silver Point was increasing its holdings in FiberMark notes and claims. In what AIG representatives characterized as a bargaining pressure point, Mr. Fortgang allegedly announced, almost daily, the increase in the size of Silver Point's holdings of FiberMark notes and other general unsecured claims. Ultimately, it appeared that Silver Point had acquired over 50% of FiberMark's outstanding debt obligations. The increase in Silver Point's position was viewed by Mr. Musante as "a tad convenient." Nonetheless, Mr. Musante, on behalf of AIG, and Messrs. Fortgang and David Sawyer on behalf of Silver Point, and FiberMark continued to negotiate the corporate governance provisions through most of February 2005. As of February 24 or 25, 2005, it appeared that Silver Point and AIG had reached an accommodation and agreement. FiberMark urged the necessity of its emergence from chapter 11 to preserve value for all parties and in anticipation of the confirmation hearing scheduled for February 28, 2005, requested a Committee vote in support of the plan of reorganization that had been filed and the Plan Supplement related thereto.

The Committee's attorneys agreed to poll the members of the Committee over the weekend prior to February 28, 2005. Once again, despite the earlier indications, consensus was not achieved. Mr. Musante, on behalf of AIG, elected to vote against the plan of reorganization,

as did Post. The polling of the Committee members was not completed until after the commencement of the confirmation hearing on February 28, 2005. The Committee's attorneys reported that there appeared to be two remaining corporate governance issues as between AIG and Silver Point and suggested the possibility of judicial mediation. At that juncture, Silver Point appeared to be of the view that there was no need for mediation. Silver Point's level of frustration had increased to the point that it believed further negotiations with AIG would be fruitless. It believed that AIG had reneged and that Delaware corporate law should govern the Plan Supplement.

During the second phase of the hearing, the Committee's attorneys reported to the Court that the Committee had voted 3-2 in favor of the FiberMark plan of reorganization. However, FiberMark refused to prosecute confirmation of the plan in the absence of unanimity. Thereafter, the issues were compounded by the fact that SDI's vote in support of the plan of reorganization, which Mr. Hodara reported was received by voice mail prior to the second phase of the confirmation hearing, was invalid because during the prior week and before the polling process, SDI had sold and transferred its claim to Silver Point. Thus, the Committee vote, to the extent significant, was tied.

In the face of what had occurred, FiberMark became more aggressive and undertook during March of 2005 to recast the corporate governance issues in what it considered to be a neutral, balanced set of provisions that protected the rights of all shareholders beyond the minority shareholder protections provided under the corporate law of Delaware. Although the efforts of FiberMark were supported by Silver Point, AIG and Post insisted upon other and different provisions that would restrict Silver Point's ability to take certain actions as the majority controlling shareholder of FiberMark. In the middle of March 2005, FiberMark

informed AIG's attorneys that it would not accept the continued stream of demands made on behalf of AIG and Post.

During this process, Mr. Musante claims to have become aware that Silver Point had purchased, on January 20, 2005, the claims of Alex Kwader and others that resulted from the planned rejection of the Supplemental Employee Retirement Plan and other benefit plans (the "SERP"), and as of February 25, 2005, the claim of SDI. It was discovered that the notice of the transfer of the SERP claims had not been timely filed and, further, that FiberMark's motion filed on February 1, 2005, to approve a compromise and settlement of issues relating to the allowed amounts of the SERP claims did not disclose that Mr. Kwader and others who were direct or indirect beneficiaries of the compromise and settlement had previously sold and transferred their claims to Silver Point. As to the SDI claim, it was discovered that the assignment of claim form from SDI to Silver Point contained a highly unusual provision, Paragraph 5.(a), that purported to enable SDI to remain as a member of the Committee as an agent of and subject to the direction of Silver Point.

The purchases of the SERP and other benefit claims, and the circumstances surrounding the notice of those sales and their relationship to the compromise motion, as well as the purchase of the SDI claim, had the effect of substantially elevating the acute distrust by and antagonism held by AIG and Post against Silver Point. Consequently when AIG's negotiations with FiberMark broke down on March 14, 2005, and it became clear that FiberMark would pursue a plan of reorganization supported by Silver Point, AIG and Post turned to the use of alleged violations of the Trading Order. The pursuit of the alleged Trading Order violations appeared to be a means to overcome Silver Point's dominant position as well as FiberMark's intention to prosecute a Silver Point supported plan.

The effort by AIG and Post to counter-balance Silver Point's dominant position by using the alleged Trading Order violations as leverage was fully supported by the Committee's lead attorney. The Committee's lead attorney, Mr. Hodara from Akin, was anxious to support AIG and appeared to believe that the assertion of Trading Order violations could serve to provide AIG and Post with bargaining leverage. Mr. Hodara appears to have recognized the circumstances as an opportunity for the use of strategic litigation to compel concessions and, ultimately, an agreement among the parties in exchange for the release or withdrawal of any charges of Trading Order violations and any breaches of fiduciary duties by Silver Point or others.

In furtherance of this strategic litigation option and ignoring the specific and unambiguous provisions of the Trading Order, the Committee's lead attorney communicated with the U.S. Trustee as to the circumstances surrounding the transfer of the SDI claim. Ultimately, as more fully described hereinafter, the actions of the parties, including the Committee's motion, based upon the votes of AIG and Post, to engage special counsel to investigate the trading activities of Silver Point, resulted in the appointment of the Examiner.

On April 22, 2005, the Examiner was appointed. The investigation conducted by the Examiner has involved many examinations and thousands of pages of testimony and interviews, as well as, a review of over 650,000 pages of produced documents and legal analysis. It is unfortunate that simple, uncomplicated chapter 11 cases should have resulted in the trauma and harm that has affected the administration of the FiberMark cases. Leadership with judgment was missing in the FiberMark situation. Efforts to reconcile, largely undertaken in good faith, broke down because of rigidity and intense self-interest fueled by individual rancor and distrust. The resort to strategic litigation based upon doubtful claims as a means to compel reconciliation

was not an exercise of leadership or good judgment. Such action further inflamed an already counterproductive environment to the detriment and prejudice of the reorganization process and the interests of creditors other than AIG, Post and Silver Point. A very limited and directed review of the facts and circumstances concerning the alleged trading violations of Silver Point would have avoided the conflagration that resulted -- a conflagration that may have severely disabled FiberMark's exit from chapter 11.

The consequences of the lack of leadership and the ill-advised resort to strategic litigation for bargaining leverage now appear to be significant. Based upon the amended plan and proposed disclosure statement recently filed by FiberMark, the projected value of distributions that would be made to general unsecured creditors pursuant to that plan has decreased almost $60 million, as compared to the plan that was filed on December 17, 2004.

II.

THE EXAMINER

A. The Appointment of the Examiner

The acrimony and deadlock that entangled FiberMark, the Committee and the Committee's members gave rise to the filing of a series of pleadings towards the end of March 2005. These pleadings included a request by FiberMark for an order establishing a dispute resolution procedure[1] and a request by the Committee to retain special counsel to investigate Silver Point.[2] In response to these pleadings, on March 30, 2005, the Court entered an order that, among other things, directed FiberMark, the Committee, the U.S. Trustee, and any other party in interest to show cause why the Court should not *sua sponte* appoint an examiner.

On April 8, 2005, the U.S. Trustee filed a statement in support of the appointment of an examiner. On April 11, 2005, AIG and Post filed a joint statement in which they also supported the appointment of an examiner. AIG and Post further stated, however, that in their view the appointment of an examiner should not preclude the Court from granting the Committee's application to retain special counsel. On April 11, 2005, the four person Committee dominated by AIG and Post filed a statement that did not object to the appointment of an examiner and, like AIG and Post, stated that the application of the Committee to retain special counsel should be granted.

[1] Debtors' Motion For Order Establishing Expedited Procedures For, And Safeguarding Estate Resources Sought To Be Used In Connection With, Resolving Claims Trading Issues That Have Aggravated Intercreditor Dispute And Halted Plan Confirmation Process, dated March 21, 2005.

[2] Application of the Official Committee of Unsecured Creditors for an Order Authorizing and Approving the Retention *Nunc Pro Tunc* of Klee, Tuchin, Bogdanoff & Stern LLP as Special Counsel, dated March 29, 2005.

In light of the parties' submissions, the Court entered an order on April 13, 2005 directing the U.S. Trustee to file a statement setting forth the names of potential examiners. On the same day, the U.S. Trustee sent a letter to the attorneys for the parties requesting that the parties identify potential candidates. The U.S. Trustee then conducted telephonic interviews of nearly twenty candidates that had been proposed by the parties. As a result of this process, on April 18, 2005, the U.S. Trustee proposed that Harvey R. Miller, be appointed as the Examiner.

On April 19, 2005, after a hearing, the Court entered an Order Directing the Appointment of an Examiner and Specifying Examiner's Duties Pursuant to § 1104(c) and § 1106(b) of the Bankruptcy Code (the "Examiner Order"). Attached hereto as Exhibit B is the Examiner Order. The Examiner Order provided that an Examiner shall be appointed to investigate:

- the transfer of the Debtors' executives' claims, including but not limited to, the claims of Alex Kwader, and other persons who were employees of the Debtors at the time of the transfer of their claim(s), to Silver Point Capital, L.P., the nature and extent of the disclosure of those transfers and whether breach(es) of fiduciary duties to the estate resulted;

- the transfer of the claim of former committee member Solution Dispersions, Inc. to Silver Point;

- the quality of the "screening wall" Silver Point, and the other members of the Creditors' Committee, established in accordance with this Court's Order Approving Specific Information Blocking Procedures and Permitting Trading in Securities of the Debtors Upon Establishment of a Screening Wall (doc. # 684) (the "Trading Order"), whether it was breached, and whether the Trading Order was violated;

- the dispute among Committee members regarding corporate governance issues and whether any Committee member breached its fiduciary duty to act in the best interest of all creditors; and

- any other matter the Examiner deems necessary and relevant to the complete and full investigation of the four enumerated areas included herein.

The Examiner Order also provided the Examiner with the authority to retain counsel, require document production, and conduct examinations pursuant to Rule 2004 of the Federal Rule of Bankruptcy Procedure (the "Rule 2004 Examinations") and directed parties that had information that the Examiner deemed relevant to cooperate fully with the investigation.[3]

On April 22, 2005, the U.S. Trustee filed an Application for Order Approving the United States Trustee's Appointment of an Examiner and the Verified Statement of Harvey R. Miller pursuant to F.R.B.P. 2007-1. On that date, the Court entered the order approving the appointment of Mr. Miller as the Examiner (the "Appointment Order"). Attached hereto as Exhibit C is the Appointment Order. On May 6, 2005, the Examiner filed an application to retain Weil, Gotshal & Manges, LLP ("WGM") as his attorneys. No party objected and on May 9, 2005, the Court granted the Examiner's application.

B. The Examiner's Investigation

On April 27, 2005, the Examiner requested document production from FiberMark, FiberMark's professionals, the Committee, its members, and the Committee's professionals. FiberMark, Wilmington and Silver Point promptly agreed to waive any privileges and/or otherwise applicable rules immediately and began producing documents upon receipt of the Examiner's requests. FiberMark, Wilmington and Silver Point also volunteered to appear for

[3] The Examiner Order originally established a June 8, 2005 deadline for the submission of the Examiner's report. On May 27, 2005, the Examiner moved to amend the Examiner Order to extend the investigation period and increase the compensation limitation based on a better estimate, albeit overly optimistic, of the time and cost that the assignment required, as well as because of delay that resulted from a discovery dispute with the Committee and certain members thereof, the large quantity of documents produced, and the number of interviews/examinations required. No parties objected and on June 2, 2005, the Court granted the Examiner's motion and extended the report deadline until July 6, 2005. The Court further extended the report deadline on July 1, 2005 to July 8, 2005.

interviews and examinations. AIG, Post and Akin, however, declined to comply with the Examiner's request pending an agreement as to the scope of work product and privilege issues.

Akin filed a motion for the Court to resolve the examination dispute. The Court held an emergency telephonic hearing on May 10, 2005 to consider the motion. On May 13, 2005, the Court entered the Amended Order Supplementing Order Directing The Appointment of an Examiner, etc. dated April 19, 2005 that resolved the dispute by providing that the production of documents to the Examiner would not constitute a waiver of any privilege with respect to any third party. Based on the request by certain Committee members, the Court also ordered that this Report shall be (i) confidential and filed with the Court under seal subject to further order of the Court, (ii) served on the U.S. Trustee, FiberMark, FiberMark's postpetition lenders, the Committee, the members of the Committee, and such parties' respective attorneys, and (iii) kept confidential by all parties receiving the Report subject to further order of the Court.

Thereafter AIG, Post and Akin began compliance with the Examiner's request for production of documents. As a result of the Examiner's requests, the parties produced and the Examiner and his attorneys have reviewed over 650,000 pages of documents.[4] The Examiner and his attorneys also conducted nineteen Rule 2004 Examinations, resulting in 4,425 pages of testimony. The following individuals were examined pursuant to Federal Rule of Bankruptcy Procedure 2004:

A. Alex Kwader, FiberMark, May 10, 2005;

B. Brian Jarmain, Silver Point, May 13, 2005;

C. Richard Dalessio, Silver Point, May 13, 2005;

[4] Skadden was unable to produce e-mails created prior to January 2005 because its computer system automatically deletes e-mails after 90 days.

D. David Sawyer, Silver Point, May 16, 2005;

E. John Hanley, FiberMark, May 19, 2005;

F. Jeffrey Berenson, Berenson, May 19 & 31, 2005;

G. Suzanne MacDonald, Wilmington, May 19, 2005;

H. Gary Hobart, Post, May 20, 2005;

I. Gregory Braun, AIG, May 24, 2005;

J. Thomas Musante, AIG, May 25, 2005 & June 1, 2005;

K. Chaim Fortgang, Silver Point, May 26, 2005;

L. Islam Zughayer, Berenson, May 27, 2005;

M. Harry Wilson, Silver Point, June 1, 2005;

N. Marvin McFarlen, SDI June 2, 2005;

O. Kaye Handley, AIG, June 6, 2005;

P. Richard Grissinger, Silver Point, June 7, 2005;

Q. Fred Hodara, Akin, June 8 & 17, 2005;

R. Peter Corbell, Chanin, June 9, 2005; and

S. Michelle Levitt, AIG, June 14, 2005.

In addition, the Examiner and his attorneys conducted in person and telephonic interviews, including follow up questions relative to certain of the Rule 2004 Examinations. The last follow up examinations were conducted on June 30, 2005 and concluded at approximately 8 PM (ET). The parties interviewed by the Examiner included D. J. Baker, Rosalie Gray, J. Gregory Milmoe, and Alan Straus of Skadden, James Anderson of Ryan, Smith & Carbine, Ltd. ("Ryan"), Marc Diagonale, Fred Fogel, Chaim Fortgang, David Sawyer[5] and Ed Mule of Silver

[5]Messrs. Sawyer and Hobart, as a follow up to each of their Rule 2004 Examinations, were interviewed telephonically. Mr. Goldsmith also was interviewed telephonically. All three acknowledged that their statements during such interviews were given as if under a Rule 2004 Examination.

Point, David Friedman of Kasowitz, Benson, Torres & Friedman LLP (attorneys for Silver Point), Michael Hopkins and Susan Johnston of Covington & Burling ("Covington") (attorneys for Wilmington), Suzanne MacDonald of Wilmington, and Carl Goldsmith and Gary Hobart of Post. Summaries of each interview were prepared and are in the possession of the Examiner. In addition, the Examiner and Lori R. Fife of WGM, visited the premises of Silver Point to inspect the physical layout of the screening wall and to understand the procedures relating thereto. In connection with that visit, the Examiner discussed the screening wall procedure and policies with Mr. Mule, Silver Point's Senior Managing Director and Fred Fogel, Silver Point's General Counsel.

The interviews of attorneys from Skadden, resulting from their immediate offers to cooperate, were very comprehensive and time consuming. As a result, the Examiner determined that it was unnecessary to duplicate the interviews with Rule 2004 Examinations. Shortly after the Examiner was appointed, Mr. Fortgang also offered to meet with the Examiner to provide Silver Point's positions on the issues set forth in the Examiner Order. The Examiner and his attorneys met with Mr. Fortgang for several hours. Thereafter, the Examiner decided to continue Mr. Fortgang's examination under Rule 2004. Throughout the investigation and from time to time the Examiner and/or his attorneys have contacted or were contacted by parties or their attorneys as to Rule 2004 Examinations and interviews or to expand upon the same. The Examiner also advised various persons of the opportunity to provide additional information if they so desired.[6]

[6] In light of time constraints, the Examiner did not undertake a detailed review and examination of the professionals' charges and expenses of the respective professionals for FiberMark and the Committee and is not making any specific recommendations as to the allowance and disallowance of specific charges and expenses claimed by any of the professionals. However, as set forth in the Examiner's recommendations, the Examiner makes recommendations

This Report is based on the examinations, interviews and documents produced by the parties, as well as substantial legal and factual research conducted by the Examiner and his attorneys.[7]

as to the allowance of compensation and reimbursement of expenses charged in connection with: (i) alleged trading order violations by Silver Point and (ii) the Committee's activities regarding corporate governance.

[7] Copies of the Rule 2004 Examination transcripts, summaries of the interviews, and all documents cited herein are maintained at WGM on behalf of the Examiner.

III.

SUMMARY OF CONCLUSIONS

Based upon the entire investigation and as set forth in this Report, the Examiner has reached the following conclusions with respect to each of the enumerated areas of investigation set forth in the Examiner Order:

A. "the transfer of the Debtors' executives' claims, including but not limited to, the claims of Alex Kwader, and other persons who were employees of the Debtors at the time of the transfer of their claim(s) to Silver Point, L.P., the nature and extent of the disclosure of those transfers and whether breach(es) of fiduciary duties to the estate resulted."

The purchase by Silver Point of the claims of Mr. Kwader and other employees of FiberMark was not a violation of the Trading Order because such claims are not Securities as such term is defined in Section 2(a)(1) of the Securities Act of 1933. Silver Point's delay in disclosing the purchase of the SERP claims was unintentional and caused no harm (and any other deficient disclosure was caused by other parties). Silver Point did not violate any fiduciary duties in connection with its purchase of the SERP claims. There is no evidence that in purchasing the SERP claims, Silver Point possessed or used non-public confidential information or that Silver Point bought the SERP claims with the intent of purchasing the support of Mr. Kwader or FiberMark. Importantly, pursuant to the assignment of claim executed by Mr. Kwader and the other SERP claimants, Silver Point as the transferee of the claims received no economic benefit from the settlement of the SERP claims, as it agreed to pay a fixed percentage for such claims as finally allowed.

B. "the transfer of the claim of former committee member Solutions Dispersions, Inc. to Silver Point."

The purchase of the SDI claim by Silver Point was not a violation of the Trading Order because trade claims are not Securities as that term is defined in Section 2(a)(1) of the

Securities Act of 1933. The purchase of the SDI claim by Silver Point was not a breach of fiduciary duties on the part of Silver Point. Silver Point Committee personnel were not parties to and did not participate in the purchase of the SDI claim by Silver Point's public side trader. The insertion of Paragraph 5.(a) in the assignment of claim agreement, while improper, was included by the Silver Point trader, without consultation with or advice from any other person, for the purpose of accommodating SDI's representative on the Committee. There is no evidence that anyone else at Silver Point understood or was aware of that the Silver Point trader had drafted and added language to a standard form of assignment agreement that would allow SDI to serve on the Committee as an agent of Silver Point. While Paragraph 5.(a) is startling, any professional experienced in bankruptcy or reorganization law and practice would immediately conclude that it was an unenforceable and voidable provision. The only harm caused by the transfer of the SDI claim and Paragraph 5.(a) was to stimulate the already highly charged distrust of Silver Point by AIG and Post.

C. "the quality of the "screening wall" Silver Point, and the other members of the Creditors' Committee, established in accordance with this Court's Order Approving Specified Information Blocking Procedures and Permitting Trading in Securities of the Debtors Upon Establishment of a Screening Wall (doc. # 684) (the "Trading Order"), whether it was breached, and whether the Trading Order was violated."

1. *Silver Point*

Silver Point complied with the Trading Order in all material aspects and maintained a previously established Screening Wall in accordance with the Trading Order. There is no evidence that the Silver Point Screening Wall was breached. Nevertheless, the circumstances surrounding its trading activities, particularly those involving the SDI claim and SERP related claims, did raise questions that needed to be propounded and answered.

Accordingly, Silver Point should bear a portion of the responsibility for the costs and expenses of the investigation.

2. *Post*

Post did not maintain a screening wall and did not file with the Court a declaration or affidavit in accordance with the Trading Order. Although Post did not consummate any trades of FiberMark "Securities" subsequent to the Commencement Date, there is evidence that Post wished to trade in FiberMark Securities and offered to sell all of its FiberMark Securities to Silver Point in December 2004 at a premium over the then market and in January 2005 at a discount to the then market. Moreover, Post Committee personnel engaged in conduct in furtherance of Post's trading activities. Under the circumstances, and especially because Post Committee personnel had non-public confidential information, Post's conduct may be considered a breach of the Trading Order.

3. *AIG*

AIG did not engage in trading activities subsequent to the Commencement Date. Accordingly, AIG did not violate the Trading Order.

D. "the dispute among Committee members regarding corporate governance issues and whether any Committee member breached its fiduciary duty to act in the best interest of all creditors."

1. *AIG Breached Its Fiduciary Duties*

AIG breached its fiduciary duties by using the Committee as a tool to accomplish its own agenda and seek benefits for itself, particularly in connection with the corporate governance issues and the pursuit of trading allegations against Silver Point. There is no evidence that Mr. Musante ever considered the interests of creditors other than AIG and often

commanded the Committee to act in ways contrary to the interests of such creditors or with reckless disregard to the consequences of such actions to such creditors.

2. *Post Breached Its Fiduciary Duties*

Post, in a similar fashion to AIG, acted in its own self interest in pursuing the imposition of corporate governance provisions on Silver Point and trading allegations against Silver Point, without consideration of the interests of all general unsecured creditors. Post was preoccupied with assuring its ability to exit its FiberMark position without being hindered in any way by Silver Point. Post advocated the interests of other FiberMark general unsecured creditors only when those interests were completely aligned with Post, but often acted contrary to the interests of such creditors or with reckless disregard of the consequences of its actions on the interests of such creditors when its interests were not aligned with them. Post, therefore, violated its fiduciary duties to all creditors.

3. *Silver Point Did Not Breach Its Fiduciary Duties*

Silver Point conducted good faith negotiations in connection with the corporate governance issues. Silver Point offered to provide minority shareholder protections beyond that provided by Delaware general corporate law and repeatedly made concessions in pursuit of a consensus. Although the introduction of Mr. Fortgang as the lead negotiator of the corporate governance provisions did have the effect of exacerbating an already existing tempest among the Big 3, the Examiner concludes that Silver Point consistently acted in accordance with its fiduciary duties.

E. "any other matter the Examiner deems necessary and relevant to the complete and full investigation of the four enumerated areas included herein."

1. *The Role of Akin*

Akin failed to discharge its obligations and perform its services in an independent, objective and disinterested manner as attorneys for the Committee by aligning itself with AIG and Post, particularly in respect of the corporate governance controversy and the assertion of Trading Order violations and breaches of fiduciary duties by Silver Point.

IV.

RECOMMENDATIONS OF EXAMINER

A. As a consequence of the breach of fiduciary duties by AIG and Post and the resultant loss of value to the FiberMark estate and creditors, the Examiner recommends the following:

- that AIG's and Post's claims be disallowed for voting purposes as to any plan of reorganization proposed in these chapter 11 cases including the Amended Joint Plan of Reorganization under Chapter 11, filed by FiberMark, dated June 23, 2005;

- that the Committee be disbanded as dysfunctional and unable to discharge its statutory duties to general unsecured creditors of FiberMark;

- that Wilmington be appointed as the general unsecured creditor representative for the remaining administration of these chapter 11 cases, with its expenses, including the fees and expenses of Covington, to be paid by FiberMark, in accordance with the applicable orders and rules regarding allowances of compensation and reimbursement of expenses;

- that any cash distributions to be made to AIG and Post pursuant to a confirmed plan of reorganization be reduced in the aggregate sum of $8,378,000[8], allocated 2/3 to AIG and 1/3 to Post, representing the loss in value to the other Noteholders and general unsecured creditors (other than Silver Point), because of the delay and extension of the chapter 11 cases caused by the conduct of AIG and Post and that such amount be reallocated and distributed to the other Noteholders and the general unsecured creditors (other than Silver Point) pro rata based upon the allowed amounts of their claims. In absence of any cash distributions as aforesaid then as directed by further order of the Court; and

- that any plan of reorganization confirmed in these chapter 11 cases not provide for releases and exculpation for AIG, Post or Silver Point from any party other than FiberMark.

B. As a consequence of the facts surrounding the purchases by Silver Point of the claim of Mr. Kwader and other SERP claims and the SDI claim that precipitated an investigation

[8] Attached hereto as Exhibit D is a chart showing the calculation of this amount.

and ultimately, the appointment of the Examiner, and the breaches of fiduciary duties by AIG and Post, the Examiner recommends that the costs of the Examiner's investigation, including his attorneys fees and expenses be paid by AIG, Post and Silver Point and allocated 1/3 each. The payments by each shall be deducted from any cash distributions to them pursuant to a confirmed chapter 11 plan for FiberMark or else paid by each pursuant to further order of the Court.

C. As a consequence of (i) the actions of Akin in aligning itself with AIG and Post and failing to represent all of the members of the Committee and the other general unsecured creditors, (ii) the actions of Akin in connection with its investigation of Silver Point, and (iii) the failure of Akin to discharge its responsibilities under the Trading Order which contributed to the disarray and dysfunctionality of the Committee and the postponement of FiberMark's emergence from chapter 11, some significant portion of the compensation requested by Akin for the period after December 1, 2004 should be disallowed.

D. The Examiner recommends that (i) AIG, Post, Silver Point, Akin, Chanin, Berenson and Skadden bear their own costs in connection with Examiner's investigation and (ii) AIG, Post, Silver Point, Akin, Chanin and Berenson bear their own costs in connection with the corporate governance dispute, and none of such parties be reimbursed by FiberMark for any costs or fees relating thereto.

V.

THE INVESTIGATION

A. Historical Background

FiberMark is a Vermont-headquartered producer of specialty fiber-based materials for industrial customers and consumers, with substantial operations in North America and Germany. FiberMark was created in 1989 as a result of a management-led buyout of the Specialty Paperboard division of Boise Cascade Corporation and has grown substantially through a series of acquisitions, many of which were financed with borrowed funds.

FiberMark's material prepetition debt consisted of an $85 million secured credit facility with General Electric Capital Corporation ("GECC") and two series of publicly-traded senior unsecured notes, (i) 9.375% notes in the principal amount of $100 million due October 15, 2006, issued pursuant to an Indenture dated as of October 15, 1996, among Specialty Paperboard, Inc., as Issuer, Specialty Paperboard/Endura Inc., and CPG Acquisition Company, as Guarantors, and Wilmington Trust Company, as Trustee, and (ii) 10.75% notes in the principal amount of $230 million due April 15, 2011, issued pursuant to that certain Indenture dated as of April 18, 2002, among FiberMark, Inc., as Issuer, FiberMark Durable Specialties, Inc., FiberMark Filter, and Technical Products, Inc., FiberMark Office Products, LLC and FiberMark DSL Inc., as Guarantors, and Wilmington Trust Company, as Trustee (collectively, the "Notes"). The aggregate outstanding amount of the Notes as of the Commencement Date, including principal and accrued interest, was $345,629,166.67. Other general unsecured creditor claims aggregated approximately $12 million.

B. FiberMark and its Advisors

On March 30, 2004, FiberMark commenced these chapter 11 cases[9]. On April 30, 2004, the Court entered an order approving the retention of Skadden, as FiberMark's attorneys. On June 1, 2004, the Court entered an order approving the retention of Berenson as FiberMark's financial advisors and investment bankers.

C. The Creditors' Committee and Its Advisors

On April 7, 2004, the U.S. Trustee at the organizational meeting held in Albany, New York, appointed the members of the Committee. The Committee initially consisted of (i) Wilmington, the Indenture Trustee for both issues of FiberMark's Notes, (ii) AIG, (iii) SDI, (iv) Post, and (v) DuPont, a FiberMark trade vendor. On June 24, 2004, DuPont, after its claim was satisfied, resigned as a member of the Committee. On October 28, 2004, the U.S. Trustee appointed Silver Point, as a member of the Committee. The bulk of Silver Point's Notes were acquired subsequent to the Commencement Date.

On May 19, 2004, the Court approved the retention of Akin as co-counsel for the Committee, *nunc pro tunc* to April 7, 2004. On May 19, 2004, the Court also approved the retention of Ryan as co-counsel for the Committee, *nunc pro tunc* to April 7, 2004. On June 14, 2004, the Court approved the retention of Chanin as financial advisor and investment banker for the Committee effective as of April 7, 2004.

D. FiberMark's Acrimonious Prepetition Relationship with the Noteholders

1. FiberMark's Downward Spiral

[9] Attached hereto as Exhibit E is a timeline of the relevant events in these chapter 11 cases.

FiberMark's downward spiral toward chapter 11 started in 2001 when its operations began suffering due to general and industry-specific economic conditions. The industry downturn was aggravated by FiberMark's burden of acquisition debt and its failure to efficiently consolidate and integrate the acquired assets. To assist in exploring strategic options during 2004, FiberMark hired Berenson. Soon thereafter, FiberMark realized that without a reduction of its outstanding debt, FiberMark's ability to meet all of its debt obligations, and specifically, the $100 million maturity of the 9.75% Notes in 2006 was extremely doubtful. FiberMark was skeptical of its ability to refinance the Notes based on its performance and credit statistics.[10] FiberMark's situation worsened in the third quarter of 2003 when it was required by its auditors to write off the value attributed to certain assets which FiberMark believed contributed to its entry into the "zone of insolvency."[11]

2. December 2003 Meetings with Noteholders

In an attempt to address its projected liquidity problems and to alert Noteholders that FiberMark needed to deleverage its outstanding debt, FiberMark arranged to meet with representatives of four of its larger Noteholders, including AIG.[12] The Noteholders other than AIG, after hearing FiberMark's presentation, suggested that the projected liquidity concerns were premature and that FiberMark should continue to meet its obligations under the Notes, including the payment of current interest.[13] AIG made a proposal involving a minor reduction in

[10] Hanley Tr. at 10.

[11] Hanley Tr. at 14.

[12] Hanley Tr. at 15.

[13] Kwader Tr. at 16-17.

the amount of its Notes, in exchange for equity and other consideration.[14] Mr. Musante, who reviewed the AIG proposal, describes it, as not making "any sense for the company" and one which he doubted "they would bite on."[15]

The meeting with AIG occurred in New York City in December 2003.[16] Alex Kwader (CEO) and Alan Klein (who was replaced as CFO by John Hanley later that month) attended on behalf of FiberMark, along with Jeffrey Berenson, Islam Zughayer and probably Richard Oh of Berenson.[17] Damian Geistkemper, an analyst at AIG, and one of his associates represented AIG. At the meeting, FiberMark advised AIG that it needed a significant reduction in debt.[18] FiberMark may have suggested a reduction of as much as 50% as the principal amount of the Notes.[19] AIG told FiberMark it would consider the situation and provide its response at a later date.[20] AIG, as the other three Noteholders did, also advised FiberMark to continue to service its Notes and pay current interest and that the 2006 maturity payment would be addressed in that year.[21] FiberMark did not consider the AIG proposal adequate to meet its liquidity problems and no further deleveraging discussions occurred in 2003 or the first quarter of 2004.

[14] Musante Tr. at 52-53.

[15] Musante Tr. at 53-54

[16] Berenson Tr. at 219-21.

[17] Zughayer Tr. at 9-10.

[18] Berenson Tr. at 222.

[19] Berenson Tr. at 222; Braun Tr. at 37-38.

[20] Zughayer Tr. at 12-13.

[21] Kwader Tr. at 16-17.

During the discussions with AIG, Mr. Geistkemper cautioned Alex Kwader that FiberMark should not consider a chapter 11 reorganization process and that it would be very bad for Mr. Kwader, personally, if FiberMark were to seek relief under chapter 11.[22] The warning made a deep impression on Mr. Kwader.[23]

As a result of the December 2003, meeting, Gregory Braun, AIG's Portfolio Manager, contacted Mr. Musante, a member of AIG's workout group, located in Los Angeles, California, and briefed him on the FiberMark situation.[24] Although Mr. Musante reviewed AIG's proposal to FiberMark, he did not have any further involvement with FiberMark until March 2004.

3. The FiberMark Auditors Qualified Opinion

In the first quarter of 2004, in connection with its annual audit and the filing of its Form 10K under the Securities Act of 1933, FiberMark became aware that its auditors, KMPG, probably would issue a qualified opinion as to its financial condition and ability to operate as a going concern. As a consequence of such potential occurrence and the continuing industry downturn and its operational problems, FiberMark decided to engage restructuring attorneys. In March, 2004, Skadden was employed as such attorneys. According to D. Jan Baker, the partner at Skadden with primary responsibility for the FiberMark engagement, FiberMark employed Skadden because of its concern that the issuance of a qualified audit opinion would cause

[22] Kwader Tr. at 23-24.

[23] Kwader Tr. at 24-25

[24] AIG's workout group consisted of three professionals, including Kaye Handley, who was head of the workout group, Tom Musante, and Tatiana Ilecezwa. Handley Tr. at 29. Assignments to the individual members of the workout group appear to be made haphazardly, as portfolio managers and analysts needing assistance from the workout group simply contact one of the professionals, asking him or her to get involved without utilizing a formal system. Handley Tr. at 31-32.

FiberMark to lose trade support and, potentially, large customer accounts.[25] Mr. Kwader stated that a qualified audit opinion would result in a "totally adverse" reaction from customers, vendors, and suppliers.[26] "We'd have to pay cash. You know, COD for anything we bought. Lose employees. It would just be a death spiral."[27]

Mr. Baker stated that about the third week of March, FiberMark learned it was going to receive a qualified audit opinion and it began feverishly preparing for chapter 11.[28] Mr. Hanley suggested that the qualified opinion affected the timing of the chapter 11 filing, as opposed to the decision whether to file

> The fact that the auditors were not going to give us an unqualified audit opinion affected the timing of the filing, the exact timing, getting it done before, you know, March 31, our 10-K filing date. The company's view at the time was if we had filed a 10-K with an [unqualified] opinion, it would have created a pretty significant communications issue for all of our various constituents. I mean, everybody would have been panicking, so we decided that [effective] the timing of the filing.[29]

Mr. Hanley noted, however, that the "fact that we needed to restructure our balance sheet was above and beyond what the auditors felt."[30]

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[25] Baker Interview, April 26, 2005.

[26] Kwader Tr. at 27-28.

[27] Kwader Tr. at 27-28.

[28] Baker Interview, April 26, 2005. Interestingly, the Affidavit of John E. Hanley Pursuant to Local Bankruptcy Rule 1007-2 contains no reference to the issuance of a qualified opinion and the potential consequences. Ex. 11; Hanley Tr. at 19-20. "Ex. __" citations herein, for Exhibits 1-170, refer to exhibits marked during the Rule 2004 Examinations taken by the Examiner during the course of his investigation.

[29] Hanley Tr. at 20.

[30] Hanley Tr. at 18-19

4. Formation of Ad Hoc Committee and Introduction of Akin and Chanin

As the next interest payment date on the Notes, April 15, 2004, approached, rumors began to circulate in the financial markets about credit and other financial issues confronting FiberMark. In March 2004, AIG and other Noteholders became active in organizing an ad hoc committee, to meet with FiberMark and take collective action as Noteholders. The ad hoc committee of Noteholders (the "Ad Hoc Committee") was formed on or about March 24, 2004.[31]

Fred S. Hodara, Esq. the chairperson of Akin's restructuring group, also became aware of the market rumors and called Mr. Musante to inquire about the FiberMark situation.[32] Mr. Hodara and Mr. Musante had a close relationship as a result of their previous collaboration in chapter 11 cases, including Tower Records and Venture Holdings ("Venture"). Mr. Musante served as chairperson of the unsecured creditors' committee for Venture and, Mr. Hodara, on behalf of Akin, was the lead attorney for that creditors' committee.[33] Mr. Musante agreed to arrange for Akin to represent the Ad Hoc Committee.[34]

Mr. Musante was successful in convincing the Ad Hoc Committee to engage Akin and, specifically, Mr. Hodara, without a formal interview process.[35] Although Mr. Hodara

[31] AKIN0000093-97. As of the Commencement Date, the ad hoc committee consisted of AIG, Barclays Capital Asset Management, Deutsche Asset Management, Fidelity Management & Research Company, Franklin Advisers, Inc., MFS Investment Management, Post, and Trust Company of the West. Ex. 11.

[32] Hodara Tr. at 33.

[33] Musante Tr. at 29-30; Hodara Tr. at 29-30.

[34] The full extent of the relationship among AIG, Mr. Musante and Akin was not disclosed until April 18, 2005, when, at the request of the U.S. Trustee, Mr. Hodara filed with the Court the Supplemental Declaration of Fred S. Hodara.

[35] Hodara Tr. at 37-38.

testified that Mr. Musante was "not necessarily" leading the charge to have Akin retained,[36] the facts suggest otherwise. A March 25, 2004 e-mail from Mr. Musante to Mr. Hodara stated:

> Any conflicts? Selection is a TODAY issue, and before I push send on the e-mail that gets you hired, I want to confirm that you are 95%+ certain that there is not an issue.
>
> Task list for today:
>
> 1) You confirm the above
> 2) I'll work the Committee formally (informally is done)
> 3) I'll let you know formally
> 4) You'll need to contact Jan Baker.[37]

Chanin, likewise, anxiously pursued engagement by the Ad Hoc Committee and initially performed services without any engagement agreement in order to enhance its prospects of an actual engagement.[38] On March 29, 2004, the Ad Hoc Committee interviewed two financial advisory firms, Chanin and Jefferies & Co.[39] After the Ad Hoc Committee selected Chanin, an engagement letter for Chanin was drafted and circulated among Committee members, but it is unclear whether the engagement letter was ever sent to or signed by FiberMark.[40]

5. Akin Seeks Retainer from FiberMark

Akin was retained by the Ad Hoc Committee on March 25, 2004.[41] As directed by Mr. Musante, Mr. Hodara "immediately interfaced" with Mr. Baker.[42] It appears that Mr.

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[36] Hodara Tr. at 47-49. Mr. Musante said he supported, but does not remember if he recommended the retention of Akin. Musante Tr. at 36.

[37] Ex. 100.

[38] Corbell Tr. at 34; Ex. 48.

[39] AKIN0000081.

[40] Corbell Tr. at 33, 36-41.

[41] AKIN0000093.

Baker and Mr. Hodara had a cordial initial meeting on March 25, 2004, after which Mr. Baker said he "enjoyed" meeting with Mr. Hodara, looked forward to working with him, and would assist in making sure that the Ad Hoc Committee becomes the statutory creditors' committee in FiberMark's planned chapter 11 cases.[43] Mr. Baker also expressed hope that a quick resolution could be reached on a chapter 11 plan so that "this process can be concluded as rapidly as possible."[44] He noted that "[m]anagement believes that a rapid conclusion is the best way to protect value for the benefit of bondholders and, frankly, I suspect that your Committee members would agree: quicker is better."[45]

Mr. Hodara and Mr. Baker had several conversations during the week prior to the Commencement Date.[46] In one of their first conversations, Mr. Baker told Mr. Hodara that FiberMark would be filing chapter 11 cases within a week.[47] Mr. Baker informed the Examiner that a primary concern of Mr. Hodara was obtaining a retainer fee and engagement letter from FiberMark for Akin.[48] Mr. Hodara convinced Mr. Baker to have FiberMark sign a formal engagement letter with Akin, dated March 26, 2004 (but signed by FiberMark on March 29, 2004),[49] pursuant to which FiberMark paid a $40,000 retainer fee to Akin on March 29, 2004.[50]

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[42] Hodara Tr. at 35.

[43] AKIN0000568.

[44] AKIN0000568.

[45] AKIN0000568.

[46] Hodara Tr. at 41.

[47] Hodara Tr. at 45-46.

[48] Baker Interview, June 13, 2005.

[49] Supplemental Declaration of Fred S. Hodara in Support of the Application of the Official Committee of Unsecured Creditors of FiberMark, Inc. et al. to Retain and Employ Akin Strauss Hauer & Feld LLP as Co-Counsel, Nunc Pro Tunc to April 7, 2004, Ex. B., dated May 12, 2004.

Mr. Hodara testified that $40,000 was an estimate of the charges that he believed would be incurred by FiberMark for the services that Akin would perform for the Ad Hoc Committee during the week before the Commencement Date.[51] According to Mr. Baker, the $40,000 paid to Akin was a cheap price to avoid causing Akin to be irritated and adverse to FiberMark.[52]

Mr. Hodara considered the filing information furnished by Mr. Baker to be confidential non-public information. Accordingly, he did not inform the Ad Hoc Committee members of the impending chapter 11 filings, as such members might have been trading in FiberMark Notes during that week. Nevertheless, he knew that there were many rumors in the market that FiberMark intended to commence chapter 11 cases.[53] Despite the clear indications, Mr. Musante kept pressing Mr. Hodara to make sure that FiberMark did not commence chapter 11 cases. Mr. Musante directed Mr. Hodara on March 26, 2004 to "*contact the Company and demand a meeting IMMEDIATELY. Today, tomorrow*."[54] FiberMark did not recognize any useful purpose in acceding to Mr. Musante's demand and declined to meet with the Ad Hoc Committee. Mr. Hodara reported to the Ad Hoc Committee later that day that, based on conversations with Mr. Baker, "it is clear that there will not be meaningful discussions with the Company in the very near term."[55]

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[50] AKIN0000253-56.

[51] Hodara Tr. at 45.

[52] Baker Interview, June 13, 2005.

[53] Hodara Tr. at 304.

[54] AKIN000051 (emphasis added).

[55] AKIN0000081.

The Ad Hoc Committee viewed the commencement of chapter 11 cases as a drastic step adverse to Noteholders. According to Mr. Hodara, based on the information the Ad Hoc Committee received from Chanin, "it did not appear that the financial condition was in fact that dire and I think the company conceded that it was not as dire as many companies we see who do precipitously file, rather Jan and Jeffrey Berenson were clear as to having other reasons for filing that way."[56] Mr. Hodara testified that Mr. Baker and Mr. Berenson told the committee "things were bad enough that they felt the company should be filing," but this was "bewildering to the bondholders and, quite frankly, to myself . . ., [as they] didn't make a case, you know, as to being out of cash tomorrow or any of these things that you typically would have done when you were putting your companies into bankruptcy."[57] In contrast, FiberMark remained steadfast based upon the negative reactions it had received from AIG and the other large Noteholders in December 2003, its need to deleverage, and the potential consequences of the publication of the qualified audit report.[58]

The Ad Hoc Committee's reaction to Mr. Hodara's report on this news was "surprise" and "anger."[59] The anger was "[t]hat a company that had only approached the bondholders days before would be contemplating an immediate filing without engaging in a

[56] Hodara Tr. at 38-39. Later in his deposition, Mr. Hodara backtracked on this statement, "I'm not sure what exactly I just said about Chanin saying, but I doubt I said that they had concluded things weren't that bad. They had minimal, minimal information at that time. They had real doubts about how bad it was. I think we all had doubts. I think Jan and Jeffrey themselves may have even said to us it's not that we are out of cash tomorrow." Hodara Tr. at 43-44.

[57] Hodara Tr. at 40-41.

[58] Zughayer Tr. at 24.

[59] Hodara Tr. at 45-46, 50.

meaningful discussion with their primary stakeholder."[60] Other than Mr. Hodara's testimony, there is no evidence that FiberMark had approached any Noteholder in March 2004.

Mr. Hodara testified about the Committee's reaction to Mr. Baker's position:

> The reaction was that the company's reaction seemed odd, that this was very different than what [the Noteholder] had been accustomed to. Parenthetically, I agreed with them, as did Chanin, and specifically with respect to the December timeframe, Mr. Musante specifically said he had not been involved at all, that, you know, whoever was involved was not part of the workout process, *and for the company to rely on that experience to reach a conclusion that discussions would be fruitless seemed to them to be a ruse, that just, you know, that sophisticated reorganization professionals could not really mean what they were saying.*[61]

Mr. Baker indicated that FiberMark deemed the time period to be critical, and decided, therefore, that it would not be fruitful to engage in communications while at the same time preparing for a chapter 11 filing. [62]

> The characterization of FiberMark's professionals' conduct as a ruse set the tone for the future relationship of the parties. Mr. Musante was angered and demanded that Akin and Chanin act stalwartly to stop FiberMark from filing the chapter 11 cases.

Notwithstanding Mr. Baker's advice, and perhaps to butress his position in light of Mr. Musante's admonitions, on March 30, 2004 Mr. Hodara wrote to Mr. Baker advising him that the Ad Hoc Committee has requested that FiberMark "take no action, including a possible bankruptcy filing, until the Company has permitted an opportunity for a meaningful [dialogue]

[60] Hodara Tr. at 50.

[61] Hodara Tr. at 57 (emphasis added).

[62] Baker Interview, June 13, 2005.

between the Company and the Informal Committee."[63] Mr. Hodara ended his letter with his own admonition to FiberMark and Skadden, stating that "we request that the Company's Board of Directors, which has a fiduciary duty to the Bondholders at this time, take this request of the Informal Committee into account."[64]

Mr. Musante also called Mr. Baker directly the day before the Commencement Date to explain in no uncertain terms that it would be a huge mistake for FiberMark to ignore the Ad Hoc Committee and initiate chapter 11 cases.[65] Mr. Baker said Mr. Musante had a very "insistent tone" that could be construed as an attempt to intimidate.[66]

Prior to the commencement of the chapter 11 cases, Mr. Baker informed FiberMark's Board of Directors of the conversations and views of the Noteholders and their attorneys. On March 30, 2004, the FiberMark board authorized and approved the filing of the chapter 11 cases.[67] The Board noted that it was unfortunate that the large Noteholders had not been more receptive in December 2003.[68] The Board confirmed its determination that it was in the best interests of FiberMark to seek relief under chapter 11 and the chapter 11 cases were commenced on March 30, 2004.[69]

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[63] AKIN0000007.

[64] AKIN0000007.

[65] Kwader Tr. at 25-26; Hanley Tr. at 24; Baker Interviews, April 26 and June 13, 2005. Mr. Musante disputes this and says he does not recall telling Mr. Baker it would be a mistake to file chapter 11, only that he wanted to meet and explore alternatives to chapter 11. Musante Tr. at 65.

[66] Baker Interview, June 13, 2005.

[67] Baker Interview, June 13, 2005.

[68] Baker Interview, June 13, 2005.

[69] Prior to filing the petition and other motions seeking first day relief, Skadden sent a copy of such motions to Akin. Hodara Tr. at 306.

E. Strain, Stress & Tension Among Committee Members

1. Organizational Meeting of Creditors and Selection of Akin and Chanin as Committee Advisors

On April 7, 2004, the U.S. Trustee convened the organizational meeting of creditors in Albany, New York. Among the approximately 40-50 people attending in person were representatives of Wilmington, Mr. McFarlen on behalf of SDI, several trade creditors, and many professionals seeking to be engaged by the Committee.[70] Several Noteholders participated by telephone, including Mr. Musante and a representative of Post.

Mr. Hodara had previously enlisted Mr. Musante's assistance to assure the retention of Akin as attorneys for the statutory creditors' committee and Chanin as financial advisors. Prior to the organizational meeting, Mr. Hodara sent Mr. Musante an e-mail:

> Tom, have you been in touch with the specific people from the indenture trustee that will be in Albany on Wednesday to assure allegiance to Chanin and Akin? We have a relationship with Jim McGinley, so I expect he will do the right thing, however, I have learned to NEVER take these things for granted.[71]

Mr. Musante answered "I will call."[72]

Mr. Musante fulfilled his commitment and on April 7, 2004, Akin was engaged by the Committee, without consideration of any other law firms. Although "Wilmington would have preferred to interview" other law firms,[73] Wilmington acquiesced to AIG and Post's desires

[70] MacDonald Tr. at 9.

[71] AKIN0000478-80.

[72] AKIN0000478-80.

[73] MacDonald Tr. at 16.

not to conduct such interviews. Suzanne MacDonald, Wilmington's representative, said, "I did not think we would win on the counsel—on picking counsel. I thought that was already decided—pretty much decided fait accompli."[74] According to Ms. MacDonald, "[i]t was very clear to me that Akin was wanted by both Post and AIG. And one of the other two committee members gave me the flavor that they wanted Akin as well, so it was a three to two vote," although no vote was formally taken.[75] In its advocacy of Akin as attorneys for the Committee, Mr. Musante did not disclose the extent of his and AIG's relationship with Mr. Hodara and Akin.[76]

In contrast to the Akin engagement, the Committee did interview three financial advisors after the organizational meeting, i.e., Chanin, FTI Consulting, Inc., and Jefferies & Co. Ultimately the Committee selected Chanin on a 3-2 vote.[77] The selection of Mr. Musante as Committee chairperson was a non-competitive situation. According to Ms. MacDonald, "no one said 'I'd like to be chairman,' so Tom said he would be."[78]

2. The Governance of the Committee

From the very first meeting of the Committee at the organizational meeting, Mr. Musante dominated the Committee in an aggressive and authoritative manner. Susan Johnston, Esq., from Covington, attended the Albany, New York

[74] MacDonald Tr. at 20.

[75] MacDonald Tr. at 20-21.

[76] MacDonald Tr. at 20; McFarlen Tr. at 14.

[77] MacDonald Tr. at 16-17. It is clear that AIG and Post voted for Chanin and Wilmington voted for FTI Consulting, Inc. It is unclear how the other two Committee members split their votes, but it appears SDI may have voted for Chanin. MacDonald Tr. at 21-22; Ex. 26.

[78] MacDonald Tr. at 23; McFarlen Tr. at 15-16.

meeting. Ms. Johnston described Mr. Musante as "an aggressive vulture who basically steamrolled his professional choices in."[79] Ms. Johnston further elucidated, "he showed up at the meeting by phone (he is in LA), got on the committee, volunteered to be chair and subdued the inexperienced and meek trade member into voting his way."[80] This behavior caused Wilmington to be suspicious and cautious of AIG and created a tense atmosphere in the Committee. Based on Mr. Musante's conduct in the first week of the case, Ms. Johnston wrote, "Jim [McGinley, Wilmington's senior officer] feels we need to set a certain tone from the outset"[81] and "Jim anticipates fights with the chair."[82] Mr. Hodara also testified that his "sense was that the hostility between AIG and Wilmington started right at opening day at the organizational meeting."[83]

3. The Fight Over Committee Bylaws Heightens Tension Between AIG and Wilmington

The discussions over the Committee's bylaws are illustrative of the tense relations within the Committee from the outset and the struggle between AIG and Wilmington over Mr. Musante's attempts to control the Committee.[84] Although the initial draft of bylaws were

[79] Ex. 21.

[80] Ex. 21.

[81] Ex. 21. Although Ms. MacDonald testified that the "meek trade member" would have been SDI, Mr. McFarlen did not remember whether anyone tried to encourage him to vote for either Akin or Chanin. MacDonald Tr. at 21-22; McFarlen Tr. at 15.

[82] CB000044.

[83] Hodara Tr. at 99. Mr. Hodara noted in his testimony that Mr. Musante was hostile to Wilmington because it had sponsored "another financial advisor and I think that AIG did not appreciate that." Hodara Tr. at 99-100.

[84] Hodara Tr. at 67.

circulated by Akin on April 13, 2004,[85] the final bylaws were not adopted by the Committee until June 25, 2004, over two months later.[86]

The dispute between Wilmington and Mr. Musante centered on the powers the bylaws might confer to the Committee chairperson. Wilmington offered revisions to the initial draft bylaws that, among other things, sought to limit the ability of the Committee chairperson to act unilaterally.[87] For example, Wilmington introduced the concept of "Excluded Matters" over which the chairperson could not act without prior Committee action or consent.[88] Mr. Musante disagreed with many of Wilmington's positions and requested the inclusion of a provision that would give the chairperson of the Committee a tie-breaking vote, a provision that Mr. Hodara testified that he had never heard of.[89]

On April 19, 2004, Mr. Storz of Akin prepared a summary of the differences in position between Wilmington and AIG. Rather than debate the bylaws at Committee meetings in April or May, Akin chose to submerge the issues and use back channels to broker a compromise.[90] Indeed, on April 27, 2004, Mr. Hodara informed his Akin colleagues that "we do NOT want to bring [the bylaws] up at the committee meeting, but you will need to be prepared to deal with them if someone brings them up and you are forced to do so."[91] Earlier that day, Mr.

[85] Notably, the draft bylaws were modeled upon the bylaws of the Venture Committee. COMM40487-98.

[86] Ex. 114.

[87] COMM39696-710.

[88] COMM39696-710.

[89] Hodara Tr. at 72.

[90] COMM39696.

[91] Ex. 113 (emphasis in original).

Hodara explained that "the only real way to head off an ugly discussion is to do some shuttle diplomacy between Tom and Wilmington in advance of the mtg [sic]."[92] After collecting the competing views of Committee members, Akin proposed a revised version of the bylaws on June 16, 2004.[93] This draft "attempted to strike a balance" as to the concerns of all Committee members.[94] The bylaws were finally reviewed on a Committee conference call in June and adopted in a form more neutral and balanced than those proposed by Mr. Musante.[95]

4. Disputes Among Committee Members Over Professionals' Fees

Professionals' fees were also a source of dispute among Committee members. These disputes further illustrated Mr. Musante's attempts to control the Committee and Wilmington's desire to contain Mr. Musante's attempts to exercise unfettered power. In an internal Akin e-mail, Kerry Berchem recounted a conversation she had with Mr. Musante shortly after the first and only face to face meeting among the Committee members, FiberMark and their respective advisors, that occurred one month following the Commencement Date of these cases: "[T]om had some words with [Jim McGinely] of [W]ilmington Trust about why he brought his counsel to the meeting [of April 29, 2004, discussed below] and that [McGinely] had better keep his attorneys['] fees reasonable per the indenture. McGinley (according to [T]om) stated that [T]om ought to make sure he keep[s] *his counsel[s']* ([i.e.] us) fees reasonable."[96] Ms. Berchem

[92] Ex. 113.

[93] COMM482273-86.

[94] COMM482273-86.

[95] COMM483905-30 (last revision); Ex. 114 (final version).

[96] Ex. 116 (emphasis added). Interestingly, Ms. Berchem noted Mr. McGinley's reference to Akin as Mr. Musante's counsel without disputing or questioning the description.

concluded with a prophetic warning: *"[t]his situation is a tempest in a teapot and you should be aware of it*."[97]

Mr. Hodara also recognized the tension between Mr. Musante and Wilmington, stating in response to Ms. Berchem's e-mail that after having a "good long talk" with Mr. McGinley,[98] he realized that "[w]e'll have to mediate between our two friends."[99] Mr. Hodara in his testimony acknowledged the strained relationship between Mr. Musante and Wilmington.[100] As stated by Mr. Hodara, Mr. McGinley's position was "[t]hat he wasn't going to be pushed around, that he didn't care how large the bondholders' position might be, that he's a very experienced and knowledgeable bankruptcy professional and knows how to manage the situation and was going to do the right thing."[101]

The distaste felt by Wilmington as a result of Mr. Musante's conduct was so strong that six months later, on October 27, 2004, when Skadden sent an e-mail questioning the payment of indenture trustee fees under the plan, Mr. McGinley wrote to Mr. Hodara: "This gives me a terrible flavor/reminder of Mr. Musante and our original conversation (which I

[97] Ex. 116 (emphasis added). Mr. Hodara also remembered being told that there was friction at the meeting between Mr. Musante and Mr. McGinley as a result of Mr. Musante's belief "that it was too expensive to have multiple outside lawyers for Wilmington at the meeting." Hodara Tr. at 85-86.

[98] Mr. Hodara testified that he heard that "Mr. McGinley was distressed that he had been confronted in the way that he was by Mr. Musante." Hodara Tr. at 89.

[99] Ex. 116.

[100] Hodara Tr. at 96 ("Clearly in my mind at the time and throughout was the fact that Mr. McGinley and Mr. Musante were not getting along and I felt it was going to be one of our many jobs here to see if we could get them to get along.").

[101] Hodara Tr. at 96-97. Mr. Hodara later elucidated that Mr. McGinley felt that he was being "leaned on" by Mr. Musante, which he felt was a challenge to his view that the indenture trustee should exercise independent judgment. Hodara Tr. at 107-108.

apprised you of) at the first meeting with the debtors in Skadden's offices."[102] Mr. Hodara responded that "[t]his is not coming from Musante; this is Skadden on its own."[103]

Post also attacked the fees for Wilmington's attorneys; Mr. Hobart noted on October 24, 2004:

> It seems that Wilmington Trust has internal policies that require/permit them to have not one but two counsel involved in everything they do, including purely business matter discussions. Thankfully, I did hear that while they generally want two counsel for continuity, only one bills when they're on the same phone call (I assume a review on their expenses will verify this). Either way, Wilmington refused to control costs by simply relying on committee counsel like every other committee member. This makes Wilmington very expensive both now and on future assignments. Therefore, I propose that the new indenture trustee be a firm that has more reasonable policies on controlling costs, and not Wilmington. Nothing personal, just sound economics.[104]

Mr. Hobart's attack of Wilmington's attorneys was a consistent theme. During a November 23, 2004 call, Mr. Hobart, according to Ms. Johnston:

> asked out of the blue who was on the call . . . When Martin and I fessed up, he asked Suzanne if there would be a time he could speak with her about the enormous fees in the case, and why it was necessary for WTC to have two lawyers on every call and what could be done to rein in costs. He did give some lip service to WTC's need for counsel, but in his view two is too many.[105]

Post was belligerent about fees even with the Committee's attorneys as illustrated by Mr. Hodara's e-mail to Akin attorneys:

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[102] COMM0129744.

[103] COMM0129744.

[104] PA07593.

[105] CB001090.

> With Post on the fee warpath (did I mention that to you?), I think we need to be circumspect about having a lot of us on these various calls. For today's call, who is planning to be on? If several of us, we need to figure out if there is a way for some on the call to listen with one ear without billing while working on and billing something else.[106]

In contrast, other than Mr. Hobart's focus on administration expenses, the Committee had no standard practice for monitoring the professional fees during the course of the chapter 11 cases. Although Berenson prepared a weekly cash report that itemized the professional fee charges and expenses and distributed a copy to Chanin, it was not forwarded to Committee members. Rather, after an incident in which Mr. Musante received one copy, Chanin advised Mr. Zughayer of Berenson not to send any copies directly to Committee members.[107] During his examination, Mr. Musante testified that he did not know that the aggregate chapter 11 professional charges through the first 11 months of the cases were approximately $9 million or that Akin's charges were approximately $3.8 million.[108]

5. Wilmington's Exclusion from Committee Affairs

Mr. Musante's domination of the Committee, often with the support of Post, was virtually complete. Wilmington and SDI were consistently excluded from discussions and activities initiated by AIG and Akin. Although SDI rarely complained, Wilmington expressed continual frustration about the dysfunctional nature of the Committee. Despite Wilmington's complaints, it appears that little changed throughout the chapter 11 cases. Mr. Musante continued to dominate and exclude Wilmington as a regular process.

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[106] Ex. 161.

[107] Zughayer Telephonic Interview, June 13, 2005.

[108] Musante Tr. at 147; Ex. 87 (The professional charges through May 2005 approximated $16 million).

a. June 7, 2004 Meeting

On June 7, 2004, AIG and Post commanded FiberMark's senior management to attend a meeting in Los Angeles, California to discuss the FiberMark situation.[109] The meeting was precipitated by FiberMark's proposed KERP and Mr. Musante's perception that FiberMark was not satisfactorily moving forward with a plan of reorganization. Although the substance of the meeting is discussed below in more detail, the planning surrounding the meeting illustrates the pattern of Mr. Musante's domination of the Committee.

Despite the importance of the matters to be discussed at the California meeting, Wilmington was neither invited to participate nor informed of the meeting until a few days before it occurred.[110] Ultimately, Wilmington received notice of the meeting as a result of an agenda being circulated via e-mail to the Committee by Chanin on June 3, 2004 in a hasty attempt to mollify Wilmington.[111] Wilmington expressed surprise and dismay that such a critical meeting was scheduled without its knowledge. Ms. Johnston responded to Chanin's e-mail as follows:

> Wilmington Trust is very interested to learn of the West Coast meeting. When was it scheduled? Who is invited? Who is expected to attend? Has it been discussed with the Committee before? We are also very interested to know of the plan proposal outlined in the attached memo. We are not aware that the UCC has at any prior point discussed any plan

[109] COMM0045771.

[110] MacDonald Tr. at 31-32.

[111] Ex. 60.

> treatment for the unsecured claims. Can you shed some light on this before tomorrow's call?[112]

Wilmington was once again left out. Ms. MacDonald testified: "Nobody said to us, 'We think the company should come out and make a presentation, and what do you think about it, Wilmington Trust?' It was all done without our knowledge and we only found out about it right before."[113] Even after Wilmington learned of the meeting and it was discussed during a Committee call, Wilmington was not invited to participate in the meeting.[114]

In contemporaneous internal communications between Wilmington and its attorneys at Covington, Wilmington discussed the fact that the Committee was dysfunctional. Mr. McGinley asked "are we a 'committee' or are these two [AIG and Post] going to run this committee autonomously?? Where is the report of the outcome of this 'separate' meeting?? Does Fred [Hodara] care about this?"[115] He also stated that "*I feel that this committee is pretty lame, with AIG/Post running the show with Chanin as their mouthpiece.*"[116] Despite the fact that it was not correct, Akin told Wilmington that "the LA meeting was initiated by management," apparently to protect Mr. Musante from the charge of excluding other Committee members.[117]

For several days after the meeting, Wilmington was not informed of the results of the meeting, even though important issues, such as the KERP, the plan and the sale process were discussed. This prompted Mr. McGinley to contact Mr. Hodara: "Wilmington Trust has heard

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[112] Ex. 60.

[113] MacDonald Tr. at 33.

[114] MacDonald Tr. at 35-36.

[115] CB000268-70.

[116] CB000275 (emphasis added).

[117] CB000269.

nothing about the results of this hastily announced meeting. Is there going to be any dissemination of information???"[118] Mr. McGinley then repeated to Mr. Hodara Wilmington's oft-expressed sentiment: "*My concern is that this Committee is being run autonomously by two members.*"[119]

b. Other Examples of Wilmington's Exclusion

There are multiple other examples during this period of Committee members other than AIG and Post being treated as non-participants. For example, in connection with FiberMark's proposed sale of certain idle facilities, on June 2, 2004, Chanin sent an e-mail to Mr. Musante and Ms. Choi with various details and indicated that a memorandum on the topic would be distributed to the rest of the Committee later in the week.[120] It is unclear, however, why Mr. Musante and Ms. Choi received the information prior to the rest of the Committee.

In another shocking example, on November 8, 2004, as the Committee was negotiating the plan with FiberMark, Peter Kim from Chanin sent an e-mail: "AIG, Post and Silver Point (cc Chanin and Akin teams): This is a follow up to confirm our call for . . . today to discuss among other issues the treatment of trade vs. bond claims."[121] This e-mail was not sent to Wilmington or SDI. It defies logic to think that the one trade representative on the Committee, let alone all members of the Committee, would not be interested in discussions on how to treat trade claims vs. Note claims under the plan.

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[118] CB000258.

[119] CB000258 (emphasis added).

[120] COMM0191225-26.

[121] COMM0046760-61.

After Wilmington's numerous complaints about being left out, Mr. Hodara took action by assigning each Committee member an Akin attorney.[122] Mr. Hodara realized on December 1, 2004 that "as we have had no Committee call throughout these intra-Noteholder negotiations, [this] means [the] Trustee and Marvin have also been largely out of the loop on the spill-over negotiations with the Company."[123] He, therefore, told the Akin team that if they have not been keeping up with their assigned Committee member, "please remedy that ASAP."[124]

Evidently, Mr. Hodara's plan failed to work, because he wrote to Messrs. Musante, Hobart and Sawyer on December 3, 2004 mocking Wilmington's continued displeasure, stating, "John [Storz] and Jon [Gold] have been trying to keep Wilmington and Marvin up to speed. Suzanne is a little bent out of shape as usual, this time because she thinks it is unfair that MARVIN hasn't been consulted enough on the level of [the Cash Option]."[125]

c. Mr. Musante's Disdain of Wilmington

Mr. Musante's lack of respect for Wilmington's views was manifest throughout the administration of the chapter 11 cases. In August, Ms. MacDonald suggested to the Committee that she speak with FiberMark to let them know that in her experience, a sales process is more successful when a debtor works with the creditors' committee.[126] She also criticized a proposal of Mr. Hodara to move to terminate exclusivity in August 2004, as discussed below in more detail. Mr. Musante's reaction to Ms. MacDonald comments were

[122] Hodara Tr. at 259

[123] COMM0224470.

[124] COMM0224470.

[125] COMM0288659.

[126] Ex. 156.

anger and disrespect. He sent an email to Akin and Chanin stating: *"That's where we've been screwing up, we haven't had Susan negotiating directly with the Company. If only they could hear how persuasive she is and her voluminous experience as a person with ABSOLUTELY NO SKIN IN THE GAME, all would be well. Wish I'd thought of that before*."[127]

Mr. Musante directed his advisors to make sure Ms. MacDonald did not contact FiberMark, stating: "Not sure it plays well for me to suggest she not talk directly with the Company, but if one of you can dial her back on direct communications with the Company, that should be a goal."[128] When Mr. Musante's e-mail was forwarded by Mr. Hodara to the Committee's Vermont attorney, James Anderson, a neutral, impartial observer and later a commentator on the antics of Mr. Musante and others, Mr. Anderson told Mr. Hodara "*You have your hands full. Tom's style of damn the facts, full speed ahead certainly worked in Iraq. I'm sure it will work here as well.*"[129] Mr. Anderson's comments were certainly prescient and confirmed Mr. Hodara's description of Mr. Musante to Mr. Baker at the beginning of the chapter 11 cases as an angry man.[130]

d. Akin and Wilmington

Akin and Chanin often were explicit in their allegiance. On September 28, 2004, Mr. Hodara sent an e-mail to the Akin team and to Chanin explaining that he

> [j]ust got (gently) reamed out by Suzanne MacDonald at Wilmington. She claims to have spoken with Kathy [Choi] and Marvin [McFarlen] to confirm her impression that they

[127] Ex. 156 (emphasis added).

[128] Ex. 156.

[129] Ex. 156 (emphasis added).

[130] Baker Interview, June 13, 2005.

> are all being systematically excluded from the process: never heard about Germany, didn't get a copy of the Plan, etc. . . Do any of you have the sense that Kathy feels out of the loop."[131]

The reference to Germany was a trip that Mr. Musante, Chanin, Berenson and representatives of FiberMark management took in September 2004 to visit FiberMark's German facilities.

Mr. Musante, who had apparently been blind copied on Mr. Hodara's e-mail, replied to all that "Kathy shouldn't. She knew about Germany and passed. For her, plan should be only issue, and I think that was just oversight."[132] The Committee advisors, while concerned about Ms. Choi's feeling left out, appeared to be completely justified in leaving Wilmington out of important facets of the case. Mr. Corbell of Chanin, stated:

> I don't feel badly about not having reached out to other Committee members to ask if they wanted to go to Germany because it just doesn't make sense. Having said that, clearly we need to manage the situation better. I would be surprised about Kathy because I have sent her e-mails giving her updates and I discussed all this with her last Thursday/Friday.[133]

This appeared to satisfy Mr. Hodara that Post was not actually upset: "My guess is that Suzanne's reference to Kathy was her confirming that Kathy had not received these materials earlier either, rather than Kathy making an editorial comment about being pissed."[134] In his testimony, Mr. Hodara also stated that Ms. MacDonald was "misstating," "overstating" or

[131] Ex. 159.

[132] Ex. 159.

[133] Ex. 159.

[134] Ex. 159.

"mischaracterizing" the positions of Post and SDI and that "there was no issue with Kathy or Marvin at all."[135]

The Committee's professionals often discussed important issues with AIG and Post without the participation of Wilmington or SDI, even as to issues that were especially relevant to them. For example, after DuPont resigned from the Committee in June 2004, Mr. Hodara wrote on June 23, 2004 to Mr. Musante, Ms. Choi, and the Committee's advisors (but not Wilmington or SDI) asking, "are there any bondholders that you would suggest we reach out to in order to attempt to get a third bondholder appointed in place of DuPont? Should I ask Silver Point? The UST will lean toward appointing another trade."[136] SDI, the only remaining trade creditor, was intentionally excluded from conversations regarding DuPont's replacement. In internal e-mails, the Wilmington team expressed frustration that "Fred doesn't keep us in the loop [as to] what can be done regarding the vacancy" on the Committee.[137]

During a June 29, 2004 Committee call, Wilmington first learned of Silver Point. The Committee's professionals acknowledged that they had discussed Silver Point with AIG and Post, but not other members, further supporting Wilmington's belief that the Committee's professionals viewed AIG and Post, and not the Committee as a whole, as their clients. As contemporaneously described by Ms. Johnston to the Wilmington team:

> [W]hen I asked for some more detail about Silver Point Fred said that it had been discussed on the prior call. However, neither Martin nor I, who were both on the prior call, had heard this, which gives rise to the implication that they are having so many calls with AIG and Post Advisors that they

[135] Hodara Tr. at 379.

[136] Ex. 131.

[137] CB014312.

> can't keep straight what they said to whom. Peter, of Chanin, indicated that he had spoken with Silver Point, but he gave no details. Is it fair to assume that Silver Point is on the same page as AIG and Post Advisors, *if not in the same pocket?*[138]

Upon receipt of the e-mail, Mr. McGinley became so fed up with the one-sidedness of Akin that he considered speaking with the U.S. Trustee. He wrote: *"I also think Fred needs to be called on the carpet for his lack of candor with us. Do we speak with the US Trustee?"*[139] Ms. MacDonald agreed: *"Fred is not representing the entire committee."*[140]

Wilmington's frustration was intensified when Mr. Hodara initially reached out to Silver Point. Mr. McGinley wrote to the Wilmington team: *"Is the chair, Post and Akin sharing confidential committee info with a non committee member, while excluding us as a committee member?"*[141] Similarly, even documents as fundamental to the chapter 11 cases as the plan of reorganization and disclosure statement were not distributed to all Committee members before Akin provided comments to FiberMark. Martin Beeler of Covington noted that "Akin will be discussing its first round of comments with the Debtors on Wednesday. Hodara wasn't terribly forthcoming on what Akin's (and AIG's) comments consist of at this point."[142]

When Wilmington expressed its view that Silver Point should not be permitted to listen to Committee calls before it became a Committee member, Mr. Hodara told Ms. Johnston,

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[138] CB015941-42 (emphasis added).

[139] CB016131-32 (emphasis added).

[140] CB016131-32 (emphasis added).

[141] CB01630 (emphasis added).

[142] CB015966.

according to a contemporaneous e-mail from Ms. Johnston to Mr. Beeler, that "*the noteholders might try to replace WT if this issue surfaced in Silver Point's face.*"[143]

Accordingly, the evidence corroborates Wilmington's feelings that this was a Committee run by one, and sometimes two, members, with few, if any, efforts by the Committee's professionals to represent the entire Committee.

6. Additional Evidence of a Dysfunctional and Mismanaged Committee Dominated by Mr. Musante

Pursuant to the recommendation of Mr. Hodara, the Committee did not keep minutes of meetings or votes, because according to Mr. Hodara the maintenance of minutes can lead to "mischief."[144] Clearly, there was no recognition of a need for transparency in the interests and protection of all general unsecured creditors.[145] It was not until David Friedman, attorney for Silver Point, demanded minutes for the Committee's March 21, 2005 telephonic meeting that minutes for a meeting were prepared. Even then it was only after Wilmington complained about the delay in receiving a copy of such minutes that Akin produced them.[146]

The investigation demonstrates that Mr. Musante used the Committee as the instrument for getting his agenda accomplished. He did not view the Committee as a congress of equals. As the Examiner pointed out in Mr. Hodara's examination, there were many important e-

[143] CB04165 (emphasis added).

[144] Hodara Tr. at 77-78.

[145] Starting on October 17, 2005, pursuant to the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, creditors' committees will be required to be transparent. See S. Res. 256, 109th Cong. § 405(b) (2005) (enacted). A creditors' committee appointed under section 1102(a) of the Bankruptcy Code will be required to provide information to creditors who hold claims of the kind represented by the committee and who were not appointed to the committee, as well solicit and receive comments from such creditors. Id. Further, committees may be subject to a court order that compels any additional report or disclosure to be made to the creditors. Id.

[146] CB 2716; COMM0028791.

mails sent by Mr. Hodara to Mr. Musante, but to no other Committee member.[147] Mr. Hodara responded that "[i]t's not uncommon, though, for myself and the chair of a committee to have frequent communications without broadcast to a full committee."[148] However the extent of such communications in the Examiner's experience, is atypical, particularly when the committee consists of five members.

Mr. Musante's aggressive personality dominated the Committee and the chapter 11 cases and was a source of many of the disputes that occurred throughout the cases. Mr. Hodara admitted that Mr. Musante is "aggressive" and stated that Mr. Musante "*is probably the most hands-on, informed Committee member, or at least among the most hands-on, informed Committee members with whom I have ever worked. He takes what he does very seriously and he takes his role in each of those two cases [FiberMark and Venture] as chairperson very seriously*."[149] While Mr. Hodara's description is laudatory, it does not dissipate the reality that the relatively small FiberMark Committee was dysfunctional and used to pursue the individual agenda of Mr. Musante.

F. Animosity Between FiberMark and Committee Grows Postpetition

1. Parties Continue to Bicker Over FiberMark's Failure to Meet with Noteholders Pre Chapter 11

Along with the strain among Committee members, the tension between FiberMark and its professionals and the Committee and its professionals continued, unabated, after the Commencement Date. In a telling example, the day after the Committee selected Akin,

[147] Hodara Tr.at 138.

[148] Hodara Tr. at 138.

[149] Hodara Tr. at 125-26 (emphasis added).

Mr. Hodara contacted Mr. Baker and requested in an e-mail that FiberMark's management and advisors make a prompt presentation to the Committee.[150] Mr. Baker responded that he did not think it would be prudent to schedule such a meeting prior to confidentiality agreements being signed.[151] Mr. Hodara angrily responded that he did not agree with Mr. Baker's decision and revealed that the disputes between the two in the week prior to the Commencement Date were not forgotten:

> We can't make the Company do what it's not inclined to do, but we would like the Company to cut some corners on the niceties, like the CAs [confidentiality agreements] to facilitate the dialogue. What we find Company's often willing to do, where there is an oral commitment to get the CAs done, is to proceed based on the oral commitment. *Management has a [credibility] issue on the subject of willingness to be forthcoming because of the way the proceedings began absent meaningful opportunity [for dialogue]*. Ultimately, it is [obviously] up to you and them as to whether steps are taken to overcome that start.[152]

Mr. Baker responded equally forcefully, also referring to his view of FiberMark's attempts to negotiate with the Noteholders prior to the Commencement Date:

> Fred – I am surprised to hear a reference to credibility. As you know, the Company attempted to start a [dialogue] in December with the major bondholders. For reasons best known to the bondholders, that effort failed. If we need to review with the Committee the presentation that was given in December to the bondholders, we will be glad to do so, but I really don't want to begin this process with a presumption that the Company has not attempted to be forthcoming.[153]

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[150] COMM0005729.

[151] COMM0005729.

[152] COMM0005729 (emphasis added).

[153] COMM0005729.

Subsequently, although a diligence meeting between their respective advisors, FiberMark and the Committee was initially planned for the third week in April 2004, Rosalie Gray, Esq. of Skadden sent an e-mail to Mr. Hodara on April 16, 2004, indicating that in the interest of making a thorough presentation to the Committee, the meeting would be postponed until the following week (during which a full meeting between FiberMark and the Committee had already been planned).[154] After several e-mails between Ms. Gray and Mr. Hodara bickering over the details as to scheduling, Mr. Hodara retorted *"Ok, but the company can't unilaterally set and cancel meetings any more. The company went into a bankruptcy proceeding. Its creditors' committee wants to meet."*[155]

A simple issue of scheduling a meeting between a debtor and a creditors' committee, which usually is not contentious, in these cases was fraught with tension and recriminations as a skirmish in the battle for control of the chapter 11 process.

2. Committee Attacks the Fees and Motives of FiberMark's Professionals

The continuing friction between FiberMark and the Committee and their respective advisors in these cases included the engagement terms of professionals. FiberMark filed its application to retain Berenson as its financial advisor on April 6, 2004.[156] At the request of the U.S. Trustee, Berenson quickly agreed to withdraw the request for approval as an engagement under section 328 of the Bankruptcy Code.[157] As a consequence, Berenson's entire

[154] Ex. 119.

[155] Ex. 119 (emphasis added).

[156] Ex. 59. The United States Trustee requested, and the Debtors agreed, to remove the Debtors' request to retain Berenson under 11 U.S.C. § 328(a).

[157] Ex. 59.

compensation was subject to judicial review and comments of all parties. Nevertheless, Mr. Musante directed Mr. Hodara to persist in pursuing an objection to the Berenson engagement.

Mr. Hodara angrily communicated to Mr. Baker his "dismay" at both the Berenson engagement and what he regarded as FiberMark's disregard of the Committee during the first days of the chapter 11 cases:

> I am dismayed by your answer, to put it mildly. This may be the first time in over 20 years of doing this that a Company has denied a request of a Creditors' Committee with which I am involved an opportunity to have a dialogue regarding the terms of engagement of its advisors prior to pushing the matter to a court hearing.
>
> While I am dismayed, I am not surprised because [your] response is exactly in line with the way the Company has chosen to deal with several items in the one short month that it has been dealing with its unsecured creditors. That is, to take [its] own counsel to the disregard of the reasonable requests of its most important constituency without any meaningful dialogue. The further the Company wants to push its agenda without consultation with its creditors, the more difficult this process will prove to be.[158]

Apparently, Mr. Musante credits Berenson with being the prime culprit behind FiberMark's decision to file chapter 11 cases and its subsequent conduct.

In a theme that would be oft-repeated throughout the case, Mr. Musante also attacked Skadden and Berenson for acting in a "self-serving" manner designed solely to earn fees for themselves. Mr. Hodara testified that Mr. Musante had a view that part of the reason for "the precipitous bankruptcy filing was a desire of the Debtors' professionals to earn what are usually larger fees in a bankruptcy rather than proceed in a less expensive out-of-court proceeding."[159]

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[158] Ex. 59.

[159] Hodara Tr. at 173.

On June 1, 2004, the Court approved the engagement of Berenson, noting the Committee's objection in the Order and providing that the Committee's objection was preserved for resolution during the fee application process, the exact resolution Mr. Baker had proposed.[160]

Mr. Musante often expressed his views that Skadden and Berenson were, not only intentionally delaying the case to earn additional fees, but also enemies poisoning management against the Committee.

> There is no incentive for Skadden or Berenson to move this process quickly, rather the opposite, since more time and more issues will help justify higher fees on ultimate review. . . Maybe if we get the KERP/severance issues out of the way, Berenson and Skadden won't have anything else to whisper in management's ear about why we're the bad guys.[161]

Mr. Musante concluded that his "view is to be inclined to litigate the [Berenson fee] issue now."[162]

Mr. Musante revealed in his examination that his belief that Berenson and Skadden were operating on a self-serving basis to increase the fees paid to themselves "was not based solely on the time period between the appointment of the committee on April 7th or 8th. . . but rather on my entire experience with this case starting pre-petition, before the filing, through the filing, through the period in which the committee was appointed, and thereafter."[163]

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[160] Order Under 11 U.S.C. § 327(a) Authorizing Debtors' Employment And Retention Of Berenson & Company, LLC As Financial Advisors And Investment Bankers As Of Petition Date, dated June 1, 2004.

[161] Ex. 121.

[162] Ex. 121.

[163] Musante Tr. at 118.

3. Dispute Over the Chanin Retention and Control of the Process

The fight over Chanin's retention demonstrates the views of Mr. Musante and the Committee's advisors that all parties in interest should acquiesce to the Committee's demands. On May 7, 2004, the Committee filed its application to retain Chanin as its financial advisor. Ms. Gray of Skadden wrote to Akin, describing FiberMark's issues with Chanin's retention application, including the retention under section 328 of the Bankruptcy Code in light of the changes made in the Berenson retention as to section 328, and the extent of FiberMark's indemnification of Chanin.[164] Kevin Purcell, Esq. of the Office of the U.S. Trustee replied that he concurred with Ms. Gray on "all her points."[165] But, Mr. Purcell went further:

> Perhaps my largest concern is the "economics" of this application. I am unclear why the debtor should pay for services to Chanin when very similar services (and pay scale) will be rendered by Berenson. I can understand the Committee wanting to have its own experts to advise them on the deal the debtor's professionals propose. But I cannot understand the debtor and the Committee having their professionals compete to bring in a deal, which simply doubles (or very close to doubles) the cost.[166]

Mr. Purcell then stated that the U.S. Trustee "would likely object to Chanin's appointment for all these reasons."[167]

Not surprisingly, Mr. Hodara remarked to Chanin and Mr. Musante (but no other Committee members) that Mr. Purcell's e-mail "defies belief."[168] Mr. Musante was even more

[164] Ex. 122.

[165] Ex. 122.

[166] Ex. 122.

[167] Ex. 122.

[168] Ex. 122.

incredulous: "*Somebody pick me up off the floor (where I landed after hitting the ceiling). . . I'm at a complete loss to explain, other than Skadden and Berenson are creating issues to pad their own pocket (and a confused UST).*"[169] Mr. Victor of Chanin concurred with the Committee Chairperson: "*It is truly ridiculous and a waste of time and money. That both the company and the u.s.t. are so unmindful of who has any economic interest in this company is shameful*."[170]

Of course, not all creditors agreed with the Committee about the reasonableness of Chanin's retention. On May 24, 2004, Stephen Steidle, a former FiberMark employee and an unsecured creditor, filed an objection to the application, asserting that "the Committee's application appears to request that Chanin do the same work that Berenson has been engaged to do."[171] Nevertheless, on June 14, 2004, the Court approved the Committee's retention of Chanin but, as it had for Berenson, preserved objections, such as any FiberMark or others might have, for later assertion pursuant to the fee application process.[172]

4. AIG's Unprofessional and Counterproductive Conduct at the Only Face to Face Meeting Between FiberMark and the Committee Establishes Highly Adversarial Environment for these Chapter 11 Cases

Setting the date for the April 29, 2004 meeting,[173] as noted, caused an acrimonious exchange between Messrs. Hodara and Baker. Among the attendees at the meeting

[169] Ex. 122 (emphasis added).

[170] Ex. 122. Mr. Hodara testified that he agreed with Mr. Victor's statement. Hodara Tr. at 151 (emphasis added).

[171] Creditor Stephen A. Steidle's Opposition To Application Of Official Unsecured Creditors' Committee For Employment Of Chanin Capital Partners LLC, dated May 24, 2004, at 1.

[172] Order Authorizing Retention of Chanin Capital Partners LLC As Financial Advisors And Investment Banker Of The Official Committee Of Unsecured Creditors, dated June 14, 2004.

[173] Ex. 115.

were Messrs. Kwader and Hanley from FiberMark, and representatives from Skadden, Berenson, Akin, Chanin, and all Committee members.

The objective of the meeting "was to communicate the FiberMark story, who we were, what we were about, how we had arrived in Chapter 11 and some discussions of our prospects going forward."[174] Similarly, Mr. Zughayer testified that the purpose of the meeting was "to inform the committee as to where the company was, why the company filed, the prospects for the company and our preliminary view on what the company's exit should look like."[175]

The conduct of Mr. Musante and his associate at the meeting has been described as unprofessional and disrespectful. Ms. MacDonald testified as to a "feeling of hostility" when Mr. Musante and Post asked questions. She stated that their behavior "wasn't very pleasant" and "wasn't professional."[176] Mr. Kwader described the meeting as "adversarial."[177] Similarly, Mr. Zughayer described the conduct of Mr. Musante as "unprofessional" and said the meeting revealed the antagonism between AIG and FiberMark and its professionals.[178] Mr. Zughayer testified as to Mr. Musante's "demeanor," stating that

> he was very demonstrative in his displeasure; a lot of giggling, whispering to his colleague, kind of audible sighs. I think he made a few flip remarks about the management where half the

[174] Hanley Tr. at 31.

[175] Zughayer Tr. at 31.

[176] MacDonald Tr. at 27.

[177] Kwader Tr. at 30.

[178] Zughayer Telephonic Interview, June 13, 2005.

> table heard. So he clearly was not pleased about how the meeting was going or the way it was going in general.[179]

According to Mr. Hanley, the meeting was "difficult, adversarial, and many times unprofessional."[180] When asked in what way the meeting was unprofessional, Mr. Hanley testified as follows:

> I was surprised because I was watching while my team mates were making their presentations and there was a lot of very negative body language. People were – you know, statements were made and people were tossing their pencils up in the air, kind of snickering at times. There were notes being passed amongst themselves on various things.
>
> It was a little bit embarrassing professionally to be trying to make a serious presentation over matters that were serious enough, I mean, this was not only my company's reputation at stake but my own personal reputation at stake, and we were doing our best, and there were – some members in the audience weren't respecting what we were saying – receiving as respectfully as I thought it deserved to be.[181]

Mr. Hanley also described the Noteholders' (and particularly AIG's) reaction to his own presentation:

> When I got up to make the financial presentation, it was tough to complete a sentence without someone trying to find a flaw in my statement or a flaw in the logic—the financial logic that I was presenting. So it was difficult, but we got through it. They asked a lot of tough questions; I guess fair questions given that they were investors whose investment had been potentially impaired pretty significantly. So I didn't take it personally.[182]

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[179] Zughayer Tr. at 33.

[180] Hanley Tr. at 32.

[181] Hanley Tr. at 34.

[182] Hanley Tr. at 32-33.

Rather than opening the lines of communication between FiberMark and the Committee, the April 29, 2004 meeting appeared to stiffen the parties' attitudes toward each other. Responding to an e-mail from Mr. Lee of Chanin regarding scheduling a call with FiberMark about its internal controls and accountings system, Mr. Musante responded with one telling sentence: "*We need to try and leave Berenson out of the loop as much as possible.*"[183] Shockingly, after April 2004 for the remainder of these chapter 11 cases – almost 12 months – it appears that there were no in-person meetings between FiberMark and the entire Creditors' Committee. Ms. MacDonald testified that from March 30, 2004 through March 30, 2005 "we probably had two or three calls with the debtor themselves. . . We hardly ever interacted with the Debtor."[184] According to Mr. Baker and Ms. Gray, and consistent with all materials reviewed by the Examiner, FiberMark rarely participated in Committee conference calls and there was no real forum for FiberMark to provide updated information on its business or the status of the chapter 11 cases.[185]

5. Early Disputes About Access to Information and Control of Process

Ms. MacDonald testified that the "information flow regarding financial information . . . was a problem in the eyes of AIG and Post."[186] She also suggested that she thought FiberMark was not forthcoming in producing information requested by the

[183] COMM0479031 (emphasis added).

[184] MacDonald Tr. at 51.

[185] Baker Interview, June 13, 2005.

[186] MacDonald Tr. at 48.

Committee.[187] Mr. Hanley stated that the Committee often complained that FiberMark and their advisors were not providing information as quickly as it would have liked:

> [W]e were constantly being criticized for, you are not supplying information; you're giving us incomplete answers; we need more information sooner. I want this – I want an Excel spreadsheet that explains your entire business so I can make little, simple adjustments and see how it affects the financial results. . . Chanin was rather critical. We were trying to explain to them that, you know, companies that get themselves into Chapter [11] don't always have the most sophisticated analysis and reporting capability and that that was being worked on. We tried to be as cooperative – we were as cooperative as we could be.[188]

In addition, Mr. Zughayer indicated that they sent "information to Chanin on a weekly basis. We sent volumes of information to Chanin. And we learned on several occasions that the committee just wasn't getting information," suggesting that Chanin was not forwarding such information.[189]

Mr. Musante was clearly frustrated by his perception that FiberMark was not compliant with the wishes of the Committee. He complained that FiberMark was not being forthcoming and expressed his frustration to FiberMark. As described by Jonathan Gold of Akin, who attended the April meeting, Mr. Musante "said to the company that he felt as though he was being treated as an out of the money creditor as opposed to a future owner of the company."[190] Mr. Hodara explained that this statement "refers to that same general theme that had begun right at the start of the case of all the bondholders feeling that the company was not

[187] MacDonald Tr. at 61.

[188] Hanley Tr. at 49-50.

[189] Zughayer Tr. at 82.

[190] Ex. 115.

paying proper attention to the interests of the largest stakeholder of the company."[191] Mr. Musante testified that Akin and Chanin were of the view and he agreed that Skadden and Berenson were being unusually difficult, especially for a simple case.[192]

G. The KERP Battleground

The battle over the KERP brought the already existing hostility between the Committee and FiberMark to a heightened level of antagonism. For what turned out to be bad negotiating strategy on the one hand and retribution on the other, the FiberMark estate incurred substantial professionals fees and expenses and loss of precious time as a result of the KERP warfare.

1. Mr. Musante's Opposition to the KERP

In Mr. Musante's view, there was no need for a KERP if the chapter 11 cases were accelerated and in any event, no need to reward senior management for their decision to commence chapter 11 cases. As early as April 1, 2004, Mr. Musante stated, "I'm opposed to any management retention plan here. They could have done this another way."[193] After the first day motions hearing, even though there was no KERP proposed at the hearing, Mr. Musante, by telephone to Mr. Hodara continued to express his view on any KERP. According to Mr. Baker, Mr. Hodara told him that Mr. Musante is very angry and totally opposed to a KERP. (Mr. Hodara reportedly told Mr. Baker that "Tom is rarely happy.").[194] Mr. Hodara repeated the

[191] Hodara Tr. at 83.

[192] Musante Tr. at 123-24. The Examiner believes the transcript, which uses the word "usually" instead of unusually, is in error.

[193] AKIN0000361.

[194] Baker Interview, June 13, 2005.

consistent theme – that Mr. Musante was incensed because FiberMark filed chapter 11 cases despite AIG's request that it not do so.[195]

As the cases progressed, Mr. Musante's opposition to a KERP intensified. During one of the breaks in the April 29th meeting at Skadden, Mr. Musante reportedly told Mr. Baker that a KERP could be approved only "*over my dead body*."[196] James Anderson, the Committee's Vermont attorney, observed the confrontation between Mr. Baker and Mr. Musante on April 29, and described Mr. Musante as "angry" and "rude."[197] Mr. Hanley said Mr. Musante told him, Mr. Kwader and FiberMark's advisors on multiple occasions: "No KERP. Absolutely no KERP; not appropriate, not necessary. We will be out of Chapter [11] in a few months with an all equity plan. There is no need for a KERP."[198]

Mr. Musante was particularly opposed to Mr. Kwader receiving any payments under the KERP, as he held Mr. Kwader responsible for FiberMark's decision to commence the chapter 11 cases.[199] As stated by Ms. MacDonald, "Tom Musante was not happy with Alex Kwader."[200] She also testified that Mr. Musante stated on more than one occasion "that he did not want Mr. Kwader to continue in Mr. Kwader's current position."[201]

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[195] Baker Interview, June 13, 2005.

[196] Mr. Kwader testified that he heard Mr. Musante say that phrase, while Mr. Hodara testified that Mr. Baker told him Mr. Musante said the phrase. Kwader Tr. at 35-36; Hodara Tr. at 109 (emphasis added).

[197] Anderson Interview, June 27, 2005.

[198] Hanley Tr. at 43-44.

[199] Mr. Berenson echoed this view, stating that the Debtors and their advisors had "an impression that there was residual [ill] will from the inception of this case over this perception that we filed against the wishes in particular of AIG and Mr. Musante, and we never seemed to be able to get beyond that and Mr. Kwader was blamed for that in part. I'm sure that we and others were [as well]." (Berenson Tr. at 100).

[200] MacDonald Tr. at 27.

[201] MacDonald Tr. at 30.

Mr. Hodara corroborated that "[t]here was never good things said about the CEO of the company, Alex Kwader."[202] "[G]enerally [AIG and Post] did not have a positive view of Mr. Kwader at any time."[203] As Mr. Hodara testified, AIG and Post's relationship with Mr. Kwader started out as hostile and continued as a hostile relationship through the chapter 11 cases.[204]

2. Evolution of the KERP

Early in the cases, Skadden and Berenson advised senior management they should consider a KERP. Mr. Hanley accepted the recommendation of his advisors:

> Skadden advised us shortly after the filing that, you know, one of the elements of a Chapter [11] case like this would be plans to secure the motivation and [retain] employment of key employees; that introduced the concept, and felt it was important to get that on the table as soon as possible after, you know, discussions.[205]

Akin questioned whether Skadden had put the idea of a KERP into these simple businessmen's heads. Mr. Musante testified that he thought Mr. Baker told him he was sorry he brought up the KERP to the Debtors.[206]

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[202] Hodara Tr. at 114.

[203] Hodara Tr. at 115.

[204] Hodara Tr. at 115. Mr. McFarlen, however, testified in response to questions about Committee members' feelings toward management that "I don't feel like it was anybody carrying a grudge or anything like that. . . I guess the feeling was that the people who had caused the problem were the ones who were there in the room, there was not anything specific as far as, I don't know, individual animosity." McFarlen Tr. at 22.

[205] Hanley Tr. at 41-42.

[206] Musante Tr. at 105.

Because FiberMark expected pushback from the Committee on the KERP, Skadden advised FiberMark to start the process with a high case proposal and negotiate from that point. According to Mr. Hanley:

> The approach that the company took to negotiate or present its position on the KERP was to file a motion and recommend a KERP amount. On the advice of Skadden and Mr. Baker, that was kind of how it was done and, you know, you put out your position and then that elicits a response from the other side and normally negotiations then begin in earnest. . . So you put out your number as a starting point, and we put out a number that was high expecting to negotiate down to someplace in the middle.[207]

Mr. Musante expressed his opposition to a KERP frequently and vocally in the first few months of the case. The message was understood by FiberMark. As a result, FiberMark also proposed the KERP without having meaningful conversations with the Committee. Mr. Baker confirmed that FiberMark decided to file the KERP motion because Mr. Musante's vocal opposition to a KERP indicated that pre-filing negotiations would be acrimonious and unsuccessful.[208] Accordingly, he advised FiberMark to use the pressure of a motion and a hearing date to set the parameters for the resolution of KERP issues.

Nonetheless, FiberMark did furnish the proposed KERP motion and terms to the Committee on May 14, 2004, for review prior to filing the motion. In the same e-mail, Skadden indicated its intention to file the motion on May 21, 2004 and expressed that while it is

> willing to continue discussions after the filing in an effort to address any concerns of the Committee before the hearing,

[207] Hanley Tr. at 41.

[208] Baker Interview. Although Mr. Berenson testified that there were negotiations with the Committee prior to the Debtors' filing the KERP motion, he appears to be mistaken about the timing. Berenson Tr. at 61-62. Mr. Berenson admitted, in any case, that he was not directly involved in the KERP discussions, but Mr. Zughayer and Mr. Oh from Berenson were involved. Berenson Tr. at 60.

> [given] the position of AIG, however, we understand that there may be little to be gained from a dialogue between the Company and the Committee on these issues, and we will be prepared to leave the matter in the hands of the Court.[209]

Mr. Hodara forwarded the proposal received from Skadden to other Akin attorneys, Chanin and Mr. Musante, but not to any other Committee member.

3. The War of the Worlds over the KERP

Mr. Musante's response upon receipt of the May 14 proposal was to consider his war options: "Any chance we can terminate exclusivity early in conjunction with our own plan to 100% equitize bonds, reinstate trade? What possible problems could debtor have with this, except that it makes it hard to justify big professional fees and big KERP payments."[210]

Mr. Musante's "bring it on" attitude was recognized by Mr. Corbell of Chanin that same day: "*Tom is ready to launch missiles. He wants to take on Skadden/Berenson out of principle*."[211] Mr. Corbell also recognized the destructiveness caused by the unreasonable fighting between the Committee and FiberMark: "This case has gone sideways far too quickly and it will only get worse if we don't make a good faith effort to insert reasonableness into it."[212] Mr. Victor concurred with Mr. Corbell's "sideways" e-mail: "*Rarely have we ever seen so much unnecessary gymnastics in a deal. And we will not do well if this matter drags out.*"[213]

4. Committee is Outraged at Terms of the KERP

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[209] Ex. 124

[210] Ex. 124.

[211] Ex. 123 (emphasis added).

[212] Ex. 123.

[213] Ex. 123 (emphasis added).

Mr. Hodara viewed the terms of the proposed KERP as applied to senior management to be "outrageous."[214] Mr. McFarlen agreed at this point that the KERP was "excessive" and its terms "too rich."[215] Ms. MacDonald testified that the Committee discussed the KERP proposal and "[s]ome of the committee members thought it was too rich for certain people. . . Mr. Kwader in particular."[216] Ms. MacDonald testified that the opposition of AIG and Post "was directed at executive officers and Kwader. The Committee did approve a retention package for some of the what I would call the 'rank and file' as well as Kwader and some of the executives."[217] She also said, however, that "Post and AIG really did not want to give a severance or a KERP. They didn't want to do either."[218]

Some of the opposition to the KERP was based on the fact that the Committee did not actually believe there was a risk of defection. As stated by Mr. Zughayer, the Committee had posited that "these people worked in Brattleborough in the paper industry, so where are they going to go?"[219] Mr. Zughayer also said that "I think the people they [FiberMark] would have lost, they [the Committee] wouldn't have minded losing."[220]

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[214] Hodara Tr. at 179.

[215] McFarlen Tr. at 32-33.

[216] MacDonald Tr. at 39.

[217] MacDonald Tr. at 42-43.

[218] MacDonald Tr. at 43.

[219] Zughayer Tr. at 93.

[220] Zughayer Tr. at 94.

Mr. Hodara admitted he was critical of the way the Company handled the KERP, mainly because FiberMark did not give the Committee enough deference and a large enough role in determining the terms of the KERP.[221] He elaborated,

> In my experience, companies typically come to their Creditors' Committee in advance of filing a KERP motion to discuss their request, to discuss their view and analysis of why they believe the particular KERP or severance request is appropriate in that case, and in my experience, a discussion ensues between the committee and the company and, more often than not, in my experience, the parties, through that discussion, reach a consensual resolution.[222]

He believed that any efforts FiberMark made in engaging the Committee during the prefiling period were "perfunctory and immaterial."[223]

5. FiberMark Files the KERP Motion

On May 21, 2004, FiberMark filed the motion to approve the KERP, which included both a retention program and a severance plan. Attached hereto as Exhibit F is a comparison of the proposals and counterproposals made throughout the two-month KERP negotiations. The KERP proposed in the motion, provided that total payments under the retention plan would not exceed $5,266,239, plus a $500,000 discretionary recognition plan. Under the severance plan, the covered employees would be entitled to receive a lump sum payment within sixty days of the employee's termination date plus certain benefits in exchange for a release and the signing of a non-solicitation, non-compete, non-disclosure, and non-

[221] Hodara Tr. at 177-78.

[222] Hodara Tr. at 177-78.

[223] Hodara Tr. at 178.

disparagement agreement. FiberMark estimated that the maximum theoretical cost of the severance plan was approximately $5,670,930, but likely would be much lower. [224]

Despite relatively inconsequential and superficial negotiations regarding the KERP between FiberMark and the Committee, it became apparent that the details of the KERP were not the central issue in the KERP battle. A major facet of the war was the animosity of Mr. Musante for Mr. Kwader and the Debtors' professionals. According to Mr. Berenson, the Committee's reaction to the KERP motion was "emphatically negative."[225]

The Committee sought an extension of the dates for any KERP objection deadline and the hearing. FiberMark denied this request, angering Mr. Hodara even more. He wrote to Mr. Baker on June 2, 2004 that "the Company's refusal to extend these dates – dates that were unilaterally set by the Company in the first place [represented] – *yet another slap in the face of the Creditors' Committee.*"[226] He pointed out that "members of the Committee had reached out to have a direct dialogue with management on this issue and it was management that chose the June 7 date for the Los Angeles meeting with Messrs. Musante, Hobart and Chanin. The Committee had hoped for an earlier date."[227] He went on, "For the Company to have chosen a late meeting date and to then deny our request for a postponement of the date by which the

[224] Debtors' Motion for Order Under 11 U.S.C. Section 105(a) and 363(b)(1) Authorizing Implementation of Key Employee Retention and Severance Plans, dated May 21, 2004.

[225] Berenson Tr. at 59.

[226] COMM0126408 (emphasis added).

[227] COMM0126408.

Committee needs to file an objection and have a public hearing on these issues, is bizarre, at best, and is, in any event, a flagrant provocation."[228]

FiberMark and the Committee also disagreed as to whether negotiations over the KERP should occur between principals, as requested by the Committee, or professionals, as FiberMark wanted. Mr. Baker explained in his June 3 e-mail,

> [t]he Company, based on strong advice from its advisors, does not intend to engage in principal to principal negotiations on the KERP. As I indicated to you in our conversation, I have never seen that occur in any case in which I have been involved. I believe it to be an extremely inappropriate negotiating dynamic in this context.[229]

On June 4, 2004, the Committee filed an objection to the KERP, arguing that a KERP was unnecessary because promptly preparing and consummating a chapter 11 plan would have the same effect as a KERP[230]. Moreover, the amounts of each of the retention plan and severance plan were excessive.

6. Negotiations of the KERP

On June 7, 2004, at Mr. Musante's command, a face to face meeting took place in Los Angeles. At that meeting, AIG, Post and Chanin made a counterproposal, the details of which are set forth in Exhibit F. In general, they proposed severe reductions in the retention and severance amounts, offering about one-third of FiberMark's proposal on the retention plan ($1,669,842, a reduction of $3,596,397) and severance plan ($1,942,092, a reduction of

[228] COMM0126408.

[229] COMM0126470-71.

[230] Objection of the Official Committee of Unsecured Creditors to the Debtors' Motion for an Order under Sections 105 and 363(b)(1) Authorizing Implementation of Key Employee Retention and Severance Plans as well as a Reservation of Rights by the Committee of Unsecured Creditors with Respect to Debtors' Motion for Order under 11 U.S.C. Section 105(a), 363(f) and 365(a)(1) Approving Sales of Three Idle Facilities and (II) Authorizing Assumption, on Modified Terms, of Commission Agreement Related to Such Sales, dated June 4, 2004.

$3,728,838). They also proposed changing the milestones at which the retention payments were paid to tie them to how quickly FiberMark filed and confirmed a plan of reorganization: 20%, upon filing of plan and disclosure statement, 30%, upon confirmation of the plan, and 50%, 180 days after the effective date of the plan.

At some point in the meeting, Mr. Musante asked to speak to Mr. Kwader and Mr. Hanley without their advisors present.[231] Mr. Musante asked Mr. Kwader what he really wanted out of the Company and discussed reaching an agreement whereby Mr. Kwader would agree to retire early.[232] Mr. Musante remembers that he told Mr. Kwader that if he agreed to leave FiberMark, the Committee would agree that he could remain on the board as chairperson with some compensation.[233] Mr. Kwader's recollection is that Mr. Musante offered him two years severance to leave the Company at that time.[234] Mr. Hanley stated that after that meeting, "it was pretty clear from the point of view of at least AIG and Post, that they were anxious for Mr. Kwader not to be part of the long-term solution for the company."[235]

On June 8, 2004, Mr. Corbell displayed his pessimistic views of negotiations with FiberMark, writing to Mr. Hodara and Mr. Gold: "I think we have to proceed as if we don't get a deal with management, partly because I think it sends a strong signal that could help negotiations, but more because I think these *guys are on another planet* so I'm not optimistic

[231] Zughayer Tr. at 92.

[232] Hanley Tr. at 51.

[233] Musante Tr. at 141.

[234] Kwader Interview, June 28, 2005.

[235] Hanley Tr. at 51.

about a deal."[236] Mr. Hodara agreed. As the original June 14 KERP hearing date approached, Mr. Hodara took the position that the Committee should move forward with discovery as it waited for FiberMark to respond to its proposal.

Eventually FiberMark agreed to continue the hearing, and the parties entered into a stipulation on June 11, 2004 to adjourn the hearing to July 9, 2004 to allow additional time to negotiate a settlement, or failing that, to take depositions.[237]

On June 9, 2004, FiberMark proposed modifications to the KERP that would result in a reduction of $331,263 in retention payments and $1,325,052 in severance payments.[238] However, the Committee failed to respond. Thereafter, Mr. Baker stated "[u]nfortunately, and despite what we trust are the best efforts of all concerned, during the past two weeks the Company has received no further substantive response from the Committee, and the litigation preparations and concomitant expenses are advancing on all fronts."[239] Mr. Baker then explained that "as a gesture of good-faith, the Company has made a series of final, major revisions to the KERP."[240] Mr. Baker continued that although it is unusual to file a counter-proposal before a response to the prior proposal is received, FiberMark believed that the circumstances (no substantive input from the Committee) called for such a solution.[241] The

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[236] COMM0191416 (emphasis added).

[237] Stipulation Continuing Hearing with Respect to Approval of Assumption Issue under Debtors' Motion for Order under 11 U.S.C. Sections 105(a), 363(a), 363(f) and 365(a) (I) Approving Sales of Three Idle Facilities and (II) Authorizing Assumption, on Modified Terms, of Commission Agreement Related to Such Sales, dated June 11, 2004.

[238] COMM0045771-74.

[239] COMM0047726-28.

[240] COMM0047726-28.

[241] COMM0047226-28.

proposal reduced the maximum payments under the retention plan, severance plan, and discretionary recognition plan from the original amounts in the KERP motion by $1,611,539, $1,437,552, and $200,000 respectively.

Mr. Baker stated "*this is my first case in over 30 years of law practice in which it has been necessary to litigate a KERP, and I continue to be at a loss as to why the parties here have been unable to resolve this matter consensually.*"[242] Mr. Baker also reiterated the Company's previously expressed concerns with respect to the cost of litigation in connection with the KERP.

Mr. Hodara finally provided a counterproposal on behalf of the Committee (subject to Committee review) on June 22, 2004.[243] Revealing the Committee's sentiments about Mr. Kwader, the counterproposal required Mr. Kwader and another employee to resign as officers and employees of FiberMark in order to receive payments under the plan (which, for Kwader, would be $1.1 million, subject to reduction if the KERP milestones were not met). The proposal permitted Mr. Kwader to remain on the board of directors for up to two years, but provided that the recovery under his SERP claim (as explained below in more detail) would be inversely related to the amount of time he remained a director.[244] The retention and severance payments payable to other employees were also lower than the amounts set forth in FiberMark's proposal of the same date. Significantly, the proposal continued to provide that no payments would be made under the KERP until the plan and disclosure statement were filed and that

[242] COMM0047226-28 (emphasis added).

[243] COMM0046996-99.

[244] COMM0046996-99.

payments would be reduced if certain very tight deadlines were not met. For example, the plan had to be on file by July 20, 2004.

As to the cost of the KERP dispute, Mr. Baker wrote to Mr. Hodara that "the all-in cost for the KERP litigation will, I believe, *set a record in bankruptcy history for the legal costs incurred in connection with an official committee's consideration of a KERP – a sum that will probably approach $1 million."*[245] Mr. Baker continued, "it is also perplexing to us, in light of the fact that you have previously informed us that the Committee is very concerned about controlling legal costs, that the Committee has embarked on a course of action that insures the highest possible legal costs."[246]

Mr. Baker further recognized the Committee's strategy of strategic litigation to achieve its aims:

> The Committee has an agenda, which is certainly its right. It has litigated ferociously in an effort to force the Company to accept that agenda, which is also its right. The Company, for its part, does not believe that the course of action proposed by the Committee is in the best interests of maximizing value and, consequently, has declined to agree with the Committee. As a result we are at an impasse.[247]

Mr. Baker suggested that this agenda has colored the Committee's view on the KERP:

> I do not believe that anyone who sat through the depositions to date can reasonably doubt the good faith or sincerity of the Company on these issues, but it is clear to me that the Committee must do so, or your letter would not have

[245] COMM0047222-25 (emphasis added). The KERP dispute actually ended up costing much more than that.

[246] COMM0047222-25.

[247] COMM0047222-25.

> employed the allegations it did with respect to the Company's management.[248]

Mr. Baker characterized the Committee proposal as an incentive plan that penalized employees for any delay in exiting chapter 11, while the Company sought to retain employees and thus wanted a KERP.[249] He stated that "the parties are so far apart on their Visions [sic] of how to rapidly extricate the Company from Chapter 11 and simultaneously maximize value that there is no reasonable prospect of settlement."[250] Indeed, he ended the letter with statement that an out-of-court resolution of the matter is "impossible."[251]

The Committee, or at least the two Committee members who received a copy of the letter, and its advisors were disappointed by the letter in that it did not respond to their proposal and "it really does not acknowledge any movement on our side whatsoever."[252] Interestingly, when the Examiner questioned Mr. Musante on why the Committee pursued litigation when the difference between the parties was not that great, Mr. Musante backtracked and answered that "$500,000 is a lot of money."[253]

Notwithstanding Mr. Baker's earlier expression that the KERP should not be tied to the plan or emergence, on July 7, 2005, he wrote a letter to Mr. Hodara in which he set forth a proposal aimed at satisfying the Committee's desire to implement a KERP with incentives for early emergence and penalties for delay. The proposal provided that the final KERP payment for

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[248] COMM0047222-25.

[249] COMM0047222-25.

[250] COMM0047222-25.

[251] COMM0047222-25.

[252] Ex. 62.

[253] Musante Tr. at 203.

senior management would be reduced by 5% should confirmation occur after December 31, 2004 and by an additional 5% should confirmation occur after March 31, 2005. At the same time, the final KERP payment for those individuals would be increased by 5% should confirmation occur prior to December 31, 2004.

7. The Costly KERP Hearing and Forced Resolution

Not surprisingly, the parties were unable to resolve their differences, leading to a heavily-contested discovery process and a three day hearing on the KERP motion ending on July 14, 2005. A total of eight people were deposed and six people testified in connection with the KERP litigation, including experts on both sides. After the three-day hearing, the Court's indication that it would not "split the baby," but would rule totally in favor of one side or the other was the impetus for the parties to reach an agreement on a KERP.

8. The KERP Settlement

The agreement, which was memorialized in a stipulation approved by the Court on August 5, 2004, embodied a KERP that was consistent with FiberMark's final proposal.[254] The total amount of the retention payments was agreed to be $3,279,000, a reduction of $375,000 from FiberMark's final proposal, while the total amount of the severance payments was agreed to be $4,099,866, a reduction of only $133,512 from FiberMark's final proposal.[255] Moreover, the milestones were similar to those set forth in that proposal: as soon as practical after entry of an order approving the KERP, the effective date of the plan, and 120 days after the

[254] Stipulation Resolving Disputes Between Debtors And Committee With Respect To (I) Debtors' Motion For Order Under 11 U.S.C. Section 105(a) and 363(b)(1) Authorizing Implementation Of Key Employment Retention And Severance Plans And (II) Debtors' Motion For Order Under 11 U.S.C Section 1121(d) Extending Exclusive Periods For Filing Chapter 11 Plans and Obtaining Acceptances Of Such Plans, dated August 5, 2004.

[255] The reduction in the amount of the severance payments is not reflected in the Stipulation Resolving Disputes; however, various other memorandums discuss the change. COMM0255151.

effective date. The top six employees would receive 25% in the first installment, 25% in the second installment, and 50% in the final installment. Thus, after a three day trial preceded by extended discovery, the Committee achieved a result whose benefits were significantly offset by the costs of the proceeding.

The KERP litigation resulted in a decrease from the proposal set forth in the KERP motion of $1,987,239 in retention payments ($5,266,239 to $3,279,000), of $1,437,552 in maximum theoretical severance payments ($5,670,930 to $4,233,378), and of $200,000 in the discretionary recognition program. The KERP battle was very expensive, not only in terms of the legal fees incurred, but also in terms of the delay caused and, most importantly, the poisonous relationship it fostered between FiberMark and the Committee. The professional fees charged in connection with KERP litigation totaled approximately $1,650,000. Akin billed approximately $880,000 for about 2,150 hours spent in connection with the KERP litigation. In addition, Akin paid $80,000 to Ernst & Young and $87,000 to FTI Consulting for expert services, bringing the Committee's total fees (not including Chanin) in connection with the KERP litigation to approximately $1,050,000. In addition, Skadden billed approximately $600,000 for about 1,300 hours spent in connection with the KERP litigation.[256]

The Committee knew the KERP fight would be costly. The question is whether the Committee seriously contemplated whether the costs would be worth the savings to the estate. Mr. Musante testified that the Committee performed a cost/benefit analysis, considering

> [h]ow much was being sought under the KERP, how much we believed that exceeded "market standards" whatever that means. What it might cost to litigate this issue on an adversarial basis with the debtor. Whether there were other

[256] The figures in this paragraph do not include expenses, which undoubtedly are in the tens of thousands of dollars.

> benefits that might also reduce administrative expenses to the estate that could be achieved in connection with it. And we made the determination that opposing the KERP was the right choice at that time.[257]

He also noted that "[o]bjecting and pushing back does not always lead to litigation. It often leads to resolution."[258] Mr. Musante has a selective memory, remembering facts and events in his favor but too often answering "I don't recall" or "I don't recall specifically" when asked about facts that might weaken his position.[259]

There are several indications that the KERP litigation was less about the economics and more about demonstrating to the Court and FiberMark who was in control, i.e. the Committee. As noted in a June 25, 2004 e-mail from Ms. Johnston to Michael Hopkins of Covington, reviewing the various topics discussed in a Committee call the day before:

> *It appears that no compromise of the KERP is likely, not so much because they are so very far apart on the numbers but because Chanin thinks this is a good opportunity to make the pitch to the judge about how the case should go (i.e. early all equity plan).* They are gearing up for full trial on the issue on July 9th. The gap between the settlement offers appears to range between 600,000 and 2 million (not clear what the real gap is because they are talking apples and oranges-the debtor only wants [severance] and retention and the UCC has offered [something] else which I [didn't] quite grasp in exchange for the early equity plan). I asked if they were prepared to take the risk that they might lose the whole thing (which would be the debtor's kerp proposal of $8 million) in exchange for the opportunity and while they weren't completely open I gather the answer is yes. *Which makes sense when you remember that the noteholders are angling for all equity, so depleting the cash reserves with a KERP doesn't matter much to them.*

[257] Musante Tr. at 175.

[258] Musante Tr. at 176.

[259] The testimony on pages 179 and 182 of the transcript, discussing the Committee's position on the KERP, provide a good example. Musante Tr. at 179, 182.

> Chanin led the discussion, Fred was basically a moderator. They had no prediction of how the court might rule.[260]

On July 12, 2004, Ms. Johnston expanded on the point:

> On one of our calls with the committee, Chanin and Akin, Chanin indicated that the ultimate goal is not necessarily to prevail on the KERP, although that would be nice. *Instead, it is to educate the judge at this early opportunity of the committee's view as to the immediate all equity plan.* This is one of the reasons they did not reach a settlement with the company before the trial started – there was no way to compromise between the debtor's desire to run its case the way it wants to and the noteholder's desire to take over the company at the earliest possible moment. It wasn't just an economic gap, that is – it was a philosophical difference of opinion as to where the case should go. *My guess is that Akin does not really expect to win the litigation, and they may not think losing will be especially harmful to any interests that are of value to the noteholders.* Since the noteholders don't want cash as plan consideration in any event, forcing the company to spend money to litigate this issue is not the trigger that it would normally be to unsecured creditors. Thus, I suspect that Akin will have no interest in trying to settle before concluding the trial, *as that would compromise the fundamental goal of forcing the UCC's plan down the company's throat.*[261]

Ms. MacDonald testified that Chanin's reference to getting a message to the judge was "about control and who's going to decide what and who's going to decide how this company is going to go forward and who is in charge."[262] She elaborated that it was really AIG sending "the message that they were running – going to run the show."[263]

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[260] Ex. 24 (emphasis added).

[261] Ex. 25 (emphasis added).

[262] MacDonald Tr. at 54.

[263] MacDonald Tr. at 54.

Mr. Hodara denied that the KERP litigation was brought for the purpose of informing the Court that the Committee strongly desired to have a plan filed as soon as possible and that FiberMark had not been willing to discuss the plan elements with the Committee, but admitted "I think that, as a subsidiary matter, that it would have been our intention to get those points across to her."[264] He further testified that the desired message was conveyed to the Court.[265] Mr. Musante also denied that the primary purpose of the KERP litigation was to send a message to the Court, testifying, instead, that the "primary purpose of the objection was to reduce the size of the KERP."[266]

H. Summer/Fall 2004: Sale and Plan Issues

1. June 7, 2004 Meeting

As discussed above, on June 7, 2004, representatives of FiberMark, Berenson, Chanin, AIG, and Post (but not attorneys or representatives of Wilmington or SDI) met in Los Angeles to discuss the status of the reorganization cases. The parties differed as to their recollection of the purpose of the meeting. Mr. Hanley testified that the main purpose was to try to settle the KERP, but that there were other issues including that Berenson had received some attractive offers for the FiberMark assets.[267] Mr. Hodara testified that "[t]here were several purposes from the perspective of AIG and Post, including the ultimate goal of wrapping together all of the major issues in the case in order to get to a fast plan of reorganization and emergence

[264] Hodara Tr. at 235.

[265] Hodara Tr. at 236.

[266] Musante Tr. at 191-92.

[267] Hanley Tr. at 45-46.

from bankruptcy."[268] Contrary to the April meeting, this atmosphere at the June Los Angeles meeting was described more positively.[269]

2. Initial Discussion of Sale Process—Agreement on Dual Track

Perhaps the one item all parties agreed on was that these were relatively simple chapter 11 cases and FiberMark should be able to emerge by the end of 2004. Mr. Hanley testified that "[f]rom my perspective, [the chapter 11 case] was pretty cut and dry. De lever [sic] the balance sheet, get out, and get on with business."[270] Ms. MacDonald testified that "[t]he committee thought it would be a very quick Chapter 11 process" and that she thought the case would be over by November.[271] Mr. Hodara agreed that "this was the kind of company that could be restructured very quickly" and was not complex in terms of its financial structure.[272] While not complex in financial structure, Mr. Hodara stated that the case was complex in terms of relationships.[273] "Right from the beginning, it was clear that there was the potential for problems because of the relationships between company management, company professionals and the Creditors."[274] Mr. Berenson similarly testified that it was FiberMark's impression "that the case had become suffused with personal animus for reasons that were unclear."[275]

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[268] Hodara Tr. at 310.

[269] Hanley Tr. at 57 ("Nobody was harsh or nasty or disrespectful in the meetings.").

[270] Hanley Tr. at 48.

[271] MacDonald Tr. at 25-26.

[272] Hodara Tr. at 112.

[273] Hodara Tr. at 112.

[274] Hodara Tr. at 112.

[275] Berenson Tr. at 99. Mr. Berenson further testified that the animus "was clearly between Tom Musante and Alex Kwader." Berenson Tr. at 99.

Despite the general consensus on the desirability and feasibility of an early exit from chapter 11, there was a disagreement between FiberMark and the Committee on how to achieve that common goal. FiberMark, on the other hand, believed it prudent to pursue a sales process. This difference in strategy was revealed at the June 7 meeting.

At the meeting AIG and Post produced a term sheet for a proposed plan of reorganization for FiberMark. Berenson and FiberMark were surprised. They presented their own views for an M&A or sale process.[276] This was the first time that FiberMark's pursuit of a sales process was discussed with creditors.[277]

Mr. Berenson testified in respect of the sales process, that the "initial response was negative because it was viewed as simply a way to postpone an expeditious emergence from the bankruptcy proceeding."[278] Mr. Kwader testified similarly.[279]

It is unclear why FiberMark decided to pursue a sales process despite the general agreement among the parties that these were simple cases of debtors in need of a deleveraging. When asked why, if FiberMark commenced the chapter 11 cases to deleverage, it decided to pursue a sales process, Mr. Hanley admitted "I am not sure I have a good answer for that . . . The sales process, those discussions for the time being is escaping me, all of the logic as to why we pursued that."[280] Mr. Hanley tacitly admitted that pursuit of the sales process delayed the

[276] Hanley Tr. at 53.

[277] Hanley Tr. at 54-55; COMM0045771.

[278] Berenson Tr. at 69.

[279] Kwader Tr. at 39.

[280] Hanley Tr. at 58.

chapter 11 process.[281] Mr. Berenson testified that he thought it made sense to explore a possible sale "given the dynamic that was developing between the creditors' committee and the company, as well as the other matters I referred to earlier."[282] It is unclear to what "other matters" Mr. Berenson was referring but it may have been "[t]he relationship between the ultimate owners of the business and the company's management where the company's current management fit in," which was stated in his previous answer.[283]

After reviewing the transcript from his first examination, Mr. Berenson asked in his second examination to clarify the foregoing response. He testified that the motivation to pursue a sale process early on was partly due to concerns that, given at the time the majority of the debt was held by widely dispersed creditors (i.e., Silver Point had not surfaced yet), "the proposal to swap [100% of the] debt for equity and importantly to do so in the context of keeping the company private for an indefinite period of time could provide issues, meaningful issues for the value of the residual securities, and certainly the ability of smaller holders to liquify those in the marketplace."[284]

Mr. Berenson's testimony suggests that the desire to maintain the jobs of current management was also considered, although he phrased it differently, stating that there was no plan in place to run the Company:

> [I]t was clear that the creditors' committee in the context of their desire would immediately have replaced the chief

[281] Hanley Tr. at 59.

[282] Berenson Tr. at 69.

[283] Berenson Tr. at 68-69.

[284] Berenson Tr. at 155. Interestingly, in 2005, when AIG and Post were no longer the largest creditors and had liquidity concerns of their own, they decided a sales process was in the best interest of creditors.

> executive officer of FiberMark. It was unclear to us which other senior management would have been replaced, as it might have been to them at that point in fairness. But there was no coherent plan being forwarded for running the business by a new board or a punitively new management team, certainly a chief executive officer.[285]

Mr. Zughayer also testified that Berenson pursued a sale for reasons relating to valuation and recovery to creditors, but also confirmed that distrust of Mr. Musante and potentially concerns regarding post-emergence management influenced the decision:

> I think the management and the board were genuinely concerned about the committee's chairman's behavior and his demeanor and what would happen if he ultimately took control of the board just given his views and his ability to work cohesively with anybody.
>
> We thought it would really hurt the value of the business to the detriment of the other shareholders and creditors just given that he had made several statements of, you know, how he was going to be the chairman of the board and certain decisions were made by him.[286]

Mr. Musante expressed that he would prefer to forgo the M&A process and instead pursue a quick plan of reorganization.[287] Although Mr. Musante expressed that FiberMark should be able to emerge from chapter 11 within a few months, Mr. Berenson testified that "I don't think anybody on our side believed that emerging from this particular bankruptcy process in three or four months was realistic." Mr. Berenson also did not believe that

[285] Berenson Tr. at 156-57. Mr. Berenson protested that his statement "should not be construed as an effort to preserve the jobs of management." Berenson Tr. at 157.

[286] Zughayer Tr. at 49.

[287] Hanley Tr. at 52 ("Mr. Musante had explained to me. . . that they felt that they would get, if not all of their money back most of it back through either, you know, a de-leveraging of the company and owning the equity and turning around so that they would get most of their money back if not 100 cents on the dollar.").

the sale process would unduly delay the process.[288] "We were of the view that an expedited sale process could take place within a matter of months. . . We could explore a sale, make a determination of whether or not there was value, structure, terms and conditions that would be interesting to the company's creditors with ease and we were right. In retrospect we were absolutely right about that."[289]

Mr. Berenson and Mr. Kwader both testified that although AIG and Post were initially opposed to a sale process, they became somewhat interested when Mr. Berenson quoted indications of interest from potential buyers that might achieve ranges of value for the business as high as $250-275 million.[290] Ultimately, the parties agreed to pursue a dual track: proceed with the sale process while concurrently formulating and processing a plan of reorganization.[291]

3. Disputes over the Sale Process—Breakdown of Agreement

Throughout the cases, agreements between FiberMark and the Committee proved to be illusory. Despite the agreement to continue on a dual track, tensions persisted between FiberMark and the Committee during the process. According to Mr. Musante, the Committee was still opposed to the sale process.[292] On the other side, Berenson was concentrating on the sale process and not formulating the terms of the plan.[293]

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[288] Berenson Tr. at 70.

[289] Berenson Tr. at 71.

[290] Berenson Tr. at 69-70. Although Mr. Kwader quoted the value at $270 million, Kwader Tr. at 39, Mr. Hanley corroborated Mr. Berenson's testimony that the valuation discussed was in the $250-$275 million range. Hanley Tr. at 51-52.

[291] Hanley Tr. at 60; Berenson Tr. at 71-72.

[292] Musante Tr. at 207.

[293] Ex. 17.

Mr. Musante blamed FiberMark for unduly delaying emergence, by pursuing the KERP and the sale process, rather than focusing on a plan:

> In my view that we didn't get out in September because the debtor was unwilling to work with the committee toward putting together a plan for emergence and instead spent their time putting KERPs that we believed were outsized in this place, moving for the opportunity to run a sale process and see what bids were out there over the objection of the committee before putting a plan on the table.[294]

Mr. Hodara testified that

> despite the agreement with the company and its advisors to move forward on a dual track, it seemed to us only a matter of weeks after the KERP and exclusivity hearings that Berenson was still focusing almost exclusively on the sale and not putting any effort into the other part of the dual track, the plan. . . It was not until the end of August that Mr. Baker finally said to me, Okay, as soon as my colleague Rosalie Gray returns from holiday she will have the drafting of the plan as her Number 1 assignment, which is, in fact what happened.[295]

The Committee also had fundamental disagreements with the way the sale process was being run. As Mr. Victor stated in an August 6, 2005 e-mail, "we just believe they're running a process at the wrong time, and in the wrong way. As a result, we feel that value will not be optimized because of the process they're undertaking here."[296] Mr. Victor was critical of FiberMark's unwillingness to work with the Noteholders: "This company will try anything, before agreeing to work for the bondholders and do a 'stand-alone' plan. I'd certainly like to see

[294] Musante Tr. at 206.

[295] Hodara Tr. at 359-60.

[296] Ex. 158.

Berenson's analysis as to why they think that shopping a company in a free fall bankruptcy with creditors objecting to the process creates an environment which maximizes value."[297]

Moreover, as Berenson and the FiberMark received offers, they were refusing to share information about the prospective buyers or the term sheets with the Committee.[298] Demonstrating the intense distrust that permeated the relationship among various parties throughout the chapter 11 cases, according to a Covington attorney, during an August 9, 2004 Committee call, Chanin attributed this reluctance to share information "to the recent litigation over the KERP proposal and Berenson's view that the Committee cannot be trusted to keep the information regarding potential buyers confidential."[299]

Even "neutral" Wilmington and its attorneys at Covington were expressing frustration, particularly at FiberMark, over the lack of communication and distrust among the parties and attributed much of that animosity to the KERP fight. In an e-mail to Wilmington, Ms. Johnston remarked

> Akin and Chanin have given up much hope of working cooperatively with the Debtors based on Berenson's recent refusal to negotiate the terms of a stand alone plan while the sale process continues and its refusal to provide information to the Committee about the identity of the buyers. Chanin found this last point particularly offensive, I believe, and in fact there does not seem to be any basis for such a refusal—I don't think that any of the UCC advisors disclosed confidential information during the KERP hearing in a manner that would justify Berenson's refusal. It just seems like a bad feeling, which is no way to run a case like a fiduciary.[300]

[297] Ex. 158.

[298] Ex. 17.

[299] Ex. 17.

[300] Ex. 17.

Ms. Johnston (accurately) prophesized that "the KERP litigation has probably already destroyed any possibility of a consensual case, at least for the near future."[301]

Mr. Berenson likewise admitted that it was distrust of the Committee that led to both FiberMark's refusal to negotiate a plan and a reluctance to provide the requested information.[302] Regarding the refusal to negotiate a plan with the Committee despite the agreement to continue on a dual track, Mr. Berenson testified that it was because of "a view on our part that there were certainly elements of the committee that were opposed to the sale process. Therefore, if we were engaged in this discussion, it made the exploration of a sales – it would effectively nullify the value of the exploration."[303] Mr. Berenson testified that Berenson refused to provide the Committee with requested information "[b]ecause we wished to maintain the confidentiality of the process. . . Chanin could not represent to us that there wouldn't be ex parte discussions with potential acquirers, and we did not believe that is either appropriate or efficient in terms of running the sales process."[304]

Mr. Berenson also revealed that a lot of the distrust was based on the KERP, testifying that "the KERP litigation made the approach of the creditors' committee abundantly clear, scorched earth."[305]

4. Committee's Consideration of Strategic Litigation over Exclusivity

[301] Ex. 17.

[302] Berenson Tr. at 96.

[303] Berenson Tr. at 96.

[304] Berenson Tr. at 97.

[305] Berenson Tr. at 98.

Subsequent to the call, Ms. MacDonald was "concerned" that "[i]f we file a motion so soon . . . the judge will conclude that we agree to things and then come right back into court and not honor our commitment."[306]

The recommendation to move to terminate exclusivity was consistent with the Committee's tactical use of strategic litigation to achieve its ends. According to Mr. Beeler of Covington, "Hodara speculates that the motion to terminate exclusivity has about a 50% chance of success, but he also explained that the motion, even if not granted, may bring the Debtors to the table and result in a settlement that puts the Committee in a better position with regard to plan formulation."[307] Wilmington recognized that continuing the rift between FiberMark and the Committee was not beneficial. Mr. McGinley revealed that his "gut feeling is that filing a motion to terminate exclusivity is only going to alienate the debtors further and unlikely to be granted-so why waste time and effort.?"[308] In this instance, the motion was unnecessary as Skadden agreed with Akin to promptly draft and propose a plan.

5. Committee's Rejection of Sale Prospect

In pursuing a sale, FiberMark and Berenson put together and made several management presentations to interested parties.[309] As a result, FiberMark received several firm offers, which it shared with the Committee, but the only meaningful one was for the German business.[310] According to Mr. Hanley, the offer was for $223 million ("subject to additional due

[306] Ex. 156.

[307] CB015961.

[308] CB015961.

[309] Hanley Tr. at 70 (estimating the number at half dozen).

[310] Hanley Tr. at 70-71.

diligence which always means something less"), and FiberMark expected to receive up to $50 million for the North American business.[311]

On November 5, 2004, Mr. Oh from Berenson forwarded the offeror's non-binding proposal, dated November 4, 2004, for the German business to Chanin with the note that "the valuation itself is somewhat disappointing and the wording in the letter seems to suggest more open due diligence issues than was necessarily intended according to the CSFB representative."[312] Moreover, Mr. Oh wrote that "[w]e would like to propose a call early next week between the company's advisors and the Committee and its advisors to discuss our proposed follow-up to [the offeror], the status of our discussions regarding the sale of North America and exit financing."[313]

When this offer was presented to AIG, Post and Silver Point, they responded that they would reject any offer for less than $310 million.[314] Although Ms. MacDonald testified that neither Wilmington nor SDI was asked their views of the offers and the issue was never put to a formal vote in the Committee,[315] it appears that Chanin did ask all Committee members whether they supported the Committee position.[316] Specifically, on November 16, 2004, Mr. Corbell sent an e-mail to the entire Committee stating that it "would like to convey the Committee's position

[311] Hanley Tr. at 71-72. After receiving the offer, in September 2004, Mr. Hanley, Mr. Kwader, Mr. Corbell, Mr. Wagonseller, and perhaps Mr. Musante went to Germany to make a presentation. Hanley Tr. at 73. This is yet another example of Committee members other than Mr. Musante being excluded from significant meetings.

[312] Ex. 77.

[313] Ex. 77.

[314] Hanley Tr. at 72.

[315] MacDonald Tr. at 65.

[316] Ex. 137.

as soon as possible: $310 million enterprise value for the entire business assuming a stock sale as defined by the Committee."[317] Nevertheless, it is likely that the decision to propose that number was developed by Chanin and the Noteholder members of the Committee without input from Wilmington or SDI (thus contributing to Ms. MacDonald's lack of familiarity with the issue). The e-mail from Mr. Corbell states that it is "a follow up to the discussion with Committee members during the nearly all-day conference call late last week to resolve plan and disclosure statement issues, [where] Committee members discussed what 'fill-or-kill' counter the Committee would authorize Berenson to convey to [the offeror]."[318]

According to Mr. Berenson, Mr. Musante delivered the message to him that the Committee would not support a sale unless a number north of $310 million was being offered.[319] In his examination, Mr. Musante protested that this number was not a floor, but merely a "negotiat[ing] point" for the Debtors."[320] The e-mail from Mr. Corbell discussed in the preceding paragraph supports this position; however, if it was a negotiating point and not a floor, the Committee did not do an adequate job of communicating that to Berenson. In any case, according to Mr. Baker, had the Committee stated at the beginning that it would not accept anything less than $310 million, FiberMark never would have recommended the sale process, because they knew they would never receive offers that high.[321]

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[317] Ex. 137.

[318] Ex. 137.

[319] Berenson Tr. at 84, 166-67.

[320] Musante Tr. at 215, 218-19.

[321] Baker Interview.

Nevertheless as a result of the Committee's submission of $310 million as a floor, the Company ceased pursuing the sales process[322] and concentrated on the plan of reorganization development.[323] By the time the sales process terminated in November 2004, a plan of reorganization had been drafted, and the Noteholders were negotiating the amount and the terms of the new notes to be issued under the plan and the terms of the indenture for such notes.[324]

6. Plan Negotiations

From the inception of the chapter 11 cases it was conceded that FiberMark was insolvent and that equity interests were out of the money and would not participate in the chapter 11 reorganization.[325] Thus, in late summer 2004, when FiberMark and the Committee were negotiating the terms of a plan of reorganization, the plan itself was not contentious.[326]

> As early as June 2004, the Committee's advisors, Mr. Musante and Ms. Choi came to the initial conclusion that an all equity deal made the most sense, as compared to, for example, a recovery that was part equity and part debt.

In a later e-mail in the same chain, he explained further that an all equity plan was necessary, because "Debtor can't support much debt, and is better with none."[327] As such, the first plan

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[322] Berenson Tr. at 167.

[323] Hanley Tr. at 72.

[324] Hanley Tr. at 74-75.

[325] Musante Tr. at 130-31. Mr. Hanley testified that there was "absolutely" a general agreement that the Company was insolvent. Hanley Tr. at 47. He explained that although some stockholders had filed a motion for the appointment of an equity committee, FiberMark opposed the motion, because "the expected valuation or enterprise value of the company in any proceeds that would be available to distribute would be considerably less than the unsecured debts that existed at the time of the filing. So therefore, there would be no residual available to the equity holders." Hanley Tr. at 48.

[326] MacDonald Tr. at 67-68.

[327] Ex. 60. During the time of the plan negotiations Berenson's view was that the Company "could comfortably sustain debt capacity in the range of 150 to $175 million." Berenson Tr. at 87.

proposal made by the Committee to FiberMark, which was at the June 7, 2004 meeting, involved a simple distribution of 100% of the equity to creditors.[328] There was no mention of the FiberMark issuing new debt securities under a plan.

At the request of Post, the Committee began considering including a debt component to creditors' recoveries[329] and eventually the Committee proposed a plan that included $125 million in senior secured notes being issued to creditors.[330] The first discussion of new debt for the chapter 11 creditors appears to have occurred during a Committee call held on June 29, 2004. In a contemporaneous e-mail by Ms. Johnston to the Wilmington team describing the call, she wrote that in connection with the Committee's proposed plan term sheet,

> [I]t was decided to keep it an all equity proposal for the present on the theory that it would be easier to terminate exclusivity with an all equity plan (because it would be easier to confirm). There was a great deal of discussion as to whether some debt would make the equity more liquid if there are only three principal equity holders post-confirmation. Chanin thinks not. They are reserving the option of doing a debt to debt conversion for some of the debt if Silverpoint [sic] or other significant claimants are interested.[331]

Ms. Johnston also stated

> they. . . make a credible case for why an all equity plan works for the bondholders, along the lines of the securities will be more liquid and consequently more marketable, and thus have a higher ultimate value, if the company eradicates its unsecured debt. Assuming the noteholders are able to take

[328] COMM0045773 (Agenda for June 7, 2004 Meeting).

[329] Musante Tr. at 225-26, Ex. 63.

[330] MacDonald Tr. at 67-68.

[331] CB015940-42.

> equity, it is hard to see how the large institutions that principally hold the note would disagree with this analysis.[332]

Although it is unclear to whom Ms. Johnston is referring by use of the word "they," it appears she is referring to Mr. Musante, Ms. Choi and the Committee's advisors.

During a September 27, 2004 Committee call, Ms. Choi raised the issue of including new debt notes in the proposed plan,[333] and on September 28, 2004, Ms. Choi sent an e-mail to Mr. Musante and the Committee's advisors with the "first cut" of a term sheet for such notes.[334] It appears that Silver Point was also in favor of receiving new debt as part of its recovery.[335] Asked how the Committee could propose the $125 million in notes after he had concluded that FiberMark was better off with no debt, Mr. Musante backpedaled. He testified that in the beginning, he believed that a full equitization of the Notes was appropriate, but this conclusion

> had less to do with debt capacity limitations of the debtor than it did with respect to the ultimate trading value of securities that might be issued. And that the equity markets may be a little bit more forgiving and that having substantial equity flow here may provide greater liquidity and greater value to the creditors as a whole.[336]

[332] CB015940-42.

[333] CB015965-66.

[334] Ex. 63.

[335] Musante Tr. at 510.

[336] Musante Tr. at 160.

According to Mr. Hodara, on the issue of debt capacity, "the range of view was with AIG on the low end at about a hundred million and Post and Silverpoint [sic] higher, and I think initially Silverpoint's [sic] view was the highest, somewhere in the 175 million range."[337]

Not only did the Committee change its position from supporting an all equity plan to proposing one that provided $125 million in new secured notes to creditors, it unilaterally set the interest rate for such notes at a level that FiberMark's financial advisor deemed to be above market. Berenson received proposals from various reputable banks for exit facilities ranging from $125 million to $200 million, all of which had interest rates in the single digits.[338] The Committee, however, rejected the idea of FiberMark pursuing third party financing to enable a cash dividend to general unsecured creditors, including Noteholders.[339]

Despite the fact that "the company was unhappy with the [non-market] aspects of the debt," FiberMark agreed to the plan provision "with the simple caveat that it would help smooth the way for an expeditious emergence from bankruptcy.[340] Mr. Hanley had a similar view. He said they had "arrived at a $125 million note value at a very, very high interest rate which none of us liked, including Berenson, but the feeling was that it was a necessary step to move the plan forward."[341] The agreed interest rate, which was "a condition imposed by the

[337] Hodara Tr. at 273.

[338] Berenson Tr. at 88-89.

[339] Berenson Tr. at 89-90.

[340] Berenson Tr. at. 93-94.

[341] Hanley Tr. at 74-75.

creditors' committee" was six-month LIBOR plus nine points, which at the time amounted to 12 percent per annum, while market for a comparable credit was about 7 to 8 percent.[342]

Ms. MacDonald of Wilmington said that the important issues of the level of debt and the interest rate were not discussed or decided at the Committee level – "that just appeared."[343] Again, Wilmington was a bystander and not a participant. Mr. Hodara recognized that the terms of the new notes had been determined only by the Big 3 and knew that Wilmington in particular was sensitive about not being included in major decisions. After Chanin already put together the draft term sheet for the notes, Mr. Hodara wrote to the Akin team:

> I just want to confirm your point about circulating to the full Committee – at this stage we should indeed be circulating to the FULL committee. Be innocuous in the cover memo so that the rest of the Committee does not get their noses out of joint about the Big 3 meeting "clandestinely."[344]

I. The Dominance of Self-Interest: The Cash Option

FiberMark and the Committee engaged in another round of intense negotiations on the eve of filing FiberMark's plan and disclosure statement and just days prior to the expiration of FiberMark's period of exclusivity in November of 2004.

1. FiberMark's Proposal

FiberMark notified the Committee of its proposal to include a provision in the plan that allowed the general unsecured creditors of Class 10, which included trade and management claims, to opt for a cash payment in lieu of an issuance of stock and notes (the "Cash Option"). FiberMark urged that the Cash Option be implemented because the stock and

[342] Hanley Tr. at 75.

[343] MacDonald Tr. at 69-70.

[344] COMM0137426.

notes to be issued under the plan would be highly illiquid; therefore, smaller creditors, in particular, would be unable to dispose of them without incurring large losses via discounts. FiberMark apparently concluded that the plan structure contained a bias in favor of large institutional creditors and against smaller creditors with less staying power.[345]

2. Dispute over Valuation and Level of Cash Payout

At first the Big 3 were opposed to a Cash Option on the grounds that they did not want cash going out of FiberMark and they did not want employees to participate. As a result, debate over the Cash Option was lengthy and contentious. FiberMark's initial proposal for a cash payout was approximately 62 to 63 cents on the dollar.[346] In response, Mr. Musante and the Committee countered with a proposal of 30 cents on the dollar. While Mr. Hobart appeared to go along with this low proposal,[347] Mr. Sawyer voiced concern, expressing to Mr. Musante that such an offer was "low and unfair."[348] Mr. Musante reacted "[w]ith an argument trying to rationalize the amount based on discount to plan value and other scenarios…."[349] Indeed, in a November 23 e-mail, Mr. Musante highlighted what he believed to be the two goals of the

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[345] COMM0033459.

[346] Sawyer Tr. at 195.

[347] PA14478. (November 12, 2004 e-mail from Mr. Hobart to Mr. Goldsmith). Mr. Hobart stated, "We initially said 'no' but when pushed we said that any offer would be at a discount (e.g., 30 cents)…." In his examination, Mr. Hobart clarified:

> I recall we discussed telling the company a flat no, and that a number was presented that was low to – and whether it was 30 percent or some number like that, it was a number intended to tell the company that the general answer was no, but if people must have liquidity, that on the short notice we had, a low number was a position we could take at that time.

Hobart Tr. at 344.

[348] Sawyer Tr. at 195-96.

[349] Sawyer Tr. at 196.

Committee: (1) valuation and (2) cash discount.[350] He noted a discrepancy in valuation between the Committee's calculation and that of Berenson, yet stated that there may be a way to forge a common ground and achieve "our goal on valuation."[351] This goal was clearly a higher valuation. Mr. Musante noted that:

> [t]he Company wants roughly [a] 60% cash option. At their initial valuation of a 70-72 cent recovery, this was a 15% discount. However, the Company has since reduced its recovery estimates to around 64 cents, meaning that a 60% cash option represents a 6-7% discount. The discount suggested was absurd at 15% and is more so given the reduced valuation. HOWEVER, at the same 64 cent valuation, a 25% discount yields a 48 cent cash recovery. At the Committee's desired 72 cent valuation, 48 cents represents a 1/3 cash discount. These are far more reasonable cash discounts. If the Company will work with us to achieve and incorporate into the plan a 72 cent valuation (fully supportable by the work Berenson has done), I suggest we make the cash option available to either (1) non-employees only at 50% or (2) to all non-bond claims of less than $1MM at 48% or (3) all non-bond claims, regardless of size, at 46%. This will cost, depending on option and acceptance, $3MM-$6.2MM.[352]

Noting Mr. Sawyer's willingness to consider a higher price and Mr. Hobart's ceiling of 50 cents, Mr. Musante emphasized avoiding a scenario where they "have nowhere to go" in negotiations with a "recalcitrant board."[353]

Mr. Musante's contemporaneous e-mails demonstrate (i) his views that the board should do what he wants, (ii) he cared only about the bondholder members of the Committee, and (iii) he was willing of going to war on this issue, including options as serious as filing a

[350] SP00005037-39.

[351] SP00005037-39.

[352] SP00005037-39.

[353] SP00005037-39.

breach of fiduciary duties action against the board and firing senior management. To wit, in a section labeled "stick," Mr. Musante urged his follow Noteholder Committee members (but not others):

> I think this board needs a kick in the pants to get with the program. We can save $3-6MM (and the carrying cost thereof – less the 4% dilution these claims represent) by rejecting the cash option. *If the board insists on putting forth a cash option not agreeable to the committee (and frankly its bondholder constituents), we should be firm in our willingness to reject the plan and move forward with our own. While there will be increased costs and time delays associated with this, these are more than offset by some or all of the following (1) the cash savings inherent in eliminating the cash option, (2) rejecting substantive consolidation, (3) eliminating releases for the board and its advisors, (4) fee reductions for Berenson and Skadden for pursing a plan that is [dead on arrival], (5) actions against the board for breach of duty for its actions pre-filing to present, (6) potential dismissal of certain senior management for cause, and (7) any other rights or remedies we may have.* If this board wants to proceed on this issue on its own, I say bring it on. That said, I am willing to discuss consensual resolution, but that means we consent.[354]

On November 24, 2004, Mr. Baker reiterated FiberMark's commitment to having a cash option available and reported that the option should be at the 55% level.[355] To ensure that the liquidity of FiberMark was not unduly taxed in the event that unsecured claims are allowed in amounts exceeding the current estimates, FiberMark also supported placing a cap of $8 million on the amount of cash that could be paid out.[356]

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[354] SP00005037-39 (emphasis added).

[355] COMM0016808.

[356] COMM0033458-62. As a result of the cap, to the extent that the claims of creditors electing the option exceed approximately $15 million, then the amount of cash received would decline from 55 cents, to whatever an actual pro rata share might be. In turn, the Debtors would provide the creditors a short-term opportunity to opt back to stock and notes if the pro rata share amount is determined to be less than 55 cents.

In response, Mr. Musante stated perfunctorily, "[g]etting past all the bs, I suggest a counter at 47%, uncapped, provided by Noteholders, subject to agreement on valuation."[357] Focusing again on valuation, Mr. Musante apparently hoped to forge a link between valuation (and its tax consequences) to the Cash Option and signal, without any real justification, that any ultimate resolution would be at 50 or less.[358]

On December 1, 2004, Mr. Musante reported that the valuation "range is now 265-305, midpoint of 285" which he considered "[s]till low to what it should be, but getting better."[359] He added that the proposal was "52 cents on claim," "all non-bonds eligible," $7.8MM cap (assumes $15MM total claims)," "some commitment fee for backstop," and "any successful preference actions will be entitled to participate."[360] In response, Mr. Sawyer of Silver Point asked whether they "raise any issues with the former equity as the top end of the valuation range moves forward."[361] As for the liquidity front, Mr. Sawyer expressed an intent to "shoot the pig" and tell Mr. Berenson "50 cents take it or leave it" since he believed a 1 cent move back and forth was "ridiculous" and that they were still getting a good deal.[362] Mr. Musante expressed some apprehension that the Board would accept such a proposal, referring to

[357] SP00005058-61.

[358] SP00005058-61.

[359] SP00005065-67.

[360] SP00005065-67.

[361] SP00005065-67.

[362] SP00005065-67.

Mr. Baker as a car salesman.[363] Meanwhile he questioned whether this was "worth fighting over" and noted that "we are talking about $3.6MM difference for each penny."[364]

By December 2004, some inclination to compromise finally appeared. On December 8, 2004, Mr. Corbell reported to all of the Committee members that the Board authorized the following for the Cash Option to non-bond unsecured creditors: i) a cash-out option of 52% of claim (implying a cash payment of $6.782 million for cash-out); ii) a cap on cash payment for cash-out option of $7 million; and iii) any successful preference claims are run through the FiberMark, such that FiberMark would receive 48% of the claim back in cash (to mimic the 52% cash-out option).[365]

Thus, after weeks of negotiations, on December 17, 2004, FiberMark filed a Joint Plan of Reorganization Under Chapter 11 (as amended, the "Plan") and related disclosure statement (as amended, the "Disclosure Statement") that provided an option to unsecured creditors of cash equal to 52% of the allowed amount of such holder's general unsecured claim, up to an aggregate of $7 million, with the final payment amount depending upon the amount of allowed general unsecured claims that chose cash.[366]

After reaching an arrangement on how much the Cash Option would be, the Committee and FiberMark then battled over how the Cash Option would be funded. The two

[363] SP00005065-67.

[364] SP00005065-67.

[365] SP00006323.

[366] Joint Plan Of Reorganization Under Chapter 11, Title 11, United States Code Of FiberMark, Inc., et al., Debtors, filed December 17, 2004, § 4.3(g); (Final) Disclosure Statement with Respect To Joint Plan Of Reorganization Under Chapter 11, Title 11, United States Code Of FiberMark, Inc., et al., Debtors, filed December 17, 2004, § VI(D)(2)(j).

methods contemplated included FiberMark funding the Cash Option itself or obtaining funding from a third party, including the Big 3.

On November 24th, Mr. Baker emphasized that if however "there is not an appetite on the part [of] any of the current bondholders to provide a liquidity option, then the Board is prepared to go forward with a plan that will provide one."[367] Indeed, Mr. Baker stated in his November 30 letter to Mr. Hodara that he believes "that the Board is comfortable with the Company's liquidity and debt capacity can accommodate up to this amount."[368] However, he also acknowledged that "the Committee has expressed a preference for any such facility to be provided by a third party or parties, such as existing noteholders."[369] As such, his November 30 letter offered a revised proposal noting that "the Committee originally expressed a preference for having the liquidity facility be provided by a third party, such as one or more of the existing noteholders" and "the Board supports a noteholder-provided liquidity facility of up to $8 million (or a higher amount, should the Committee desire to include smaller noteholder claims)."[370]

3. The Commitment Fee

Along with suggesting AIG, Silver Point and Post backstop the funding of the Cash Option, Mr. Musante, on November 30, stated "if we are required to expose our balance sheet in this way, we all should receive some commitment fee for doing so."[371] This he equated

[367] COMM0016808.

[368] COMM0033458-62.

[369] COMM0033458-62.

[370] COMM0033458-62.

[371] SP00005058-61 (November 30, 2004 e-mail from Mr. Musante). Mr. Musante testified, "I believe that we had provided the commitment and we're entitled to a commitment fee provided that the conditions to earning that were met …[i]t's for exposing your balance sheet." Musante Tr. at 265. Mr. Sawyer added, "Silver Point was okay with [the commitment fee]. We were providing a back stop for the company so we didn't take issue." Moreover, "[w]e

with opening a "[c]an of worms WITH dipping sauce," implying that a commitment fee could serve as an additional means for the Big 3 to benefit individually from the Cash Option.[372] Shortly thereafter, on November 30, Mr. Sawyer declared that he "agree[d] with Tom although not sure of the size or necessity of the commitment fee given the situation."[373]

Finally, on December 3, Mr. Hodara first acknowledged a willingness by FiberMark to pay a commitment fee of 1%, though the Big Three wanted 2%.[374] Pursuant to the Board's subsequent authorization of December 8, 2004, the cash to fund payments would come from either FiberMark or from non-company providers, for which those providing the commitment would receive a 2% commitment fee.[375] As such, the December 17 Plan and Disclosure Statement reflect that funding for the Cash Option will derive from either a special noteholder fund (capped at $7 million) or from FiberMark.[376] Mr. Hodara's notes indicate that on December 8,2004, FiberMark had agreed to a 2% commitment fee, which he deemed

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were, it was anticipated that AIG, Post and Silver Point would provide, on a pro rata basis, a commitment to fund the full cash out option to [the] fullest extent possible, if the maximum amount of [claimants] decided to take it, based on these levels, so the company had enough liquidity and then down the road the other bondholders would be given the option to come in and provide some of that. So it was considered a line of credit, so to speak, to the estate." Sawyer Tr. at 199.

[372] SP00005058 (November 30, 2004 e-mail from Mr. Musante).

[373] COMM0224453.

[374] COMM0180434. In his examination, Mr. Sawyer stated that he believed the commitment fee was 3% based on a $7 million commitment, regardless of whether the number of claimants took advantage of the cash option. Sawyer Tr. at 200.

[375] SP00006323.

[376] Joint Plan Of Reorganization Under Chapter 11, Title 11, United States Code Of FiberMark, Inc., et al., Debtors, filed December 17, 2004, § 4.3(g); (Final) Disclosure Statement with Respect To Joint Plan Of Reorganization Under Chapter 11, Title 11, United States Code Of FiberMark, Inc., et al., Debtors, filed December 17, 2004, § VI(D)(2)(j).

appropriate in view of the fact that funds will be tied up through the claims resolution process.[377] Indeed, the December 8 e-mail from Mr. Corbell acknowledges that the Board had authorized a 2% commitment fee for those non-company providers beholding themselves to a commitment.[378] Ultimately, the parties settled on a 3% commitment fee.[379]

4. Conclusion – Implication of Cash Option

Throughout the entire process of negotiating the Cash Option, the issue of fiduciary duties apparently received scant attention. Despite the vast amount of time expended as a result of the Big 3's limited attempt to monopolize the funding opportunity and their intense efforts to bargain down the percentage payout to other, smaller unsecured creditors and provide itself with an economic benefit in the form of a commitment fee, neither the Committee members nor attorneys for the Committee seemed concerned about the interests of the other unsecured creditors. Notably, Mr. Storz, in a December 1, 2004 e-mail, pointed out that the Big 3 and Committee advisors spent "considerable time and effort" to resolve the Cash Option issue. Though the debate did consume a lot of time, the costs associated therewith apparently received slight regard. When asked whether the cost savings from the chapter 11 process had been used up in professional fees, Mr. Sawyer replied "[o]nly in the context of delay [it] is in nobody's best interest and it continues to suck liquidity and value out of the estate."[380]

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[377] COMM0180439.

[378] PA03317-18.

[379] Joint Plan Of Reorganization Under Chapter 11, Title 11, United States Code Of FiberMark, Inc., et al., Debtors, filed December 17, 2004, §1.20.

[380] Sawyer Tr. at 75-76.

With respect to the commitment fee, on December 9, Mr. Hodara noted that "[t]he Big 3 (1) will commit tomorrow, (2) but they do not want the Committee to have potential liability – a backstop not wanted [sic] and (3) would there be an additional commitment fee for doing the full backstop, as opposed to those who came in later at pro rata..."[381] Mr. Hodara's notes reflect that Skadden stated in a prior deal that the U.S. Trustee "only wanted to ensure that opportunity was open to all" and thus "we can say that today that those that commit today can get the fee and others who join in later do not get fee."[382] "That will work fine for [the U.S. Trustee] according to Skadden."[383] Indeed, Mr. Sawyer noted that concern over self-dealing accusations served as the impetus for the recommendation to put forth a funding offer to all Noteholders in the class.[384] However, the Committee did not take it one step further and agree to dole out a pro rata share of the commitment fee as well. In fact, Mr. Sawyer stated that sharing of the commitment fee "was never contemplated."[385] When asked, then, how the participation of all Noteholders would have alleviated the self-dealing aspects of the commitment fee, Mr. Sawyer replied, "I guess it would not have gotten rid of the self dealings with regard to the commitment fee. The self-dealings was more focused on giving other bondholders the ability to pick up additional claims at a discount to the contemplated plan value."[386]

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[381] COMM0180442.

[382] COMM0180442.

[383] COMM0180442.

[384] Sawyer Tr. at 200-02.

[385] Sawyer Tr. at 200-02. Mr. Hobart testified that the commitment fee "was not viewed as a means of trying to gain some huge advantage from the estate for individual creditors, but as a solution when the company refused to take our initial answer of there should be no program whatsoever." Hobart Tr. at 356-57.

[386] Sawyer Tr. at 200-02.

Consideration of fiduciary duties also appear to have been ignored in the context of bargaining down the payout fee. Both Mr. Sawyer and Mr. Hobart seemed to insist that the value of the cash-out option was never a Committee issue; rather, it was only an issue in the scope of the larger plan.[387] Indeed, Mr. Sawyer confirmed a general lack of discussion regarding whether the Committee should have engaged in bargaining down the amount that was to be paid to other creditors.[388] Along these lines, Mr. Sawyer testified:

> I was going to say this is sort of a theme associated with the whole cashout option in terms of if you look at the dollar amounts, it really wasn't for some of the members a way to get to a fair result for some of the other claimants.
>
> It was a way to pick up more claims at a greater discount. That's reflected in some of the e-mail traffic that went back and forth.[389]

Finally, despite the fact that issues such as funding the Cash Option and the commitment fee affected all creditors, especially trade creditors, Wilmington and SDI were virtual ghosts throughout the discussions, a troublesome state of affairs in light of the fact that the Big 3 were involved in conflict-ridden decisions like who should have the opportunity to fund and at what payout rate. It is telling that Mr. Hobart had no recollection of whether Wilmington was involved in the Committee decisions about the Cash Option.[390] In fact, Mr. Hobart confirmed that "[t]here were calls regarding matters that concerned the committee among

[387] Sawyer Tr. at 74-75; Hobart Tr. at 353-56.

[388] Sawyer Tr. at 196.

[389] Sawyer Tr. at 208.

[390] Hobart Tr. at 354.

members of the committee that did not involve the entire committee."[391] This was regardless of Wilmington having concerns about committee members providing a backstop.[392] Mr. Sawyer testified that Wilmington was not privy to various Cash Option discussions because those talks were held in the context of FiberMark approaching the Big 3 to fund the Plan and not the Committee as a whole. Thus, Mr. Sawyer testified, the level of the Cash Option was not a Committee issue whereas the Cash Option's inclusion in the scope of a larger Plan was. Hence, these discussions apparently did not require Wilmington or SDI's participation.[393] Accordingly, it is unclear whether a Committee vote was even conducted on the matter.[394] Moreover, it is unclear whether Wilmington (or SDI) knew of the commitment fee to be provided the Big 3 for providing the backstop to the Cash Option.[395]

5. Debate over Payment of the Commitment Fee

Once the Cash Option was included in the Plan, FiberMark and Skadden realized that most creditors that would want to exercise the Cash Option were selling their claims to claims traders and withdrawing their election of the Cash Option. Consequently, the level of funding required to satisfy the Cash Option was lower than anticipated. FiberMark endeavored to minimize the cash payout further by encouraging further trading once it recognized that it could fund the option itself if the number of elections remained low. Doing so would allow

[391] Hobart Tr. at 355. Mr. Sawyer testified that he did not recall anyone from Wilmington or SDI being on any Cash Option-related calls. Sawyer Tr. at 202.

[392] Hobart Tr. at 358. Mr. Hobart testified that he had no recollection of whether SDI expressed a view of these issues.

[393] Sawyer Tr. at 74-75.

[394] Sawyer Tr. at 202.

[395] Sawyer Tr. at 211.

FiberMark to avoid use of the expensive Noteholder funding mechanism, including the commitment fee being paid to AIG, Post and Silver Point in connection therewith. While FiberMark was able to obtain the Committee's approval to eliminate cash option funding mechanism, pursuant to which all Noteholders were given the opportunity to participate on a pro rata basis, the three large Noteholders and Mr. Hodara were unwilling to forgo the $200,000 aggregate commitment fee.

On February 14, 2005, in response to the proposed Plan modification that provided for the possibility of FiberMark funding the Cash Option if the level of interest was so minimal, Mr. Hodara e-mailed Ms. Gray and Mr. Baker. He reported:

> I have spoken with [Mr. Musante] and [Mr. Sawyer] regarding the proposed Plan Modification and need to speak with [Mr. Hobart] as well…Their view is that the Company has a binding commitment to the Commitment Parties. They are willing to discuss having the Company ultimately make the cash payments if the payments do not exceed the level indicated, provided that the Company abide by its obligation to the Commitment Parties.[396]

Ms. Gray replied in astonishment and asked Mr. Hodara to clarify whether the Committee members were "taking the position that they should pocket commitment fees that were agreed to in the context of a $7 million standby commitment in a scenario in which they are required to put up nothing."[397] She sought a justification for this position noting that any

[396] Ex. 8.

[397] Ex. 8.

argument that FiberMark is bound is not credible.[398] Mr. Hodara replied petulantly, "Yes. That's what a commitment is for. Happy to discuss with you."[399] Ms. Gray retorted:

> *We had assumed that the three committee members would want to do what is in the best interest of the estate based on the facts now existing.* Given all of the bombs (termination events) placed by the committee members in the cash option provisions, it is not credible for any of them to say that they have relied on the expectation that they would be required to fund at any level and have legitimately earned a present right to be compensated. *On the present fact, the commitment fees are nothing more than a windfall for the three committee members.*[400]

Unwavering, on February 15, 2005, Mr. Hodara reiterated his position in a separate e-mail:

> ...to the extent the three holders have committed and made their credit available in exchange for a commitment fee, the custom in the industry is that the fee is earned, whether or not the borrower determines to draw the committed funds.
>
> My recollection is that it was the debtor that adamantly insisted on making a liquidity option available, so that, in the debtors words, minority holders would not become captive in an illiquid structure behind a controlling majority group. The three large holders agreed to make the liquidity option available with a committed backstop and then followed through on that commitment. Of course, many things have changed since that time, but the willingness of the Committed Parties to live up to their bargain has not.[401]

Mr. Hodara also added Messrs. Musante, Hobart and Sawyer to the distribution list of the e-mail, allowing each to weigh in. Mr. Musante responded with AIG's position:

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[398] Ex. 8.

[399] Ex. 8.

[400] FM00658-59.

[401] FM00676-77.

> We three holders collectively entered into a commitment to fund 100% of the maximum potential liquidity needs under the terms of the company demanded liquidity option. The commitment fee was earned upon issuance of the commitment (and our balance sheet was exposed to the obligation to fund at that time).
>
> ...the company demanded, and we provided, the full commitment at the time the company put this provision in the plan and sought court approval therefore. Accordingly the fee is currently due and payable at times set forth in the commitment letter.[402]

Mr. Hobart expressed a similar view in another e-mail to Ms. Gray on February 15, 2005, explaining that Post "requests that the debtors confirm that they will honor their obligation under the commitment that Post agreed to several months ago."[403]

Mr. Sawyer did not respond, but ultimately joined AIG and Post in demanding the payment of the commitment fee. Mr. Sawyer testified that Mr. Hodara's February 14 e-mail was "not an exact accurate reflection of [his] conversation with Mr. Hodara."[404] Mr. Sawyer, who questioned the need for the commitment fee during the negotiation of the terms of the cash payout option in November 2004,[405] instead stated that he did not feel that Silver Point was owed the commitment fee given FiberMark's decision.[406] Mr. Sawyer ultimately acquiesced to AIG's insistence on demanding the payment of the fee because AIG felt strongly about the payment of the fee and because the amount of liquidity involved was immaterial: "if this was a way to keep

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[402] COMM305447-49.

[403] COMM305450-52.

[404] Sawyer Tr. at 205.

[405] COMM33431.

[406] Sawyer Tr. at 206.

the process moving forward and to get a deal done, I would go along with whatever the other two committee members did, i.e. AIG and Post wanted to do on this point."[407]

Mr. Hodara further indicated that the Committee members were prepared to hijack the Plan modification process if FiberMark did not concede the commitment fee.[408] He insisted that the fee was for the commitment itself and not the funding: once it was authorized, it was earned, and the three Committee members displayed no intent to waive it.[409]

With a stalemate in place and no attempts to compromise via negotiations, Ms. Gray and FiberMark recognized that the Plan modification would not move forward unless FiberMark acquiesced. Consequently, Skadden included language in the revised draft of the confirmation order reflecting FiberMark's obligation to pay the commitment fee, despite the fact that all indications pointed to no need for the back-stop.[410]

Significantly, the controversy regarding the commitment fee in connection with the Plan modification was not presented to the full Committee even though Committee support was required for the proposed Plan modification. The Big 3, albeit to varying degrees, and Akin

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[407] Sawyer Tr. at 206. Mr. Sawyer added, "I believe Mr. Hodara did tell me that [if AIG did not receive its commitment fee, it would no longer move forward with the shareholders agreement]." Sawyer Tr. at 207.

[408] FM00658 (February 14, 2005 e-mail from Mr. Hodara). Mr. Hodara stated, "They seem to disagree with your one-sided assessment. As you know, the Plan cannot be modified without their and the Committee's consent and that consent for this Modification does not appear to be forthcoming."

[409] FM00658 (February 14, 2005 e-mail from Mr. Hodara).

[410] FM00833. The new language provided:

> 11. Approval of Commitment Fee to Committed Noteholders. Based upon the willingness of the Committed Noteholders to fund the Cash Payment Option set forth in Section 6.17 of the Plan, and to allocate such funds for such purpose on their respective books, the Debtors shall be, and hereby are, authorized and directed to pay the Commitment Fee to the Committed Noteholders on the Effective Date, and in accordance with the Commitment Agreements regardless of whether the Cash Payment Option is in fact, utilized by the Debtors.

FM01367.

pressed the issue, notwithstanding the fact that these three Noteholders alone stood to gain from their efforts to collect the commitment fee. The participation of Akin is particularly noteworthy because there is no evidence that it was acting on behalf of the Committee. Wilmington and SDI, the only two disinterested Committee members, played no role in the decision that the Big 3 would fund the Cash Option, the decision to seek a commitment fee, or the decision to seek collection of the commitment fee.[411] No Committee discussion was held to even address the potential conflict of interest arising from the three Noteholders' self-dealing.[412] It is unclear if the Committee would have pursued payment of the commitment fee had the fee been payable to a third party lender, as opposed to three of its members.

[411] MacDonald Tr. at 131-33, McFarlen Tr. at 58-59.

[412] MacDonald Tr. at 132.

J. Corporate Governance (2004)

1. Silver Point First Surfaces

Silver Point began to purchase FiberMark Notes during a few days prior to the Commencement Date. The bulk of its purchases, however, occurred after the Commencement Date.[413] During the postpetition period, Silver Point was an active trader in FiberMark Notes, increasing its overall position each month. By the time it was appointed to the Committee, on October 28, 2004, it held approximately 35% of the outstanding principal amount of FiberMark's Notes.[414]

As early as June 23, 2004, the Committee and FiberMark became aware that Silver Point was a player.[415] Indeed, in connection with the KERP fight, Mr. Hodara expressed concern that Mr. Baker would reach out to Silver Point to seek support of FiberMark's proposed KERP.[416] Accordingly, in the same e-mail, Mr. Hodara also suggested that the Committee approach Silver Point to replace DuPont on the Committee.[417]

As per the standard operating procedure of the Musante/Hodara concept of Committee governance, neither Wilmington nor SDI was copied on the June 23, 2004 e-mail nor did they learn about Silver Point's position until a conference call on June 29, 2004. Ms. Johnston's contemporaneous description of the terms used to describe Silver Point is illustrative of the view the Committee had of Silver Point from the beginning: "The most interesting aspect

[413] Ex. 92.

[414] Ex. 92.

[415] Ex. 131.

[416] Ex. 131.

[417] Ex. 131.

of the committee call just now was the indication that another large bondholder has surfaced, a *vulture* called [Silver Point] Distressed Funds, in Connecticut."[418]

Recognizing that Silver Point had to be a critical force in the reorganization, AIG, Post, and the Committee's advisors initially attempted to bring Silver Point into the chapter 11 process by including, on a selective basis, Silver Point in important decisions, such as the terms of a plan, the sale offers, and the operations of the business.[419] For example, when Ms. Choi initially distributed a term sheet for the secured debt securities that would be issued under a proposed plan, she stated that, "to the extent that the advisors can get some color from [Silver Point] as to what [it] would be looking for, that would be valuable input."[420]

The attention the Committee's advisors were paying to Silver Point concerned Wilmington. Wilmington raised the issue of whether the Committee was leaking confidential information to Silver Point.[421] Wilmington was opposed to letting Silver Point participate in Committee calls in October 2004 before Silver Point officially became a Committee member, but Wilmington was overruled by the other Committee members.[422] Despite Wilmington's concerns, it appears, however, that all parties involved in the communications between the

[418] CB015940 (emphasis added).

[419] Mr. Hodara testified that beginning in July 2004, he began to have conversations with Silver Point on two or three topics, including its joining the Committee, the plan, and related issues concerning the capital structure and debt capacity. Hodara Tr. at 260-61.

[420] Ex. 63. Not everyone on the Committee, however, was always in favor of being forthcoming with Silver Point on all issues. On October 11, 2004, in response to an e-mail indicating that Chanin had been discussing the post-reorganization capital structure with Silver Point, prior to its joining the Committee, Mr. Musante cautioned to Mr. Corbell to "[b]e careful with SilverPoint. They have a lot of oars in the water. Yes, we need them at the end of the day, but for now, to some extent its [sic] pay to play, and they ain't currently paying (i.e. sitting on the Committee)." AIG20497.

[421] CB015940.

[422] CB012925; CB04165.

Committee and Silver Point claim to have been sensitive to not providing non-public or confidential information to Silver Point trading personnel.[423]

2. Silver Point Joins the Committee After The Trading Order is Entered

During the late summer of 2004, Mr. Hodara approached Silver Point to join the Committee.[424] At first, Silver Point was reluctant because it did not want Committee membership to restrict its ability to trade in FiberMark Notes. To accommodate Silver Point's desire to maintain its ability to continue to trade in FiberMark's Notes and claims, the Committee revived the concept of a trading order that the Committee had earlier considered in June 2004 and dropped. Silver Point agreed that a trading order would satisfy its need not to be restricted. The Committee, therefore, filed a motion on September 27, 2004 for the approval of trading rules and procedures, including a screening wall, that would enable Committee members to trade in FiberMark Notes.[425]

At the October 19, 2004 court hearing to consider the Committee's motion, the Court expressed concern that the Committee's proposed order did not provide for an

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[423] For example, Mr. Hodara set up a call to discuss tax issues between Akin tax attorneys and Silver Point personnel on October 21, 2004, but noted:

> For this afternoon's tax call . . . , in keeping with Silver Point being unrestricted, we will have to talk in a very general way about what we have been analyzing. To the extent that you have specific questions, we will answer those as completely as we can without risking getting you restricted or us in breach of confidentiality. There is a lot of specific analysis of real situations, so it may be difficult to answer even certain hypothetical questions without putting you at risk. However, as it appears David should be under a confi [sic] soon and able to hear all of the detail as soon as that happens, it should be beneficial for him and us to hear the kinds of issues you may be thinking about so that we can pick up on those issues with David [Sawyer] as soon as he is ready.

COMM0100865.

[424] Musante Tr. at 559; Hodara Tr. at 262.

[425] Motion of the Official Committee of Unsecured Creditors For the Entry of an Order Approving Specified Information Blocking Procedures and Permitting Trading in Securities of the Debtors' Upon Establishment of a Screening Wall, dated September 27, 2004.

enforcement mechanism.[426] As a result, the Court, sua sponte, added the following decretal paragraph:

> * IT IS FURTHER ORDERED that to the extent the parties charged with enforcing this screening wall procedure (namely, the Debtor, the Debtor's counsel, the Office of the U.S. Trustee, and the Committee's counsel) have reason to believe that any member of the Committee has violated this order or the screening wall process, they are to report such suspicion of violation by filing "a notice of suspected violation" with the Court promptly, and serve a copy of the notice on the Debtor, the Committee and the Office of U.S. Trustee; such notice shall specify the name of the subject Committee member, the facts that give rise to the suspicion of violation, what steps have been taken to avoid or diminish harm to the estate, if any, and the proposed remedy.

On October 19, 2004, the Trading Order was entered.[427]

The Committee unanimously supported adding Silver Point as a member.[428] On October 25, 2004, Mr. Hodara wrote an e-mail to Mr. Purcell of the office of the U.S. Trustee to formalize the Committee's support, stating "that each member of [the Committee] is aware of the interest of Silver Point in joining the Committee as a full member and has no objection to such appointment. *The Committee further believes that Silver Point's appointment would be constructive to the disposition of this Chapter 11 case*."[429] As a result, on October 27, 2004, the U.S. Trustee filed a notice supporting Silver Point becoming a member of the Committee.[430]

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[426] October 19, 2004 Trading Motion Hearing Tr. at 8.

[427] COMM0050691.

[428] Mr. Musante was initially opposed to having the estate pay the cost of obtaining the trading order, but ultimately relented. COMM0050691.

[429] COMM0129604.

[430] Once Silver Point's appointment to the Committee became certain, some efforts were made to make Silver Point feel welcome. On October 26, 2004, Mr. Corbell sent an e-mail to Mr. Sawyer welcoming him to the Committee and inviting him to sit in on meetings with management and a paper consultant retained by the Committee.

3. Skadden Defers The Responsibility of Preparation of the Plan Supplement to Akin

Following Silver Point's appointment to the Committee, the parties turned their attention to the Plan. At a meeting between Akin and Skadden to review the preparation of the Plan, Akin decided that it would assume the responsibility for the preparation of all corporate governance documents, including the charter, by-laws, and any shareholders agreement and registration rights agreement.[431] On November 12, 2004, FiberMark filed its first proposed plan of reorganization and disclosure statement. Pursuant to FiberMark's arrangement with the Committee, the Plan provided that a condition to its effectiveness was that the Plan Supplement including, charter, by-laws, new senior secured notes indenture, registration rights agreement and shareholders agreement, "if any," shall be in form and substance reasonably acceptable to the Committee.[432] The Plan further provided that the Plan Supplement would be filed with the Court at least five days prior to the confirmation hearing (the "Confirmation Hearing").[433] The hearing to consider approval of the Disclosure Statement was scheduled for December 14, 2004.[434]

COMM0129688. He also told Mr. Sawyer he wanted to spend some time with him to get his views on the capital structure of the reorganized business and other matters. COMM0129688.

[431] FM01421.

[432] Joint Plan Of Reorganization Under Chapter 11, Title 11, United States Code Of FiberMark, Inc., et al., Debtors, filed December 17, 2004, § 10.2(c).

[433] Joint Plan Of Reorganization Under Chapter 11, Title 11, United States Code Of FiberMark, Inc., et al., Debtors, filed December 17, 2004, § 12.15.

[434] Notice Of Hearing To Consider Approval Of, And Deadline For Objecting To, Debtors' Proposed Disclosure Statement, filed November 12, 2004.

Although Skadden occasionally provided comments on the Plan Supplement to Akin,[435] during the period from the end of October 2004 to mid January 2005, it did not play a significant role in the corporate governance discussions or development of the Plan Supplement.

4. Loss of Control Causes AIG and Post to Advocate Anti-Silver Point Shareholders Agreement with Akin as Complicit Scribner

Until Silver Point came on the scene, AIG and Post had been the two largest creditors. They had assumed control of the chapter 11 process and were poised to control the reorganized FiberMark. During the time they were the largest creditors, AIG and Post did not propose that a shareholders agreement might be necessary to protect the interests of minority shareholders in the reorganized company. It appears they were willing to rely on Delaware corporate law, which provides governance standards (including minority stockholder protections) for corporations incorporated in that State. Such Delaware standards may be modified by the terms of the charter or by laws of a corporation or as part of a shareholders agreement. [436]

As Silver Point continued to purchase more Notes to increase its already dominant position, it became apparent that AIG and Post would be minority shareholders in the reorganized FiberMark. This realization galvanized their desire to insist upon enhanced minority shareholder protections beyond those provided by Delaware law. Their objectives were to preserve and benefit themselves and their ability to control the disposition of their shares and

[435] COMM0046532.

[436] Interestingly, and illustrative of the principle that different circumstances result in different treatment, in a recent chapter 11 reorganization case, AIG as the largest creditor was to become the majority shareholder of the reorganized debtor emerging from chapter 11. In that case, AIG did not urge enhancement of shareholder's rights beyond those set by Delaware corporate law nor did it require that there be a shareholders agreement to protect the interest of such shareholders. AIG has generally not taken the position that Delaware law is deficient or that a shareholders agreement is essential to protect minority shareholders. See IWO Holdings, Inc., case no. 05-10009 (PJW) (Bankr. D. Del. 2005). The corporate governance documents adopted provide little, if any, protections beyond Delaware law, and a shareholders agreement was not a condition of confirmation.

notes of reorganized FiberMark without interference from the projected controlling shareholder, Silver Point.

In the context of the emerging Silver Point, on September 28, 2004, Ms. Choi first raised the issue of needing a shareholders agreement in an e-mail to Mr. Musante and the Committee's professionals, noting that "[o]ne of the concerns we may have is that Silverpoint [sic] may have effectively 1/3 of the equity, *but we would not want them to have effective control of the company."*[437] Akin responded quickly to Ms. Choi's request, sending her a draft term sheet for a shareholders agreement on October 1, 2004.[438] Kerry Berchem and John Storz, attorneys in Akin's corporate department, were the primary drafters of the Plan Supplement documents during this time period.

On October 4, 2005, Akin distributed an initial term sheet for a shareholders agreement and a registration rights agreement.[439] The term sheet included provisions regarding information rights, the composition of the board of directors, shareholder voting rights, when certain rights terminate, restrictions on the transferability of shares, tag along rights, drag along rights, registration rights, and provisions to enable amendments of the agreements. Attached hereto as Exhibit G is a glossary of relevant corporate terms.

As the appointment of Silver Point to the Committee approached, there appeared to be an added urgency on the part of Akin, for AIG, and Post to agree to a final form of shareholders agreement. In an October 21, 2004 e-mail, Mr. Storz forwarded a draft of the term sheets for the proposed shareholders agreement and registration rights agreement to Ms.

[437] Ex. 63 (emphasis added).

[438] COMM0036519.

[439] COMM0098827.

Berchem with the note: "My sense of it is that Tom and Gary/Kathy would like to see another draft tomorrow b/c Silver Point should be on the committee [sic] very quickly—as early as tomorrow if approved by the [U.S.] Trustee."[440] Akin wanted AIG's and Post's final comments on and approval of the term sheets for the shareholders agreement and registration rights agreement before presenting them to the rest of the Committee and, especially, Silver Point. Mr. Storz sent his draft to AIG and Post on October 25, 2004 and stated "[p]lease let me know if you have any additional comments so that we can distribute to the full committee (which should include Silver Point within the next 24 hours) in the next day or two."[441]

Although later in the process, AIG and Post tried to paint their actions as concerns for small holders of FiberMark Notes who would be very minor shareholders of the reorganized FiberMark, their contemporaneous e-mails belie such an altruistic or even unselfish motive. In an October 25, 2004 e-mail from Mr. Storz to Ms. Berchem discussing certain restrictions on transferability requested by Messrs. Musante and Hobart to avoid potential adverse tax consequences, Mr. Storz noted that "Gary [Hobart] asked that we give thought to whether any of the changes they are proposing will create issues or obligations that would be unfavorable to AIG, Post, or Silver Point as the controlling shareholders."[442] The e-mail contained no reference to what would be favorable or unfavorable to other shareholders. The comments that were provided by AIG and Post on the drafts distributed prior to Silver Point's joining the Committee

[440] COMM0035839.

[441] COMM0101082.

[442] COMM0035822.

were generally aimed at increasing the value of AIG's and Post's positions and their liquidity, but limiting and restricting Silver Point.[443]

Even after Silver Point joined the Committee, Akin continued to send drafts of the shareholders agreement term sheet to AIG and Post prior to sending them to Silver Point. In an October 27, 2004 e-mail to AIG and Post, Mr. Storz forwarded the revised term sheet with a message asking "if this draft is acceptable so that we can circulate a clean copy to the full committee, which now includes Silver Point."[444] Mr. Storz wrote that the term sheet "should reflect AIG's and Post's current understanding with regard to the two remaining issues (board composition and appropriate threshold for the drag along right)."[445] It is clear that at this point in time, Akin, which as attorneys for the Committee were charged to represent the interests of all creditors, was drafting the term sheets for the benefit and at the direction of AIG and Post. No input was requested from Wilmington or SDI, much less the target of the proposed terms, the largest creditor, Silver Point.

5. Silver Point Rejects Biased Shareholders Agreement and Demands Right of First Offer

On October 28, 2004, over a month after term sheets were transmitted back and forth among Post, AIG and Akin, Mr. Storz finally distributed the term sheet for the shareholders

[443] For example, in response to the draft, Mr. Hobart requested that Silver Point's second director needed to be "unaffiliated" with Silver Point in addition to being an industry expert, that affiliate transactions of over $100,000 require a supermajority vote and be at arms' length, setting a higher threshold for drag rights (from 50% to 60%, to make it more unlikely that Silver Point would be able to exercise them). PA06457-58. Mr. Storz was generally happy to oblige. He noted, however, that if there is a non-affiliation requirement for Silver Point's directors, perhaps there should be a similar requirement for AIG's and Post's directors. He also pointed out that one of Mr. Hobart's suggestions, changing the number of directors from seven to five, might actually give Silver Point unintentional benefits. PA06457-58.

[444] COMM0101494.

[445] COMM0101494.

agreement to the entire Committee, including Silver Point.[446] The term sheet provided greater rights for minority shareholders than provided under Delaware law. However, many of those rights inured only to the benefit of AIG and Post, and provided many more limitations and restrictions on the majority holder (Silver Point) than extant under Delaware corporate law. For example, although Delaware law provides that directors are elected by a simple vote of the shareholders, the term sheet provided that AIG and Post would each be entitled to a designated director (on a Board of seven) as long as the relevant entity owned at least 10% of the shares. Silver Point, on the other hand, would be limited to two designated directors (as long as it held at least 20% of the shares), but would not be entitled to additional designated directors as its position increased. Thus, even if Silver Point's ownership increased to 85% it could only designate two directors. Moreover, one of Silver Point's directors was limited to a non-affiliate of Silver Point with expertise in FiberMark's industry, while AIG's and Post's choices in directors were not limited. Further, each designee of AIG and Post but only one designee of Silver Point must sit on any committees of the Board.

Under Akin's term sheet, tag along rights, which allow other holders to "tag along" and sell their shares in the event of a sale by a major holder, were triggered when (i) a shareholder wanted to sell 25% of the issued and outstanding shares or (ii) a sale resulted in a current shareholder owning more than 25% of the issued and outstanding shares. Tag along rights generally restrict a major shareholder's ability to buy or sell its shares and therefore negatively affect the value of its shares. The tag along might protect the other shareholders by compelling the purchaser to acquire the shares of those shareholders exercising their tag along

[446] COMM0101691.

rights. In addition, if the major shareholder bought any shares, other shareholders would have the right to tag along and put their shares to the major shareholder. The 25% trigger in the Akin draft negatively affected Silver Point in the purchase of additional shares as it owned more than 25% of all shares and, therefore, any additional purchase would trigger the tag along rights of AIG and Post. The purchase did not negatively affect AIG or Post, as either of them could sell all of its shares or buy additional shares (at least up to 25%) without triggering the tag along rights.

Drag along rights, which enable a major shareholder to drag other shareholders along if it sells shares above a certain threshold, enhance the major shareholder's liquidity and selling price because they enable the major shareholder to deliver to a buyer the precise number of shares desired and prevent minority shareholders from extracting hold up value for their shares by threatening not to sell other than at a premium. This generally majority-friendly right was set by Akin at 60%, which in effect gave AIG and Post a veto right as among Silver Point, AIG, and Post. In 2004, they collectively held approximately 70% of the FiberMark Notes.

The term sheet further provided that (i) affiliate transactions had to be at arm's length and approved by a majority of disinterested directors; (ii) any affiliate transaction or series of transactions aggregating over $100,000 within any year must also be approved by a supermajority (60%) of disinterested shareholders, and (iii) AIG and Post had a veto right on any attempt to amend the agreement, as long as the relevant entity held at least 10% of the outstanding shares.

Although Silver Point agreed that "given the ownership dynamics," a shareholders agreement was "probably appropriate," it was willing to enter into one only "if the

terms were acceptable."[447] Silver Point believed that the provisions insisted upon by AIG and Post were above market.[448] Mr. Sawyer was also concerned that the requirement that any affiliate transaction above the "very, very de minimis threshold" of $100,000 be approved by two-thirds of disinterested shareholders set up "veto rights" for AIG and Post.[449] Mr. Sawyer noted that, to give "one party or a small group veto rights over what may be in the best interests of the company at some point in time, seems a little far to the right on the spectrum."[450]

On November 9, 2004, Mr. Sawyer provided to Akin Silver Point's first comments on the proposed shareholders agreement. Mr. Sawyer recognized initially that he was outnumbered and that Akin, AIG and Post had already put together what they thought were appropriate terms for the agreement. Mr. Sawyer, therefore, wrote in the e-mail attached to his comments, "While not trying to undo what you have put together, my suggestions are focused on providing liquidity for each of the shareholders as well as protection against a major shift in ownership/control dynamics."[451] He also discussed his comments with Akin.[452]

Mr. Sawyer's proposed revisions to the shareholders agreement included, among other things, (a) eliminating limitations on Silver Point's ability to designate directors, (b) eliminating supermajority voting rights for everything except changing the number of directors, (c) lowering the drag along threshold to 50%, (d) providing that the tag along rights would be

[447] Sawyer Tr. at 86-87.

[448] Sawyer Tr. at 56-57.

[449] Sawyer Tr. at 90.

[450] Sawyer Tr. at 91-92.

[451] COMM0034562.

[452] COMM0034438.

triggered if a sale would result in a current shareholder obtaining 20% (as opposed to 25%) of the outstanding shares, and/or (e) eliminating the tag along rights unless each of AIG, Post, and Silver Point had a right of first refusal if any of them wanted to sell its shares to a third party.[453]

Mr. Storz did not believe these issues were deal stoppers, and on November 16, 2004, he distributed a revised term sheet to AIG, Post, and Silver Point with the note that "[i]deally, we'd like to bring this to a conclusion by the end of the week."[454] Mr. Storz was overly optimistic. On November 18, 2004, the Big 3 participated in a conference call with Akin that eventually became contentious. In a contemporaneous e-mail from Mr. Storz to Ms. Berchem, Mr. Storz noted that the Big 3 "are babbling back and forth."[455] Mr. Storz also wrote to Ms. Berchem that Mr. Musante was being unreasonable: *"TM [sic] is wrong. Yes, he has certain risks, but why should AIG or Post have more liquidity than SP [sic]."*[456]

On November 19, 2004, for the first time of what would prove to be many times, it was announced (incorrectly) that the parties had reached an agreement. Ms. Berchem sent an e-mail to Mr. Hodara: "We have reached resolution on the shareholders/agmt/registrartion [sic] right agmt [sic] term sheet, pending the bondholder's [sic] review of same."[457]

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[453] COMM0034438.

[454] COMM0033569.

[455] COMM0033569.

[456] COMM0033569 (emphasis added).

[457] COMM0131170. On the open issues, we agreed (conceptually)

> 1. Right to board seats are non-assignable. [Board rights attach at 14% threshold, lose them once below 14%]
>
> 2. Tag along: if sell more than 20%, then all holders can tag; if sell to a holder, who after the transaction would hold 20%, then all holders can tag
>
> 3. Termination of Shareholders Agreement on IPO with gross proceeds of $30m or more

On November 22, 2004, Mr. Sawyer reported that there was no agreement. He sent an e-mail to Akin and others, stating, in part, "We still have an issue with the Right of First Look. I cannot emphasize that this is a HUGE issue for us." He suggested a proposal that he believed would satisfy AIG's and Post's biggest concerns.[458] Unfortunately, Messrs. Musante and Hobart did not agree.

6. The Participation of Mr. Fortgang Changes the Dynamics of the Negotiations

The debate among the parties over the governance issues became even more intensive after Thanksgiving of 2004. During this period as a relatively new Silver Point employee, Mr. Sawyer asked Mr. Fortgang to become more involved based on Mr. Fortgang's legal expertise and long experience in reorganizations and resolution of corporate governance issues.[459] Mr. Fortgang's entrance into the already high-strung atmosphere appears to have elevated and reinforced Mr. Musante's penchant for control compounded by the fear that had earlier been expressed by Ms. Choi that Silver Point could get "effective control" of FiberMark. Their interaction was described by one party as surreal.[460] The Committee's Vermont co-counsel, who participated in certain Committee telephone conferences, characterized the exchanges between Mr. Fortgang and Mr. Musante as incredible in terms of volume, language and emotion.[461]

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4. Registration Rights: 15% and $30m after 1 year following Effective Date.

[458] Ex. 168.

[459] Sawyer Tr. at 54-55.

[460] Anderson Interview, June 28, 2005.

[461] Anderson Interview, June 28, 2005.

While Mr. Musante described his discussions with Mr. Sawyer as "constructive" and involving "respectful dialogue,"[462] he said that "after Mr. Fortgang got involved, it appeared that moved the parties further apart instead of closer together."[463] He explained:

> When Mr. Fortgang entered the picture which would be early December, I would describe the tone of the negotiations as less respectful or perhaps not respectful at all; that Mr. Fortgang used language that was more polemic as in "That does nothing for me." "I'm not giving you that." "This is what I'll give you. And if you don't like that you can have Delaware law" which really left no room to discuss or negotiate.[464]

Mr. Musante elaborated that by "not respectful," he meant that Mr. Fortgang "had a tendency to insult people, to not let people talk or express ideas."[465] In describing his telephonic relationship with Mr. Fortgang, Mr. Musante testified "I don't believe Mr. Fortgang has any love lost for me."[466] And, when questioned if he has any love lost for Mr. Fortgang, Mr. Musante testified that "I find him to be difficult to deal with and insulting and polemic."[467] From the perspective of others, it might have been said that Mr. Musante had met his match. Nevertheless, Mr. Musante testified that even with the involvement of Mr. Fortgang, "I expected to reach a consensual resolution."[468] Mr. Hodara who had attempted to act as a mediator and consensus builder and despite a patent allegiance to Mr. Musante, who had secured Akin's

[462] Musante Tr. at 581.

[463] Musante Tr. at 581.

[464] Musante Tr. at 582.

[465] Musante Tr. at 582-83.

[466] Musante Tr. at 588.

[467] Musante Tr. at 588.

[468] Musante Tr. at 583.

engagement by the Ad Hoc Committee and then the Committee, testified that the appearance of Mr. Fortgang did not generally advance the negotiations, due to Mr. Fortgang's personality.[469] "We already had personality conflicts in the case . . . Mr. Fortgang added an equally potent set of personality characteristics."[470]

The parties accused each other of reneging and retrading issues during this period. Mr. Musante testified that "the experience became one in which Mr. Sawyer would indicate something sounded reasonable, we would talk about some package of concessions, he would go back and return and say, well, I can't do X or Y. . . But we'll take the Z concessions that you gave."[471] He testified that as of December 1, 2004, "things were moving us apart."[472]

On December 1, 2004, Mr. Gold wrote an e-mail to the rest of the Akin team, telling them of a conversation he had with another Noteholder in the case. The Noteholder asked how Silver Point was getting along with the other Noteholders on the Committee. According to Mr. Gold, "I told him that relationships were good, and everyone was working hand in hand. He told me that there will come a time when SP [sic] goes head to head with the other bondholders and becomes difficult to deal with. Very interesting..."[473]

Mr. Hodara e-mailed back:

> This is all about Chaim Fortgang. Don't know how much experience any of you have had with him. The one thing to say about him is that he is unpredictable (other than that you

[469] Hodara Tr. at 442.

[470] Hodara Tr. at 442.

[471] Musante Tr. at 581.

[472] Musante Tr. at 587.

[473] COMM0288292-94.

> can predict that he will cause a problem and dig his heels in). The uncertainty is whether this is one of the many cases where he will ultimately allow his bluff to be called.[474]

On December 1, 2004, before Mr. Fortgang's more active participation, Mr. Musante wrote to Mr. Hodara that he had "lost patience" with Mr. Sawyer.[475] Specifically, he accused Silver Point of making "more off market" demands on the right of first look that "combined with retrades on the tag provisions . . . add up to an unacceptable deal."[476] His specific accusation was that under Mr. Sawyer's proposal of November 22, 2004,

> essentially we must agree to sell our position primarily to silverpoint [sic] but they want to be unrestricted on the tag if they want to keep acquiring from others. It punitive [sic] on value both ways to AIG and Post and vastly overestimates their leverage now. David appears to be a reasonable guy but this 11th hour jam is sitting poorly with me especially given its off market nature and last minute retrade.[477]

The reason Mr. Musante had lost patience was that "they are now trying to take directly from *me* without compensation."[478] Mr. Musante's e-mail worried Mr. Hodara who, despite his views of Mr. Fortgang, was still hopeful of a consensual resolution. He forwarded Mr. Musante's e-mail to Ms. Berchem and Mr. Storz, noting that they were at a "crisis point" and he needed their "help."[479]

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[474] COMM0288292-94.

[475] COMM0106013.

[476] COMM0106013.

[477] COMM0106013.

[478] COMM0106013 (emphasis added).

[479] COMM0106013.

Later that day, Mr. Sawyer forwarded another proposal to Messrs. Musante and Hobart with the message that "it is our belief that *our* proposal does not impact the liquidity or ability for any of us to maximize *our* value from the investment"[480] Mr. Musante again disagreed with Mr. Sawyer's proposal and assessment, stating to Mr. Sawyer:

> I read as much as I could of your e-mail, but it is so far off what should be we can't accept it. It has morphed into a right of last refusal not a first look provision. There is no basis for one bondholder to demand either from another here as silverpoint [sic] has neither paid us anything for this right nor is providing any new value to the company that would encourage us to give this right. It [is] simply an attempt to get something for nothing.
>
> I guess I [erred] in trying to work with you on this since it seems to have encouraged ever increasing demands and last minute retrades.
>
> The simple answer now is no.
>
> We now need to decide what we can do to salvage the existing filing or we all will face delays and increased administration costs if we are unable to keep on track.[481]

The rest of that day, Mr. Sawyer and Mr. Musante sent e-mails back and forth on the same issues, with the language getting more acerbic with every exchange.[482]

Akin's internal e-mails during this period indicated that Silver Point seemed to be taking a more reasonable position.[483] Nevertheless, without any stated reason, Mr. Hodara chose to ignore the Akin internal views and cater to Mr. Musante. He responded to Mr. Musante's last

[480] Ex. 45 (emphasis added).

[481] Ex. 45.

[482] Ex. 4.

[483] COMM0033569.

e-mail (without copying others) stating in part "well said. Let's see what happens now."[484] Apparently, Mr. Hodara believed that it was time to call Mr. Fortgang's "bluff."[485]

As the December 1, 2004 e-mails progressed, Mr. Musante sent another e-mail to Mr. Sawyer, indicating his refusal to accept the right of first offer:

> Given the multitude of issues, history, and timing surrounding the ROFO, I'm no longer willing to entertain any ROFO no matter what the concern and no matter what the fix. Please focus your attention on the compromise proposal I made today – (1) drop the ROFO, (2) drop the second part of the tag, (3) change the tag % to [25%/30%], and (4) change board retention threshold to [12.5%]/seat (this is the Post issue I mentioned by voicemail). Rest of business terms stay the same. Charter/Bylaws will contain cumulative voting rights...
>
> If we can't reach an agreement we will spend a lot of time and energy battling on the Committee, Company and Plan front. As we discussed with counsel today, there is no default answer as to what the governance and other issues will look like in that event. Let's stop battling each other about intercreditor issues by eliminating as many of these issues as possible and by letting all parties trade as freely as possible (subject I know to the tag), and let's get on with the real battle against the company's competition and a cost and operating structure run amok.[486]

Mr. Hodara, after receipt of the above, responded to Mr. Musante to give him, a few "Go Tom" cheers and also stated:

> Good message. You are boxing him in. I just sent him a note saying so. Here is the text of what I sent him:
>
> David,

[484] AIG21190.

[485] COMM0288292-94.

[486] COMM0032851-52.

> Just left Houlihan. Good party. Saw Chaim and he said maybe we would talk Thursday. Interesting to see Tom's e-mail right after seeing Chaim as I mentioned this exact issue to Chaim. I think Tom is doing a very smart thing here. The closer he moves the terms he would accept to market, the easier that will be for them to cramdown if they have to try that route."[487]

On December 2, 2004, Mr. Hodara forwarded Mr. Musante's offer to Mr. Fortgang and opined that the agreement is now more "creditor-neutral."[488] Mr. Hodara also counseled Mr. Fortgang that all shareholders will be bound by the agreement, if approved by order of the Court.[489]

As the debate over the specific issues continued, the parties' level of mutual distrust registered new highs. On December 3, 2004, Mr. Musante concluded that Mr. Hobart had become suspicious of Silver Point's motives. He said, "that Mr. Hobart (believes) SP wants to acquire 50% then flip the company to an entity they own – or at least have greater than 50% interest in – and the minority [will] get screwed."[490] Interestingly, Mr. Musante was of the view, initially, that Delaware corporate law, and the proposed provision as to affiliate transactions, all made the scenario feared by Mr. Hobart unlikely, but asked the Akin attorneys just to make sure.[491]

The issues then multiplied. On December 7, 2004, Ms. Berchem sent an e-mail to Messrs. Musante, Hobart, and Sawyer with revised drafts "in the interest of putting the

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[487] AIG21218-19.

[488] COMM0032851-52.

[489] COMM0032851-52.

[490] COMM0032840-41.

[491] COMM0032840-41.

Shareholder Agreement/Reg Rights Term Sheet . . . to bed."[492] She noted that she had added provisions regarding providing shareholders with 8-K information and lowering the Board nominee thresholds.[493] She also mentioned that Mr. Musante suggested changing the draft by providing that Board seats are transferable and adding back simple tag along rights (i.e., no longer based on holdings of transferee) at 40% and drag along rights at 60%.[494] Mr. Musante responded that he did not want the company to be required to provide 8-K information to shareholders and suggested 13% for the board seat retention threshold, as 12% is a "tad low."[495]

Even Mr. Musante and Mr. Hobart did not always maintain a united front. Upon further review, Mr. Musante noticed that Ms. Berchem had added a provision permitting unanimous Board approval to overshadow supermajority voting rights.[496] Ms. Berchem explained "it was [Mr. Hobart's] attempt to streamline the process and get rid of the need for a vote if there is a unanimous consent of the board."[497] Mr. Musante wrote back simply, "I'd like this back the original way."[498] Ms. Berchem replied, "Would you like me to send another e-mail? It seemed okay conceptually keeping at the board level [with] unanimous vote but I am

[492] COMM0032769-70.

[493] COMM0032769-70.

[494] COMM0032769-70.

[495] COMM0032769-70.

[496] COMM0032764-65.

[497] COMM0032764-65.

[498] COMM0032764-65.

happy to go either way."[499] Mr. Musante was not convinced: "Please recirculate. I'd like to change this back. If we have the votes, [it's] easy and streamlined as is."[500]

In general, however, it appeared during this period, as Mr. Musante testified, that AIG and Post

> had general agreement on a wide variety of provisions. There were other provisions which I felt more strongly about, Mr. Hobart was okay with; there were other provisions that he felt more strongly about and I was okay with. But collectively we ended up with a slate of provisions that we could both support.[501]

Mr. Sawyer responded to Ms. Berchem's e-mail on December 8, 2004 by indicating that without a right of first offer, they likely would not be able to reach a resolution.[502] Later that day, Mr. Storz sent a revised term sheet reflecting the above comments.[503]

7. The Leverage Game

Throughout the negotiations, it was generally contemplated and discussed by the parties that in the absence of a consensual shareholders agreement, the parties would fall back to the protections provided by Delaware corporate law. Mr. Hodara testified that Mr. Fortgang raised the issue of Delaware law in late November or early December.[504] Mr. Sawyer also testified that "[w]e made that clear on several calls as early as mid to late December that if we

[499] COMM0032764-65.

[500] COMM0032764-65.

[501] Musante Tr. at 584.

[502] PA03185-86.

[503] COMM0045112.

[504] Hodara Tr. at 419.

can't reach a shareholder agreement, one cannot be sort of imposed on us and we're fine with a standard Delaware" corporate governance package.[505]

According to Mr. Fortgang, during the entire negotiation period, Silver Point would have been prepared to proceed with a Delaware governance regime "[p]lus whatever reasonable, true protections to minority [holders] the company would ask us to do. We had agreed on day one that, for instance, certain mergers would not be done without super majority votes."[506]

Despite the elevating distrust, the parties continued to negotiate as Silver Point, the putative controlling shareholder, made concessions in an attempt to reach consensus. Indeed, at that time it was unclear why Silver Point did not attempt to exercise its leverage as the largest creditor and the future controlling shareholder by simply noting that if AIG and Post continued to be unreasonable in its view, Silver Point would withdraw from further negotiations. AIG and Post had much more to lose if the Plan Supplement fell back to Delaware corporate law. All of the concessions that Silver Point had indicated were acceptable would have been lost. Despite its position, Silver Point continued to pursue consensus. Mr. Sawyer testified that he thought "an agreement was really the fastest way to expedite the case and get out of it," particularly as FiberMark wanted a consensual deal and did not want to cramdown on anyone.[507]

In early December even Akin questioned why Silver Point did not exercise its leverage as FiberMark's largest creditor, particularly in the perspective of the filing by

[505] Sawyer Tr. at 98.

[506] Fortgang Tr. at 67-69.

[507] Sawyer Tr. at 101-102.

FiberMark of its Plan and this announcement of the support of the Committee for the Plan. Mr. Storz said to Messrs. Hodara and Gold that

> David Sawyer raised a very specific issue in regard to the shareholder agreement term sheet and I think his issue may be the sole open issue, albeit one that could kill the term sheet. However, since Kerry and I have pushed and cajoled the Big 3 as much as possible last week to resolve the issue, I think it's time that they have their come to Jesus conversation. *Specifically, David needs to flex his 800 pound gorilla status around but I'm not sure I'm the one who should deliver that message to him. It needs to be done in a sensitive manner so that we maintain the harmony among the Big 3 while simultaneously keeping ourselves viewed in the right light.*[508]

Akin's internal e-mails also reflect that it often agreed with Silver Point on the substance of its positions. Mr. Storz wrote a long e-mail to Mr. Hodara explaining the parties' positions and concerns on the particular issues. He concluded that although the Right of First Look ("ROFL") Silver Point was requesting was "not usual," but given that "the 20% tag along threshold provides an unfair benefit to AIG and Post. . . SP's suggested mechanism [the right of first look] to deal with the inequity is not unreasonable."[509]

Ms. Berchem also recognized Silver Point's leverage:

> [the right of first look] is unusual – but it could be done if Silverpoint [sic] plays its card right. David is looking for agreements from some but not all parties. To a certain extent, he [is] effectively penalizing AIG and Post for having stepped forward and disclosed their holdings or positions. Nothing will compel AIG or Post to play this game unless Silver Point REALLY is willing to walk away from the shareholders agreement, which, of course, gives each of them their board seats.

[508] Ex. 167 (emphasis added).

[509] COMM0046075; Mr. Storz suggested that "one way to bridge the gap" and deal with AIG's and Post's opposition to the Right of First Look would be to increase to 10% from 5% the number of shares that could be sold without the Right of First Look.

> Basically, what David needs to say is "if you want my vote and the ability to have a board seat, then give me this [right of first look]." But he hasn't said that outright.[510]

Mr. Hodara testified that:

> I believe the leverage that we were thinking about here is that because of their relatively small positions AIG and Post wouldn't be guaranteed of having a board seat if they didn't cut a consensual deal. And so if Silver Point would be serious about walking away from any kind of shareholders' agreement, then it's possible that the leverage of the risk of losing a clear path to a board seat could have caused AIG and Post to concede on the right of first look issue.[511]

Nonetheless, Mr. Hodara made the decision not to inform Silver Point or the Committee of Akin's views on the substantive principles or, in this instance, the strategic leverage that Silver Point could exercise.

Mr. Sawyer testified that during this timeframe, he does not recall any discussion of the rights of holders other than AIG and Post with any Committee member.[512] He viewed AIG and Post as seeking a shareholders agreement in their own self-interests vis-à-vis Silver Point.[513] Silver Point tried to explain to AIG and Post that their interests were aligned. Mr. Sawyer urged Messrs. Musante and Hobart to understand that Silver Point was aware of its fiduciary obligations and duties as a controlling shareholder and would not act to harm minority

[510] Ex. 168.

[511] Hodara Tr. at 440-41.

[512] Sawyer Tr. at 103.

[513] Sawyer Tr. at 103.

shareholders.[514] Post, according to Mr. Hobart, was primarily motivated, as it had been throughout these cases, by its desire to enhance the liquidity of its FiberMark position.[515]

8. Approval of FiberMark's Disclosure Statement and Scheduling of a Confirmation Hearing

On December 14 and 16, 2004, the hearing to consider approval of FiberMark's Disclosure Statement was held, and on December 16, 2004, an order approving the Disclosure Statement and authorizing FiberMark to begin the solicitation of acceptances of the Plan was entered.[516] A Confirmation Hearing was set for January 27, 2005.[517] On December 17, 2004, FiberMark filed its revised Plan and the approved Disclosure Statement which contained the letter from Akin that the Committee unanimously supported the Plan and its acceptance by impaired classes of creditors.[518] Thereafter, FiberMark began to solicit acceptances of the Plan. Although the Disclosure Statement contained a term sheet for the new shares of common stock, the terms described were not specific, and it stated:

> A Shareholders Agreement *may* be executed and/or will be deemed to be binding upon Reorganized FiberMark and all the holders of the New Common Stock. . . [T]he Debtors are not aware of any current agreement among any holders of Noteholder Claims or General Unsecured Claims to vote or otherwise act in concert on any matter after their receipt of shares of New Common Stock. While there can be *no assurance that a Shareholders Agreement will be agreed*

[514] Sawyer Tr. at 104-05.

[515] Hobart Tr. at 109-10.

[516] Amended Order Approving Disclosure Statement with Respect to Joint Plan of Reorganization under Chapter 11, Title 11, United States Code of FiberMark, Inc., Et Al., Debtors, dated December 16, 2004.

[517] Notice of Hearing to Consider Confirmation of, and Deadline for Objecting to, Debtors' Joint Plan of Reorganization, dated December 17, 2004.

[518] Joint Plan of Reorganization Under Chapter 11, Title 11, United States Code of FiberMark, Inc., et al., Debtors, dated December 17, 2004, at § 10.2(c).

> *upon*, the terms of the Shareholders Agreement, if any, will govern the rights of the holders of the New Common Stock.[519]

9. Mr. Musante Brings Corporate Governance Issues to Committee in an Attempt to Force Corporate Governance Provisions on Silver Point

By the end of December, Mr. Musante realized that the Big 3 had reached a stalemate as to the Plan Supplement. Accordingly, as Chairperson of the Committee and with the support of Akin, he decided to move the battleground of corporate governance from a private three party dispute to a Committee issue. The action was despite his disdain for Wilmington's judgment and the lack of involvement and knowledge on the part of Mr. McFarlen, SDI's representative on the Committee. On December 28, 2004, after discussions with Mr. Hodara, Mr. Musante sent an e-mail to Akin attorneys with a new term sheet attached. Although Mr. Musante as Chairperson of the Committee was vested with the power under the bylaws to call meetings of the Committee, politically, he requested that Akin call a telephonic Committee meeting for December 29, 2004 to consider his proposal.[520] In an e-mail to the Chanin team the next day, Mr. Hodara stated that he received "enormous pressure" from Mr. Musante to set up the telephonic meeting.[521] For appearance reasons, Mr. Hodara asked his Akin team to ensure that other issues were raised during the telephonic meeting: *"I'd like this call to not seem like a*

[519] (Final) Disclosure Statement with Respect to Joint Plan of Reorganization Under Chapter 11, Title 11, United States Code of Fibermark, Inc., Et. Al., Debtors, dated December 17, 2004, at Appendix F, p. 2 (emphasis added).

[520] COMM0045041 (emphasis added).

[521] Ex. 138.

total set-up for Tom, but rather a full-fledged Committee effort to go to the next step on all Plan issues."[522]

On December 28, 2004, Mr. Hodara sent another e-mail to the Chanin team, explaining that "talks between Tom and David on an [shareholders agreement] have broken off. Tom is determined to use the Committee process to in essence force one on all shareholders."[523] And, Mr. Musante did just that, sending a memorandum to the Committee on December 28, 2004 describing the meeting for the next day "solely to consider, discuss and approve a term sheet regarding these shareholder issues for delivery to the debtors."[524] He explained that although AIG, Post and Silver Point tried and failed to reach a consensual resolution on those issues, "the Committee can act by majority."[525] He noted that "time is of the essence" due to the impending deadlines for voting and objections to confirmation, and attached a term sheet he had drafted.[526] He wrote:

> I believe that the bulk of the provisions of this term sheet are fairly common provisions designed to provide information and other protections to minority shareholders, so although Silverpoint [sic] has indicated it does not want many of these provisions, I hope we can reach a majority consensus on much of this in short order.[527]

Because he failed to get Silver Point to agree to his governance provisions in a shareholders agreement, Mr. Musante was determined to impose such provisions on Silver Point

[522] COMM0112165 (emphasis added).

[523] Ex. 138.

[524] Ex. 40.

[525] Ex. 40.

[526] Ex. 40.

[527] Ex. 40.

by incorporating them in the proposed articles of incorporation.[528] Moreover, the term sheet circulated by Mr. Musante was even more anti-Silver Point than previous drafts. For example, it gave Silver Point only one designated director and increased a key supermajority requirement to 66 2/3%.[529]

Mr. Musante testified that prior to the telephonic meeting, he asked Akin to review the term sheet that he was going to propose, and he received a response from Akin. Mr. Musante decided he could solve the dilemma caused by the size of Silver Point's creditor position by using the Committee's "one vote – one member" rule to outnumber Silver Point and put the corporate governance provisions as to which the Big 3 could not agree in the charter and bylaws. He viewed the Committee process "[a]s a mechanic to put these in a place where their chance of enforceability was viewed as greatest and subject to the fewest challenges."[530]

> Mr. Musante said it was his view that because the new shareholders would be receiving the equity in exchange for their claims, the equity received would be subject to the terms of the charter, bylaws or even a shareholders agreement, whether or not they voted for the terms.[531]

Mr. Musante stated during the telephonic meeting of the Committee that the incorporation of such provisions were common in bankruptcy cases.[532] Mr. Fortgang disagreed

[528] COMM0561381-93.

[529] COMM0561381-93.

[530] Musante Tr. at 615.

[531] Musante Tr. at 611.

[532] Musante Tr. at 605. Neither Mr. Musante or Akin provided the Committee with names of the bankruptcy cases that supported this statement.

and argued that these provisions were "unbelievable," "unconstitutional," and could not be forced on a large holder like Silver Point.[533] According to Mr. Fortgang, at the meeting,

> Musante was lecturing people about corporate governance and why somehow this was something the committee should be involved in. We had said that the committee had no business being involved in these matters at all; that again, we were talking about a voluntary agreement between large shareholders, and this had nothing to do with the committee, and the committee had no business legislating it, getting involved in it or wasting any of the [estate] resources on it.[534]

The meeting ended with Ms. MacDonald urging the parties to spend more time negotiating to resolve the issues so that the Committee could proceed on a unanimous consensual basis.[535]

10. The Corporate Governance Issues and the Role of Akin

In the Fall of 2004, FiberMark and the Committee concluded that the development of the Plan Supplement inclusive of a shareholders agreement, if any, was for AIG, Post and Silver Point to undertake and conclude. The Plan Supplement was not viewed in the Fall of 2004 as a Committee project. Rather, the subject was considered to be one solely for the Big 3.

Mr. Musante described the circumstances of the need for a shareholders agreement. He said: "They began as committee discussions. . . They moved onto the Silver Point [sic] and AIG and Post discussing those with committee advisors and amongst ourselves. And then ultimately resumed back to the full committee."[536] He further testified that "I believe

[533] Musante Tr. at 606-07.

[534] Fortgang Tr. at 69-70.

[535] Musante Tr. at 607.

[536] Musante Tr. at 590.

the committee had asked the three largest creditors on its committee to see if they could resolve amongst themselves a consensual slate of governance provisions and bring that back to the entire committee for approval."[537]

As early as October before Akin sent the first draft of a term sheet for a shareholders agreement to the entire Committee, Akin was researching and analyzing whether a shareholders agreement could be binding on non-signing parties. It does not appear that at that time Akin reached a final conclusion on the issue.

After Mr. Musante announced that he was going to bring the corporate governance issues to the Committee, Akin, Silver Point and Wilmington each discussed whether it was appropriate for the Committee to be deciding these issues and potentially supporting corporate governance provisions that benefited or affected only the Big 3 Committee members, or at least had a greater effect on them than any other creditors.[538] In reaching his conclusion, Mr. Hodara failed to consider that two of the Committee members, SDI and Wilmington, were not bondholders and therefore, not conflicted. It does not appear that the questions raised above by Akin were answered.

On December 28, 2004, Ms. Johnston spoke with Mr. Fortgang. Thereafter she told the Wilmington team that Mr. Fortgang explained to her that the terms advanced by Mr. Musante actually work to the detriment of minority holders because (a) they force all shareholders to elect AIG and Post to the board even though they may each only own 12% or so of the new shares, and (b) the anti-takeover provisions were for the benefit of AIG and Post and were detrimental to other shareholders. Ms. Johnston also reported that Mr. Fortgang had said

[537] Musante Tr. at 594.

[538] COMM0031887-90; CB04534.

"the committee should not be using estate resources to advance the private and personal interests of AIG and Post, which is what he sees the shareholders' agreement doing."[539]

Wilmington recognized from the beginning that AIG and Post had conflicts of interests as to the corporate governance issues. Ms. Johnston described Wilmington's position to her associate, Mr. Beeler, prior to the Committee's telephonic meeting:

> [Ms. MacDonald's] inclination is to agree with silverpoint [sic] that this is not a proper issue for the committee regardless of what the plan may say. She was willing for the three holders to work out a shareholders agreement, but since they have failed to agree with silverpoint that this is not a proper issue for the committee regardless of what the plan may say. She was willing for the three holders to work out a shareholders agreement, but since they have failed to agree she thinks the board should be elected according to [Delaware] law. *I think it may be a conflict of interest for AIG and Post to push this point in any event, but it seems to me that that is for Fred to say, not me.* Moreover, [Mr. Fortgang] points out quite rightly that they cannot force him to enter into the agreement, and he will defeat the plan if it purports to impose this on him, so even if Marvin votes with AIG and Post, it will by a Pyrrhic victory.[540]

Ms. MacDonald on behalf of Wilmington reiterated the same sentiment a day later, telling Ms. Johnston in an e-mail: "I really do not want to get involved with the terms of shareholder rights. Either party could force a cramdown. Let them take it up with the bankruptcy judge."[541] This is consistent with Mr. Sawyer's testimony that Wilmington's general view on the Committees expressed during the many conference calls during this period, was "this really isn't a committee issue, you guys agree to it. Come back to us and we'll opine as to

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[539] CB001234-5.

[540] CB04554 (emphasis added).

[541] CB001246.

whether or not we think the terms are appropriate and have the appropriate protections set up for the minority . . . shareholders."[542] Unfortunately, as previously noted, Mr. Musante did not extend any credence to Ms. MacDonald's or Wilmington's views as to the role of the Committee or other issues presented to the Committee. While Akin at various times attempted to placate Ms. MacDonald and Wilmington, it clearly assisted and deferred to Mr. Musante and the achievement of his objectives. It does not appear that Akin informed the entire Committee of its reservations concerning the matter described above. A full discussion of the issue presented by Mr. Musante's proposals may have short circuited the resolution of the corporate governance issues and facilitated the prosecution of the chapter 11 cases for the mutual benefit of all the parties.

K. Corporate Governance (2005)

1. Corporate Governance Becomes a "Committee Issue"

After the December 29, 2004 telephonic meeting, pursuant to Wilmington's suggestion, the Big 3 engaged in further negotiations,[543] but with the same unsuccessful results. It was more of the same: angry words exchanged and false hopes of a deal. On December 30, 2004, Messrs. Sawyer and Musante exchanged e-mails with proposals and harsh words. Mr. Sawyer wrote "give[n] our past conversation I am not hopeful."[544] The parties later had a conversation, however, and Mr. Musante e-mailed a proposal to Mr. Sawyer.[545] Mr. Sawyer

[542] Sawyer Tr. at 94.

[543] Musante Tr. at 610-11.

[544] AIG19279-81.

[545] AIG19279-81.

later the same day, appeared more hopeful about a deal, as reflected in an e-mail from Mr. Hodara to his Akin team:

> Sawyer would like to speak with me, Kerry and John on Monday. Is that possible? I'm wide open. He says there has been very productive discussions between himself and Gary [Hobart] over the past three hours (during our call?) and that he thinks they might get there and Tom might then agree as it will be "reasonable."[546]

As the January 22, 2005 deadline for filing the Plan Supplement approached, Mr. Musante became concerned that he would not accomplish his goal of imposing his Plan Supplement via a Committee vote. After the December 29, 2004 call, Mr. Musante wanted to proceed as quickly as possible, noting on December 30, 2005, "Argh! Fred, the reality here is that unless this committee takes action there will be no minority protections. [And] that action needs to be taken soon or the result is the same. Delay is the same as inaction is the same as an affirmative decision to deny minority protections."[547] He then told Mr. Hodara that he "think[s] it appropriate to let the committee know [that] – both from me and you as counsel."[548]

On January 3, 2005, Mr. Musante informed Akin that due to Mr. Fortgang's statements on the December 29 call "and Fred's reluctance to opine that a Shareholders' Agreement . . . would be binding, and because I'm worried that the argument about 'agreement' might confuse some committee members (or even a judge), *I've opted* to go the article and bylaw route."[549] He later forwarded a proposal to the entire Committee. The proposal suggested by

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[546] COMM0112284.

[547] COMM0046066.

[548] COMM0046066.

[549] COMM0031794-03 (emphasis added).

Mr. Musante was much more pro-AIG and anti-Silver Point than the positions discussed by the parties in November and December. For example, it provided drag along rights at 66 2/3%, a level at which Silver Point could not benefit without seeking to obtain the consent of other shareholders particularly AIG or Post.[550] Mr. Musante also sought to impose high thresholds to be able to amend the various charter provisions, including, in some cases, setting the thresholds so high that AIG would effectively have a veto power (for example, information rights).[551] In the "Analysis and Opinion" sections of his proposal, Mr. Musante did not state for the Committee the other side of the issues (for example, that too high a threshold to amend could work to the detriment of minority holders if it gives one minority holder the ability to extract hold up value or otherwise prevent something that is in the best interests of reorganized FiberMark).

Akin worked directly with Wilmington and SDI to bring them up to speed on the corporate governance issues that were suddenly Committee issues by setting up a call for January 4, 2005 with only those Committee members. In advance of the call, however, Akin distributed to them (without copying the other Committee members) a memorandum "which highlights some of the issues."[552] The memorandum included sections on some of the main corporate governance issues in dispute and discussed AIG's position and Delaware law on each issue, but did not discuss Silver Point's positions as to those issues. The memorandum paints a picture of

[550] COMM0031794-03. Although the proposal also provided for tag along rights at a higher number than originally proposed (40% vs 25%), this concession was somewhat meaningless to Silver Point, as the tag along rights would be triggered in either case if Silver Point sought to sell all of its shares. Fortgang Tr. at 65.

[551] COMM0031794-03 (emphasis added).

[552] Ex. 27.

AIG's position as reasonable but does not give the opposing views.[553] Ms. MacDonald testified that Akin never provided a comparison of what Silver Point was offering versus Delaware law (even though the parties generally came to understand that Silver Point's proposal was better for minority holders than Delaware law).[554] She also testified that Akin favored AIG and Post over Silver Point during this period.[555]

On January 4, 2005, Mr. Sawyer e-mailed the entire Committee that if AIG and Post agreed to a right of first offer, he would be willing to accept certain minority rights being proposed by AIG and Post even though "our view is that many of the provisions in the proposed shareholders agreement provide benefit only to AIG and Post."[556] He further advised the Committee that the provisions being discussed "cannot be forced on us and . . . the committee has no fiduciary duty or obligation to create such provisions."[557] Mr. Storz forwarded the e-mail to a colleague with a note: "[s]o you can see how sideways this thing is going."[558]

After the corporate governance issues went to the entire Committee, Bruce Bennett of Covington, on behalf of Wilmington, became involved in commenting on the corporate governance documents. He provided his first set of comments to Ms. Berchem on January 4, 2005. One of his comments concerned Mr. Musante's attempts to put these provisions in the charter and bylaws. Mr. Bennett wrote:

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[553] Ex. 27.

[554] MacDonald Tr. at 100.

[555] MacDonald Tr. at 105.

[556] COMM0045026-27.

[557] COMM0045026-27.

[558] COMM0045026-27.

> Provisions should not be located in the charter/bylaws unless required to be there or otherwise customary. *Putting complex shareholder rights provisions in the charter or bylaws risks subjecting the company to allegations that it has breached its constitutive documents if a dispute arises*, which could be more damaging to the company and other stockholders than if the provisions were in a separate agreement and an allegation of breach of contract was made.[559]

Notes in the left hand margin of what appears to be Ms. Berchem's copy of Mr. Bennett's e-mail reflect that Mr. Musante "whole-heartedly agrees."[560] "Confirmation Order concept should work."[561] Accordingly, subsequent drafts of the documents provided that the provisions will be in FiberMark's charter and/or bylaws, or, as was added as a result of Mr. Bennett's comments, "other provision in a Shareholders' Agreement or similar document, the Plan of Reorganization or the Confirmation Order."[562] It is not clear, however, whether Akin ever resolved the dilemma of whether corporate governance provisions can be forced on a majority shareholder. Moreover, Mr. Bennett's advice was not followed as these provisions were subsequently put in the charter.

Now that Mr. Musante needed Wilmington, he reached out to his fellow Committee member more than he had since the beginning of the chapter 11 cases. On January 6, 2005, he sent a long e-mail to Mr. Bennett, Ms. Johnston and Ms. MacDonald filled with niceties

[559] COMM0046470-72.

[560] COMM0046470-72.

[561] COMM0046470-72.

[562] COMM0031735-49.

where he expressed empathy with the "frustration" felt by "'true neutrals' such as Wilmington" and explained his views on Silver Point's positions.[563]

One of the issues that became a source of dispute during this period was the scope of information rights provided to shareholders. AIG and Post wanted to provide shareholders with rights to the same type of information FiberMark would be required to provide to its new noteholders under the new senior secured notes indenture. Mr. Musante initially proposed that this provision could not be amended without the approval of 90% of all shareholders (which in effect gave AIG a veto over amendments to the provision).[564] It appears that Silver Point was not opposed to reorganized FiberMark providing shareholders with the type of information rights being proposed while the new senior secured notes were still outstanding (and, therefore, required to be prepared anyway). However, Silver Point did not want FiberMark to incur the expense and obligation to prepare and provide the information if the reorganized FiberMark, in the future, no longer had the requirement of preparing the same under the securities laws.[565] For this reason, the high threshold to amend the information rights provision was problematic. AIG and Post appeared concerned about information rights mainly for liquidity reasons – they wanted to be able to provide diligence information to potential purchasers of their shares in reorganized FiberMark, which would be a private company.

2. FiberMark Warns Committee of Refusal to Cramdown

Although the parties continued to negotiate and appeared close to an agreement, by the second week in January, an agreement had not been reached. Eventually, the Committee

[563] COMM0046454-55.

[564] COMM0031753-63.

[565] COMM0053894-95.

advised FiberMark of the stalemate. On January 11, 2005, Mr. Baker told Mr. Hodara that the Committee needs to reach an agreement on the corporate governance issues because (i) FiberMark would not pursue a cramdown plan and (ii) any delay in confirmation would be adverse to FiberMark and its creditors. Mr. Hodara forwarded this message to the Committee that day:

> This afternoon, FiberMark's Board met and considered the developing Committee stalemate on the shareholder rights/corporate governance issues. The Board, through Skadden, reiterated its view that the Committee needs to work out these issues and that the Company will not attempt to cramdown any of the creditors. . . Nevertheless, the Company believes that a delay of the confirmation hearing would be adverse to the interests of the Company and the creditors. Accordingly, the Company has instructed Skadden to file a motion with the Bankruptcy Court advising the Court of the situation and requesting that the Court determine what provisions should be included in the documents regarding corporate governance and shareholder rights.[566]

As proposals continued to be circulated, on January 12, 2005, the Committee held a call to discuss its options in light of the message received from FiberMark. Notes from Akin attorneys from the conference call suggest a concern that the judge "will not look kindly on accusations of interested shareholder issues. 'We need to present a united front.'"[567] Among the options discussed on the call were asking the Court for a delay on the basis of documentation requirements, asking the judge to decide the issues ("poor option"), and making a decision by a majority vote.[568] Mr. Musante argued that even though the Committee could not obtain

[566] Ex. 42.

[567] COMM0053893.

[568] COMM0053893. Apparently, Mr. Hobart raised the issue of getting rid of this Plan and pushing for a plan with more debt if they could not resolve the shareholder issues.

unanimity, it should make a decision, while Mr. Fortgang stressed that FiberMark would not cramdown on anyone.[569] They further discussed the issues and decided they would exchange further proposals in an effort to reach an agreement, with a "back up call" for the next day in case the parties could not agree.[570]

3. January 13, 2005 Committee Vote on Plan Supplement

Unfortunately, the parties could not agree, setting the stage for the January 13, 2005 telephonic meeting. According to Ms. MacDonald, the parties had not reached an agreement by that date "[b]ecause AIG wanted what it wanted and wasn't about to back off."[571] She further testified that it was not a substantive difference of opinion; rather:

> I think it was a matter of control. . . [U]ntil Silver Point came into the picture, AIG ran the show, and they all of a sudden became the minority shareholders, and they wanted certain things. They wanted to sit on the board, they wanted – indefinitely. In the beginning they were going to sit on that board; they were going to run the company. And then Silver Point came in and they lost – Silver Point was buying over 50%.[572]

Silver Point distributed its revised proposal the night before the call.[573] In contrast, Mr. Musante distributed his revised proposal literally minutes before the call. Mr. Musante's proposal included two completely new provisions suggested by Post: (i) no consent, waiver, amendment, or other fee may be paid to shareholders unless paid to *all* shareholders and (ii) preemptive rights (i.e., without approval of the majority of shareholders or unanimous board

[569] COMM0053893.

[570] COMM0053894.

[571] MacDonald Tr. at 107.

[572] MacDonald Tr. at 107-08.

[573] COMM044043-45.

consent, the company cannot issue new shares unless all shareholders have a right to participate ratably).[574] According to Mr. Fortgang, the provisions being requested by AIG were not only not traditional, "but no rational human being would ever concede to them."[575]

The Committee telephonic meeting of January 13, 2005 was contentious and "[v]ery confrontational."[576] In a further attempt to dominate the Committee, Mr. Musante made a motion to vote on his resolutions.[577] Ms. MacDonald protested that the parties did not have sufficient time to review the proposal, but Mr. Musante insisted that the Committee vote then.[578] After a discussion of what FiberMark would likely do in the event the Committee did not obtain unanimous approval, Mr. Musante made another motion that the Committee approve his resolutions, give them to FiberMark and move forward on the documents.[579] The resolutions were approved by a vote of three in favor (AIG, Post, SDI), one against (Silver Point) and one abstention (Wilmington).[580] Mr. Fortgang told Mr. Hodara to make it clear to FiberMark that Silver Point rejected the corporate governance proposal and will also reject the Plan.[581] He

[574] COMM0054150-58 (emphasis added).

[575] Fortgang Tr. at 89.

[576] Sawyer Tr. at 114.

[577] Ex. 169.

[578] Ex. 169.

[579] Ex. 169.

[580] COMM0053896, COMM0031371-77.

[581] COMM0053896.

submitted that the vote was illegal and that Silver Point would resign from the Committee.[582] Silver Point then dropped off the call.[583]

According to Ms. MacDonald, during the call, as noted above, the Committee discussed that FiberMark would not go forward with confirmation if the Big 3 did not agree and that, "everyone [on the Committee] knew it would hurt the company and all of the creditors if the plan didn't go forward."[584] Moreover, there was a general understanding on the Committee that Silver Point's proposal provided minority stockholders with greater rights than Delaware law.[585]

After the vote, Mr. Hodara advised Mr. Baker and Ms. Gray that the Committee had voted by majority to move forward on implementation of certain terms for the documents to be included in the Plan Supplement. He further stated:

> Silver Point dissented in the vote and asked that we advise the Debtor of its position and intention. Silver Point states that it believes that some or all of the terms approved cannot be legally binding and Silver Point intends to resign from the Committee and to vote "no" on the Plan.[586]

Mr. Baker replied that as a result of the Committee's decision, he doubted FiberMark would move forward with those documents and the scheduled January 27 Confirmation Hearing. He added, "The decision to file or not file the Plan Supplement,

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[582] Ex. 169.

[583] COMM0053896.

[584] MacDonald Tr. at 94-95.

[585] MacDonald Tr. at 100-01.

[586] COMM0022890.

however, will be made by our Board, and we will advise you as soon as we have instruction from the Board."[587]

Mr. Storz sent the resolutions to Skadden and Berenson and indicated the draft documents would be sent later that night.[588] Ms. Gray responded dismissively:

> If you are still there working in furtherance of this scheme, please put your pen down and go home. We told Akin this morning, and not for the first time, that it was unlikely that the Company would proceed with plan implementing documents that were not unanimously supported by all members of the Committee as presently constituted. The Company sees no upside in pursuing confirmation of a plan that is not accepted by class 9.[589]

Mr. Hodara responded to Ms. Gray by saying "let's speak directly before any irrevocable decisions are made. One of the many things to be considered is how to handle this situation publicly…"[590] Mr. Musante expressed his disappointment to Akin: "I'm a little surprised that the Debtor would take a position that it is only willing to act on unanimous committee position and that it is refusing to act on the duly adopted committee proposal BEFORE it has had a chance to review, discuss or consider that proposal."[591] Mr. Hobart also expressed his dismay over Skadden's message, writing to Ms. Choi on January 14, 2005: "Need to contact Jan Baker since Skadden has clearly been '*bought*' by Silver Point and plans to submit a Silver Pt [sic] friendly plan."[592]

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[587] COMM0022890.

[588] COMM0133351-52.

[589] COMM0133351-52.

[590] COMM0133351-52.

[591] COMM0133333-34.

[592] Ex. 43 (emphasis added, quotes in original).

4. FiberMark Refuses to Proceed on Basis of the Split Committee Vote

The FiberMark board met and voted against proceeding with the Plan Supplement documents approved by the Committee. On January 17, 2005, FiberMark filed a notice with the Court setting forth its intent to withdraw the Plan if the Noteholder class rejected the Plan by the voting deadline of January 20, 2005.[593] The notice described the stalemate on the Committee and FiberMark's understanding that Silver Point would reject the Plan in light of the corporate governance documents approved by the Committee over the objection of Silver Point, the largest creditor, and the abstention of Wilmington acting on behalf of all Noteholders.[594] FiberMark then explained its reluctance to confirm the Plan through a cramdown litigation to achieve the corporate governance provisions, sponsored by AIG and Post, as such litigation would be

> difficult, expensive, and time-consuming. More importantly, the Debtors believe that any such litigation ultimately is unlikely to succeed, since, insofar as they are aware, *no plan with the type of corporate governance provisions proposed by the Creditors Committee has been approved in any other case through cramdown litigation designed to increase the rights of minority stockholders at the expense of the largest stockholder.* As a consequence, if the Plan is not accepted by Class 9, the Debtors have determined that their estates and creditors would be best served by the withdrawal of the Plan and the proposal of a new plan that will contain what the Debtors believe to be fair and balanced corporate governance terms, which plan will either be accepted by Class 9 or will be confirmable by cramdown.[595]

[593] Debtors' Notice of Intent to (I) Withdraw Plan of Reorganization After Voting Deadline on January 20, 2005 if Class 9 Fails to Accept Plan and (II) File Substantially Similar Plan with Changes Necessary to Obtain Acceptance of Plan by Class 9 and Remove Other Impediments to Plan Implementation, dated January 17, 2005.

[594] Debtors' Notice of Intent to (I) Withdraw Plan of Reorganization After Voting Deadline on January 20, 2005 if Class 9 Fails to Accept Plan and (II) File Substantially Similar Plan with Changes Necessary to Obtain Acceptance of Plan by Class 9 and Remove Other Impediments to Plan Implementation, dated January 17, 2005.

[595] Debtors' Notice of Intent to (I) Withdraw Plan of Reorganization After Voting Deadline on January 20, 2005 if Class 9 Fails to Accept Plan and (II) File Substantially Similar Plan with Changes Necessary to Obtain Acceptance of Plan by Class 9 and Remove Other Impediments to Plan Implementation, dated January 17, 2005.

The notice stated that unless AIG, Post, and Silver Point could reach consensus, FiberMark would withdraw the Plan as of January 21, 2005 and file a new Plan. The new Plan would contain the same economic terms, but would eliminate the Committee's consent rights for the Plan Supplement and would specify the corporate governance terms, "which terms the Debtors will endeavor to make fair to all stockholders, compliant with applicable terms of Delaware law but with appropriate safeguards for the rights of minority stockholders."[596]

The fact that these corporate governance provisions single-handedly held up confirmation and caused so much emotion and debate among the parties demonstrates that these are substantive provisions that should have been included in the Disclosure Statement or at least provided to creditors prior to the voting deadline on the Plan. Instead, the Plan provided that these provisions would be in the Plan Supplement, which would not be filed until five days before the Confirmation Hearing. Even Mr. Hodara, noted to his colleagues on January 11, 2005 that Skadden's intention to bring the dispute over the corporate governance issues to the Court's attention "may highlight for [the judge] that these are substantive provisions and that, therefore, there wasn't adequate disclosure."[597] In hindsight, had Skadden required that these important terms be in the Disclosure Statement, the dispute would have been exposed earlier and, perhaps, facilitated resolution and emergence by FiberMark from chapter 11.

Given the benefit of hindsight, another questionable decision was FiberMark's insistence that it would not resort to cramdown as to a plan that it considered to be in the best interests of FiberMark and all of the parties in interest, especially after it became clear that the

[596] Debtors' Notice of Intent to (I) Withdraw Plan of Reorganization After Voting Deadline on January 20, 2005 if Class 9 Fails to Accept Plan and (II) File Substantially Similar Plan with Changes Necessary to Obtain Acceptance of Plan by Class 9 and Remove Other Impediments to Plan Implementation, dated January 17, 2005.

[597] COMM0044477.

parties had been unsuccessfully negotiating the governance issues for months. When asked whether it was a reasonable expectation that the parties could actually come to an agreement, Mr. Hanley stated:

> Maybe it was a hope, a wishful hope as opposed to a reasonable expectation. I think we had probably concluded among some of the senior members of management that it didn't feel like it was going to happen, but we – all our professionals, Skadden, Berenson, pulled out every stop they could to try to broker a consensual agreement and it was our sole focus to get this done and out of bankruptcy.…
>
> We were advised by our professionals if you don't have the votes for the plan, you don't just let it go down in flames. You withdraw it.[598]

After January 13, 2005, as noted, FiberMark became more assertive. FiberMark professionals recognized the negative impact of the interaction between Mr. Musante and Mr. Fortgang and recommended that AIG introduce new representatives, more experienced, resourceful and respected by Mr. Fortgang.

5. Introduction of New Players

On behalf of FiberMark, Mr. Baker suggested to Mr. Hodara that to resolve the stalemate AIG should bring a new face to the table to communicate with Mr. Fortgang. He recommended Michelle Levitt, an AIG in-house attorney who was a former colleague of Mr. Baker's.[599]

Mr. Hodara communicated the message to Mr. Musante, and on Sunday, January 16, 2005, Mr. Musante called Ms. Levitt, involving her in FiberMark for the first time. Mr. Musante explained that communications had broken down in the FiberMark case and Mr. Baker

[598] Hanley Tr. at 120.

[599] Musante Tr. at 641-42.

suggested she get involved to move the process along.[600] He explained some of the issues and that Mr. Fortgang "was not reasonable and was difficult to deal with" and was refusing to speak with him.[601] He also characterized Mr. Fortgang as "disrespectful and polemic and difficult."[602] By polemic, he meant "Mr. Fortgang tended to take extreme positions and . . . his whole negotiating style was really one of what I would characterize as brinkmanship."[603] Ms. Levitt, on January 17, 2005, called Mr. Fortgang at his home to inform him of her new assignment.[604] Mr. Fortgang reported that he was prepared to continue discussions on behalf of Silver Point.

On January 17, 2005, Ms. Levitt spoke separately to Mr. Baker and Mr. Hodara and then to Ms. Berchem, who explained the key issues and the positions of each of the parties in the case.[605] Ms. Levitt then had a telephone conversation with Mr. Fortgang.[606] Mr. Fortgang stated that he told Ms. Levitt that "any discussions from this point forward could not go forward without excluding Mr. Musante and Mr. Hodara. As a condition precedent for any further discussions, those two people could not be in the room with us."[607] He explained that he put this condition on further discussions because "we felt that we were abused both procedurally and substantively, and the methodology for imposing this regime on us and the substantive

[600] Levitt Tr. at 24-25; Musante Tr. at 643-44.

[601] Levitt Tr. at 25-26.

[602] Musante Tr. at 650.

[603] Musante Tr. at 650-51.

[604] Fortgang Tr. at 80-81.

[605] Levitt Tr. at 27-28, 83-84.

[606] Levitt Tr. at 29; Fortgang Tr. at 90.

[607] Fortgang Tr. at 90.

provisions were so off the wall and so inappropriate that there would be no point in continuing any further dialogue with people like that."[608] According to Mr. Fortgang, Ms. Levitt agreed to this condition.[609]

Ms. Levitt reported that Mr. Fortgang mentioned during their telephone calls that Silver Point then owned 45% of the Notes and that he said "everything is off the table. You have nothing now. . ."[610] In an e-mail, dated January 16, 2005, she told Messrs. Hodara and Musante: "Chaim says he has 45% and reminded me that you should be circumspect about any comments you might make about [Silver Point]. Chaim will have a lawyer there prepared to respond if statements are made by the committee concerning [Silver Point]."[611] Ms. Levitt also told Mr. Hodara that Silver Point would like Skadden to draft the documents "instead of *us*."[612] Ms. Levitt's reference to Akin Gump as "us" is revealing. She explained, however, that "Chaim is saying he does not trust the committee to write the deal down correctly. I do not care if the [debtor] holds the pen."[613] Ms. Levitt testified that Mr. Fortgang said to her on the first call that "Fred should not be able to do anything because he would ruin it all."[614]

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[608] Fortgang Tr. at 91.

[609] Fortgang Tr. at 91.

[610] Levitt Tr. at 30-31.

[611] COMM0133482-85.

[612] COMM0133482-85 (emphasis added).

[613] COMM0133482-85.

[614] Leivtt Tr. at 40-41.

Ms. Levitt also called Mr. Musante that evening to report the conversation.[615] Mr. Musante stated during that call or later in the week his opinion that Skadden favored Silver Point in the sense that if Skadden filed a plan, it would be closer to Silver Point's proposal.[616] This was also Ms. Levitt's understanding from Ms. Berchem. Ms. Berchem allegedly told Ms. Levitt what positions FiberMark was taking on various issues and that such positions on the important issues were closer to Silver Point.[617] However, she did not disclose, other than to Mr. Hodara, her earlier views, as well as those of other Akin attorneys as to their skepticism in respect to Mr. Musante's demands and their view of the reasonableness of the positions taken by the parties, as noted above. Later that day, Ms. Berchem's views as to Skadden and the situation were revealed in an e-mail to Mr. Storz, noting "we are in the midst of a disaster (worsened by the company and their wimpy advisors)."[618]

Ms. Levitt then called Kaye Handley, who is the head of AIG's restructuring and workout group, and asked her to get involved because of Ms. Handley's experience as a seasoned workout professional and, unlike Ms. Levitt, a business person who was more familiar with restructurings and related corporate governance provisions.[619] In addition, Ms. Handley, located in New York City, had previously worked with Mr. Fortgang, including instances where Mr. Fortgang, as an attorney, represented AIG and Ms. Handley. Ms. Handley agreed to become involved.

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[615] Levitt Tr. at 31-32.

[616] Levitt Tr. at 89-90.

[617] Levitt Tr. at 93.

[618] COMM0030594.

[619] Levitt Tr. at 32-33; Handley Tr. at 80.

The initial discussions between Ms. Levitt and Mr. Fortgang were promising and Mr. Hodara sent an e-mail to his colleagues sounding optimistic that with the introduction of Ms. Levitt, the parties were making progress.[620] Mr. Corbell concurred, "Sounds like progress. I suspected there would be progress with Michelle so that there can be both face-saving ability to arrive at a middle ground and to make Tom look like a stumbling block."[621]

The following day, Tuesday, January 18, 2005, Ms. Levitt and Ms. Handley reviewed documents received from Mr. Musante, spoke about the issues and jointly called Mr. Fortgang.[622] Mr. Fortgang did a lot of "complaining and yelling and being upset" and was "derogatory about Tom and Gary and other people in the case" as well as discussed the substantive issues.[623] Mr. Fortgang "was clearly very, very upset at the current state of play in the case;"[624] however, he was pleased with the introduction of Ms. Handlry and Ms. Levitt for AIG, who were willing to listen with a "new ear."[625]

Mr. Gregory Braun, the AIG Portfolio Manager located in Houston, Texas, responsible for FiberMark position also became more involved during this time. He had the ultimate decision making authority.[626] According to Ms. Handley, Mr. Braun's primary concerns were "our ability to exit the case, so that has to do with demand registration rights and tag rights,

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[620] Ex. 139.

[621] Ex. 139.

[622] Levitt Tr. at 33; Handley Tr. at 91.

[623] Levitt Tr. at 34.

[624] Handley Tr. at 94.

[625] Handley Tr. at 104.

[626] Handley Tr. at 140-41.

as well as ability to protect the company from stripping of value by a majority shareholder. So that goes to affiliate transaction protections."[627]

The next day, January 19, 2005, Ms. Handley and Ms. Levitt, along with their attorneys, had an in-person meeting with Mr. Fortgang and discussed the positions of AIG and Silver Point.[628] Ms. Levitt testified that some progress was made at that meeting, but "not a tremendous amount" because "Chaim said that we were demanding new things that we had not asked for before. That we were unreasonable and how could we expect to get anything at this point and so forth."[629]

Ms. Handley testified that:

> Delaware law was frequently mentioned by Chaim as the baseline of minimal protections available to us in the absence of a consensual agreement, and he repeatedly pointed out that such protections would be very minimal and we would be better off getting a deal, and that what [Silver Point] was willing to agree to was better than we would get under Delaware law.[630]

After the meeting and as a result of Mr. Fortgang's references to Delaware law, Ms. Handley, Ms. Levitt, and Mr. Musante spoke with their newly retained separate attorneys about the rights provided for shareholders under Delaware corporate law. At the end of the day, Ms. Handley thought she had an adequate understanding of Delaware corporate law.[631] They also spoke about alternatives if the parties were unable to reach a consensual deal, the possibility

[627] Handley Tr. at 141.

[628] Levitt Tr. at 35.

[629] Levitt Tr. at 36.

[630] Handley Tr. at 106.

[631] Handley Tr. at 107.

of cramdown and AIG's leverage.[632] During her examination by the Examiner, Ms. Handley was asked what leverage AIG had to demand greater minority shareholder protections beyond what was provided by Delaware corporate law. Her answer reveals that the only leverage AIG believed it had was the ability to hold up confirmation due to FiberMark's insistence on a consensual plan:

> I think the only leverage that we had was as a large holder, the company was clearly hoping that some consensual deal could be arranged, and so it gave all large holders a degree of leverage that the case could not move forward over an objecting large holder.[633]

Ms. Handley testified that other than hold up value, AIG did not have any economic leverage points.[634]

Mr. Fortgang testified that he became frustrated during the meetings, because at times he thought the AIG representatives with whom he was negotiating were being reasonable, but when they took the proposals back "to some other group to get it approved" (presumably Messrs. Braun and Musante), "they would come back and say, 'We can't deliver what we thought we could,'"[635] a comment very reminiscent of Mr. Musante's description of his negotiations with Mr. Sawyer in December 2004 noted above.

Contrary to Mr. Musante's impressions of Mr. Fortgang, Ms. Handley testified about Mr. Fortgang's willingness to reach a compromise:

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[632] Handley Tr. at 114-16.

[633] Handley Tr. at 116. The Examiner believes the transcript which does not include the word "not" is in error.

[634] Handley Tr. at 117-18.

[635] Fortgang Tr. at 93.

> He definitely seemed to come to that meeting with a sincere belief that we were all there to be constructive. He did call back to his office more than once seeking input and approval, and I had about as positive a sense about the case as I did for most of that week after that meeting.[636]

Ms. Levitt testified that during her interactions with Mr. Fortgang, he yelled a lot and cursed, but he was not disrespectful to her:

> [H]e was derogatory about other people who were not in the conversations, he was disrespectful to them and, you know, if there was sentence without the F word in it, those were the exceptions when he was on discussions about other members of the committee and Akin Gump. . . [H]e was disrespectful about other people [on] the committee, to the extent after talking to him I could understand why they were not talking to each other any more.[637]

The next day, Ms. Levitt and Ms. Handley called Mr. Baker and asked "could the debtor play a role as a mediator to try to resolve the outstanding issues."[638] Unlike Mr. Musante, his AIG colleagues wanted to find out from FiberMark's perspective "what minority shareholder protections the company could support if there were no consensual deal among the large creditors."[639] Mr. Baker advised Ms. Levitt and Ms. Handley that FiberMark and its advisors would consult with AIG, Post and Silver Point regarding all the corporate governance issues outstanding and "suggested that the company would come up with a plan that would give more to Chaim, i.e. [Silver Point], but less to AIG than we, AIG, were currently seeking. What they would come up with would be something probably unsatisfactory to both sides. They also

[636] Handley Tr. at 111-12.

[637] Levitt Tr. at 58-59.

[638] Levitt Tr. at 39; Handley Tr. at 99.

[639] Handley Tr. at 126.

suggested that if either side voted against the plan they believed they could confirm it over such an objection."[640]

Mr. Baker "was amenable" to having FiberMark act as mediator between the parties.[641] "He wanted to move the case forward."[642] Mr. Baker and Ms. Handley decided that she and Ms. Levitt should speak to Mr. Berenson on these issues and a subsequent conversation with Mr. Berenson followed.[643] Mr. Baker disputed Ms. Levitt's testimony somewhat in that he stated it was his idea to have Skadden involved in mediating the dispute and he proposed the idea to AIG and Mr. Fortgang.[644] In any case, eventually, a meeting was arranged at Skadden's offices between AIG and Silver Point on January 24, 2005.[645]

Before the meeting, Mr. Baker asked his restructuring partner J. Gregory Milmoe to become involved. Although Mr. Milmoe had no involvement in the FiberMark case, Mr. Milmoe had worked with Mr. Fortgang, as an attorney in other situations, and Mr. Baker believed that Mr. Milmoe as a senior corporate and restructuring partner could be helpful in dealing with Mr. Fortgang.[646] Mr. Baker also enlisted Alan Straus, another senior corporate partner, to assist in negotiating and drafting the corporate governance documents.[647]

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[640] Handley Tr. at 128.

[641] Levitt Tr. at 40.

[642] Levitt Tr. at 40.

[643] Handley Tr. at 127.

[644] Baker Interview, June 13, 2005.

[645] Levitt Tr. at 40.

[646] Milmoe Interview, May 9, 2005; Handley Tr. at 136.

[647] Straus Interview, May 11, 2005; Milmoe Interview, May 9, 2005.

6. The Meeting of January 24, 2005 at Skadden Results in Progress

On January 24, 2005, an all-day meeting was held at Skadden's offices to attempt to reach consensus on the corporate governance issues. The following parties were present:

- Skadden—Mr. Baker, Mr. Milmoe, Mr. Straus
- Berenson—Mr. Berenson
- AIG—Ms. Handley, Ms. Levitt and Mr. Wollmuth (attorney)
- Silver Point—Mr. Fortgang, Mr. Sawyer.[648]

There were two conspicuous absences from the meeting: Mr. Musante and a representative for Post. Although it appears Silver Point demanded as a condition to the meeting that Mr. Musante not be present,[649] Mr. Musante planned on attending but was unable to do so, as a (fortunate) snowstorm prevented him from flying to New York from Los Angeles.[650]

Post, the third party to what had theretofore been tripartite negotiations, was also absent from the meeting.[651] Mr. Hodara, however, testified that he discussed Post's exclusion with Mr. Baker:

> [T]he substance of my discussions with Mr. Baker were each of us saying to the other, why in the world are they not involved? This can't possibly be productive. And what we were each being told, me by AIG, him by Silver Point, was in essence, don't worry about it, we'll get our deal done and we'll bring Post along. Both Silver Point and AIG were reportedly saying the same thing. Mr. Baker and I thought

[648] Levitt Tr. at 41.

[649] Sawyer Tr. at 131-32.

[650] Levitt Tr. at 41; Handley Tr. at 131; Musante Tr. at 662-63.

[651] Levitt Tr. at 44-45 ("I don't think they were invited . . . I don't know why."); Musante Tr. at 666 ("I don't know if Post was invited."); Hobart Tr. at 195 (does not recall being invited to or even being aware of the meeting before it took place).

> that was crazy. Well, I speak for myself. I think that's what Mr. Baker was saying to me as well.[652]

The exclusion of Post would prove to be a mistake in the months to follow. Mr. Hobart appeared to take offense at Post's exclusion from discussions after January 13, 2005, including the January 24 meeting:

> My recollection is that after the January 13th vote . . ., my involvement was limited in the sense that resolution of the issues going forward, the input of Post was not sought out or to the extent that Post attempted to put input . . ., Post's input was limited.[653]

Mr. Sawyer testified that Silver Point made it a condition to the meeting that both AIG and Post would participate and he had been under the impression that Post was involved in the meeting by telephone with AIG representatives during break out sessions. That does not appear to be the case.[654] Ms. Levitt could not remember whether Silver Point stated that Post's being a party to a shareholders agreement was a condition to Silver Point's signing it.[655]

Ms. Levitt also does not know if anyone from AIG represented to anyone at the meeting that AIG was representing Post's interests at the meeting.[656] She admitted that "I think we were there as a member of the creditors' committee, so Post obviously has [its] own individual opinions, but I suppose we were there representing other creditors as well, but . . . [end of answer]."[657] Ms. Levitt believed that Post's positions were "for the most part . . . similar

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[652] Hodara Tr. at 466.

[653] Hobart Tr. at 192-93.

[654] Sawyer Tr. at 136-37.

[655] Levitt Tr. at 51-52.

[656] Levitt Tr. at 47.

[657] Levitt Tr. at 47.

to AIG's. However there were . . . a few additional protections that they also would have been interested in."[658] Mr. Hobart testified that he never said anyone other than Post could represent Post's interests.[659] Mr. Baker said he never heard Post discussed or AIG stating that it had a proxy for Post.[660] Mr. Fortgang, on the other hand, testified that Ms. Handley and Ms. Levitt implied that they would bring along Post.[661] Similarly, Mr. Straus had the impression that AIG and Post were acting collaboratively and saw their interests as aligned and Mr. Milmoe believed AIG was in touch with Post during the meeting.[662] Subsequently, in March of 2005, AIG attorneys did correspond and negotiate with FiberMark on behalf of AIG and Post.

Akin did not attend the meeting, although that did not seem to be a source of dispute or contention, as Akin was minimally involved in the discussions the week prior to the meeting.[663] Silver Point, as noted, deemed Mr. Hodara counterproductive, and had specifically requested that Akin not be involved because "Akin was not being impartial in the process and was not acting as a mediator."[664] Mr. Sawyer claimed that Akin was not impartial "[d]ue to their lack of opinion on issues, due to Akin deferring in the majority of the situations to the AIG and Post point of view without a sound or rational business or legal position to support it."[665]

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[658] Levitt Tr. at 43.

[659] Hobart Tr. at 193-94.

[660] Baker Interview, June 13, 2005.

[661] Fortgang Tr. at 102-03.

[662] Straus Interview, May 11, 2005; Milmoe Interview, May 9, 2005.

[663] Handley Tr. at 137.

[664] Sawyer Tr. at 133-34.

[665] Sawyer Tr. at 134.

At the January 24 meeting, Skadden and FiberMark met separately with each of AIG and Silver Point and then met with both parties together.[666] Mr. Fortgang explained that he was upset with AIG because AIG was accusing Silver Point of intending to take advantage of other shareholders of reorganized FiberMark and otherwise violate its duties as a majority shareholder. He found the accusations repugnant to Silver Point and its standing in the business community. Mr. Fortgang said AIG would have to trust that Silver Point would not steal FiberMark's North American assets and in any case, the protections being offered by Silver Point would prevent Silver Point from acting in such a manner. Silver Point explained the issues that were important to it. Mr. Straus reported those to AIG. He was pleased that AIG did not object outright but was willing to discuss the issues. Mr. Straus stated that the talks were over all productive.[667]

During January 24 breakout sessions, the AIG representatives were in telephonic contact with Messrs. Braun and Musante.[668] Although Mr. Hobart of Post was not a party to the meeting, it appears that Mr. Braun and/or Mr. Musante did communicate with Mr. Hobart about the meeting.[669] According to Ms. Levitt, Mr. Braun and Mr. Musante were interested in making contact with Post because "I think they were interested in other bondholder's views, and Post is the next largest bondholder."[670] A January 24, 2005 (afternoon) e-mail from Mr. Hobart to Mr. Goldsmith and Ms. Choi marked "high importance" confirms that Post was kept informed of the

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[666] Handley Tr. at 140.

[667] Straus Interview, May 11, 2005.

[668] Levitt Tr. at 45-46.

[669] Musante Tr. at 669; Hobart Tr. at 201-04.

[670] Levitt Tr. at 52-53.

discussions at the meeting: "AIG and SP appear (once again) to be close to hammering out a deal. Silver Point's proposal alone is adequate but for one point which impacts Post's liquidity."[671] That one point was the right of last offer.[672]

Although Ms. Levitt does not remember the specifics about the discussions of Post among AIG representatives at the meeting and on the telephone, she stated

> I think the substance of the discussions generally was that we wanted to make sure that any deal that might be reached would be acceptable to everyone [including Post]. . . You need everyone – I guess you don't need everyone technically, but the idea was to come to unanimous consent of the bondholders that were participating on the committee.[673]

As the meeting progressed, Mr. Fortgang once again became frustrated as he believed that after each breakout session AIG moved backward. At the end of the meeting, AIG had a long break out session that resulted in Mr. Fortgang leaving, either because he lost patience or he had to leave for another reason.[674] AIG, therefore, had a conversation with Mr. Berenson about the open issues.[675] The key open issue for AIG was "[m]aking sure that there was a higher standard for review of affiliate transactions and the particular concern of AIG was with respect to the North American assets."[676] AIG asserted that Silver Point's position did not adequately protect minority holders from losing the value in the North American assets through an affiliate

[671] Ex. 44.

[672] Ex. 44.

[673] Levitt Tr. at 50.

[674] Levitt Tr. at 55.

[675] Levitt Tr. at 55.

[676] Levitt Tr. at 55-56.

transaction.[677] Specifically, AIG believed a certain U.S. subsidiary "had substantial value but did not generate a lot of cash flow and therefore might not trip the affiliate transaction basket."[678]

The other issues discussed at the meeting were similar to those that the parties had been discussing for over three months: (a) board representation and thresholds for appointment; (b) information rights; (c) registration rights; (d) drags and tags; (e) right of first offer/refusal; and (f) right of last look.[679] Although there was no agreement at the end of the day, it appeared to be agreed that they "had narrowed down some of the issues."[680]

Mr. Milmoe made a plea to each of the parties about why the compromise that was almost at hand was good for all parties. His plea to AIG was that the deal being offered was very good compared to where AIG might end up. The rights being offered were certainly greater than if the parties were left to Delaware corporate law. He also told Mr. Fortgang that the deal on the table was reasonable for Silver Point. Moreover, fighting on these issues was a waste of time, as Silver Point was not actually going to do the things AIG was worried about: "So what's the big deal?"[681] According to Mr. Milmoe, Mr. Fortgang accepted his reasoning.[682]

Mr. Sawyer testified the AIG representatives at the meeting "thanked us for being at the meeting because if . . . the shoe were on the other foot they wouldn't have re-entertained

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[677] Levitt Tr. at 56.

[678] Handley Tr. at 143.

[679] Sawyer Tr. at 137.

[680] Handley Tr. at 142-43.

[681] Milmoe Interview, May 9, 2005.

[682] Milmoe Interview, May 9, 2005.

sitting down and having this meeting."[683] He explained this meant if "the request they were making of us had been made of them, if they were the largest shareholder, they would not have entertained this meeting."[684] To Mr. Sawyer this meant that Mr. Musante was not making rational business decisions.[685] Ms. Levitt does not remember making or hearing the statements described by Mr. Sawyer.[686]

7. An Agreement Among AIG, Silver Point and FiberMark on January 25, 2005

The next day, at the encouragement of Ms. Levitt and Ms. Handley, Mr. Braun and Mr. Fortgang participated in several telephone calls. They were able to reach an agreement in principle on the major issues.[687] Mr. Hodara reported the good news to the other Akin attorneys: "There appears to be a deal. Michelle Levitt reports the good news and has provided me with the barest of bare bones outline."[688] Mr. Fortgang told Mr. Braun he wanted Skadden to document the deal, and AIG agreed.[689]

Mr. Musante spoke to Mr. Hobart and "relayed the understanding that had been reached between Mr. Braun and Mr. Fortgang that we viewed that as – the basis for an

[683] Sawyer Tr. at 132.

[684] Sawyer Tr. at 133.

[685] Sawyer Tr. at 132.

[686] Levitt Tr. at 56-57.

[687] Handley Tr. at 145-46; Musante Tr. at 674; Braun Tr. at 147.

[688] COMM0115972.

[689] Musante Tr. at 675; Fortgang Tr. at 101.

acceptable compromise and that we hoped that they would support it."[690] Mr. Hobart testified that the terms of the agreement, as explained by Mr. Musante

> would be acceptable to us, given the context of the options available as far as whether, certainly from my position at Post, we could influence things in the agreement that were not as favorable as I felt were needed in order to represent and get the unsecured creditors a fair deal, but in the context, I recall being favorably disposed to what I was hearing.[691]

On January 25, 2005, FiberMark reported the deal in a filing providing:

> Today, as a result of additional negotiations, the Debtors have been advised, and are pleased to report, that an agreement in principle among the parties has been reached, subject to documentation, allowing the Debtors to move forward to seek confirmation of the plan with the support of the creditors committee.
>
> The Debtors intend to convene the previously scheduled confirmation hearing on January 27, 2005, at 10:30 a.m. for the purpose of providing a final report to the Court as to the outcome of the negotiations and to seek from the Court an adjusted schedule for the confirmation process going forward, including a continued confirmation hearing date.[692]

On January 27, 2005, the date of the scheduled Confirmation Hearing, Mr. Baker offered good news:

> I am very pleased to report, Judge, that as a result of intensive discussions between the parties, and in particular the largest creditors, they have reached an agreement in principle with respect to the issues that had previously divided them related to corporate governance and related matters. That was only reached a day or two ago.

[690] Musante Tr. at 680.

[691] Hobart Tr. at 205-06.

[692] COMM043859-62.

> It literally is an agreement in principle, that's being documented, and will be circulated to them, to the committee, and other parties in interest.[693]

The Court scheduled a new confirmation hearing date for Monday, February 28, 2005.[694]

8. Ms. Handley is Directed to Withdraw From the FiberMark Situation and Mr. Musante Reappears as AIG's Lead Representative

Ms. Levitt testified that once she learned that a deal had been reached, she "stepped out of the process" and did not even learn the details of the deal.[695] Although Ms. Levitt was not asked to withdraw, she received a clear message from Ed Holmes, the AIG in-house counsel officially assigned to the FiberMark matter that her continued involvement was not necessary[696] and not wanted:

> Ed Holmes asked me if I would direct Chaim Fortgang to him or to Tom so there wouldn't be more than one voice speaking on behalf of AIG. So I presumed that would mean me and Kaye [Handley], that we should allow them to be the lead so that . . . there [would] only be one person actually speaking to him so he couldn't say to one person at AIG that another person said this, i.e. he was playing people off each other.[697]

Similarly, Ms. Handley did not have any further involvement after the January 24 meeting. A few weeks later, she heard that the parties were still having disputes, and she asked Mr. Holmes if she should get involved, he declined her offer.[698]

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[693] January 27, 2005 Status Conference Tr. at 2-3.

[694] COMM0043854.

[695] Levitt Tr. at 60-61.

[696] Levitt Tr. at 62.

[697] Levitt Tr. at 74-75.

[698] Hanley Tr. at 149.

As set forth below, the terms of the "deal" reached on January 25, 2005 were not crystal clear as to specificity and as drafts were circulated, issues began to arise. As a result, the agreement did not materialize.

Although Ms. Handley and Ms. Levitt were both very careful in their examinations not to disparage their colleagues, the implication of their testimony was that they could not understand both before the January 25 agreement and after it fell apart why these parties could not reach a resolution. Although they did not explicitly question Mr. Musante's negotiating strategy or tactics, it was apparent from their pursuit of a completely different strategy that they questioned his conduct. Unlike Mr. Musante, Ms. Handley and Ms. Levitt approached the problem constructively. They first talked to Silver Point and asked what Silver Point needed to be comfortable. They then talked to FiberMark, asked what corporate governance regime FiberMark would find acceptable, and, most importantly, considered their options and alternatives (including their lack of leverage). They realized that the best option for AIG (and, significantly, other creditors) was to reach a consensual resolution with Silver Point and the best way to do that was through a neutral mediator in a face-to-face meeting with discussions focused on issues and concerns, not on personalities.

9. Beginning Suspicion of Silver Point

Although the negotiations in the week leading up to the January 24 meeting were significant in that they led to an apparent agreement, they were also significant in that they marked the beginning of the suspicions by AIG, Post and Akin of wrongdoing by Silver Point.

It was during the week of January 17, 2005 that AIG and Akin first turned their attention to the trading activities of Silver Point. On January 17, 2005, as noted above, Mr. Fortgang told Ms. Levitt that Silver Point, which had owned 35% of the Notes when it first joined the Committee, now owned 45% of the Notes. Asked about the context in which Mr. Fortgang gave this information to Ms. Levitt, she responded,

> He told me in the first conversation we had. He was, you know, we are acquiring, we are getting bigger. We are not going to have a chance, you know, to get all this stuff. The bigger we get the less opportunity you are going to have. You can't hear the tone when you read the transcript. But the tone was sort of aggressively stating that they were going to get bigger and bigger and then we won't have anything.
>
> So this was in the context of everything is off the table now, and I don't care what they said, what they did at that meeting last week, (the January 13 telephone meeting) blah, blah, blah. You are lucky I am talking to you. I am never going to talk to Tom and Fred again. Fred should be off this case. Very heated discussions.
>
> So letting us know that they were going to get bigger and he was going to – and then we would be in a weaker position as time passed.[699]

At the January 19 in-person meeting between AIG and Silver Point, Mr. Fortgang announced Silver Point's position again, stating that it then held close to 50% of the bonds.[700] The next day, Mr. Fortgang reportedly told Ms. Levitt and Ms. Handley that Silver Point had exceeded 50% of the bonds and "our guys love the trade claims."[701] During this conversation, Mr. Fortgang was, according to Ms. Levitt, "aggressively, loudly, yellingly . . . said that once he

[699] Levitt Tr. at 97-98.

[700] Levitt Tr. at 99.

[701] Levitt Tr. at 105.

is a majority shareholder it doesn't really matter what you think, and how could you ask for anything if you are not a majority shareholder. I don't remember the exact words, but that was the clear nature of the discussion."[702]

Ms. Levitt agreed that if Silver Point acquired more claims, AIG would have a more difficult time negotiating, because Silver Point would have a larger vote under a plan and

> as a majority shareholder you would have greater rights, and majority shareholders in any company tend to get more deference from the management of that company, get more benefits, more board members. . . [T]here are benefits associated with owning a majority of the company in the long and short run of the plan process, and once the company comes out of bankruptcy.[703]

Apparently, the prospect of Silver Point accumulating more of FiberMark's Notes and the implications of that made AIG apprehensive and acted as a catalyst to find some counter-leverage. Consequently, during that week Ms. Levitt asked Paul DeFilippo AIG's attorney, whether a trading order had been entered in the FiberMark cases,

> Because Chaim kept telling me about where his position was and normally, this is not the rule, there [are] rules on this, it is not that common for people on committees to go ahead. In my experience it has not been that common for members of committees to trade. It happens and there are trading orders, but it has not been that common in my experience. I was curious since he was letting us know that Silver Point was trading.[704]

Ms. Levitt did learn there was a trading order and received a copy.

> I didn't scrutinize it in detail . . . But its existence made me comfortable enough at the time, and I didn't have any reason

[702] Levitt Tr. at 107-108.

[703] Levitt Tr. at 108.

[704] Levitt Tr. at 96-97.

> other than Chaim's general state of aggressiveness which I had been told by his reputation is just the way he is. So he was aggressive enough and assertive enough about those points for me to want to get a copy of the trading order.[705]

Ms. Levitt testified that although she communicated Mr. Fortgang's message about Silver Point's position to Mr. Musante and others, she did not raise the issue that there might have been a trading impropriety.[706] Mr. Hodara, on January 21, 2005, reached a different conclusion and, deciding that this issue required immediate attention and directed the Akin team to investigate (notwithstanding his subsequent decision that Akin could not investigate and prosecute claims against Silver Point).

> Check this out: Tom called late last night and advises that Chaim told them last night that SP has gone over 50%. And, he has taken EVERYTHING off the table: no cumulative voting, nothing on affiliate transactions, etc. Could make our job easier in some ways.
>
> Ken and Jon: let me know <u>immediately</u> what the Trading Order required in the way of signatures and filing, whether SP or any other party filed anything and if so can we get a copy and see who at the institution signed. Then, what follow up did the Judge ultimately have us include for monitoring compliance? I seem to remember a 6 month affirmance of compliance.[707]

The Akin attorneys responded to Mr. Hodara, but at that point there was no evidence of a violation of the Trading Order.[708]

10. The January 25, 2005 Agreement Unravels in the Drafting Process, as AIG Makes New Demands and Accuses Skadden of Favoring Silver Point

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[705] Levitt Tr. at 98-99.

[706] Levitt Tr. at 102.

[707] COMM0115668.

[708] COMM0115668.

As discussed, the parties agreed that Skadden would draft the documents reflecting the deal. Mr. Straus sent an e-mail to Mr. Storz setting forth the business terms that were agreed upon:

- Board composition : 7 members; 5 to be appointed by SP, 1 each by AIG and Post so loans as they maintain a 12-1/2% stock ownership position
- Board seats are personal to the investors – i.e., they do not transfer with transfers of stock
- Transactions with Affiliates: Mergers with/sales of all or substantially all assets to Affiliate/sale of US operations (if less than all or substantially all assets) – requires approval by majority of disinterested directors and by majority of disinterested shareholders
- Any other transactions with an Affiliate having a value in excess of $5 million – requires approval by a majority of disinterested directors
- Tag-along rights and dragalong [sic]: If SP sells 50.1%, must offer tag, may impose drag. Any sales by AIG or Post to third parties require them to offer "last look" to SP for 2 business days. Excepted from the requirement to provide a "last look" are sales by AIG and Post of up to 2-1/2% of their combined position on an annual basis
- Registration Rights: No demand registration for 2 years. In year 3, 30% can trigger demand provided that shares to be sold have a value of $60 million. In year 4, 25% can trigger demand at valuation of $45 million; in year 5, 20% can trigger demand at valuation of $32.5 million; in year 6 and thereafter, 15% can trigger demand at valuation of $20 million.[709]

Mr. Hodara forwarded the terms to Mr. Musante (but apparently not to Silver Point) asking him to "[l]et me know if any of these varies with your understanding."[710] Mr. Musante made only the "following two points of clarification:

> 1. Affiliate transactions requiring disinterested shareholder are 1) merger, 2) sale of material assets (defined as $25MM or more) or 3) sale of any of US Operations (ie, if less than $25MM).

[709] Ex. 85.

[710] Ex. 85.

2. Last look basket is 2.5% of all shares outstanding."[711]

He also wanted to see how the deal compared to his proposal accepted by the Committee. He told Mr. Hodara to "please ask Skadden to redline the material provisions below against the provisions the Committee provided them so we can easier track the changes."[712]

Prior to circulating the documents to AIG or Post, Skadden conferred with Silver Point multiple times to ensure that the drafts reflected Silver Point's view of the deal. Skadden did not so inquire of AIG or Post. On January 27, 2005, Mr. Straus had a conversation with Mr. Sawyer about the terms of the deal as Silver Point understood them.[713] He then sent an e-mail to Messrs. Sawyer and Fortgang summarizing the key points he had discussed with Mr. Sawyer "[j]ust to make sure that you are not surprised by anything and that we have reflected the deal correctly."[714] He then added that "[t]hese points are reflected in the draft that will go out to you. If these are not correct, please let me know ASAP so that we can discuss it before you spend time reading something that doesn't reflect your deal."[715] Later that day, Mr. Straus circulated a draft of the the newly titled "Investors Rights Agreement" (the "IRA") to Silver Point prior to its circulation to other parties. Mr. Straus noted that "we have not circulated this to AIG, Post or Akin Gump, and we will not do so until we have your clearance."[716] Silver Point and Mr. Straus

[711] Ex. 85.

[712] Ex. 85.

[713] SP000001118-19.

[714] SP000001118-19.

[715] SP000001118-19.

[716] FM01528.

then traded a couple of e-mails with a discussion of comments.[717] According to Mr. Sawyer, Silver Point had asked Skadden to review the drafts before they were sent to AIG and Post "[t]o make sure that the points were reflected as we had thought they were supposed to be."[718] Silver Point did not discuss with AIG or Post that it was going to ask to review the drafts before they went out.[719]

Despite the fact that Mr. Baker had been "hounded by calls from AIG and Post as to the status of the documents,"[720] Mr. Straus did not distribute the documents to AIG and Post until February 1, 2005.[721] On that day, Mr. Straus sent the first draft to AIG (Mr. Holmes, Ms. Handley, and Ms. Levitt), Post, Silver Point, and Mr. Storz.[722] The exclusion of Mr. Musante may have been intentional, as Skadden may have seen that his presence led to months of stalemate, while it appeared that the parties were able to reach an agreement in one day without him. Skadden's view, expressed as early as February 3, 2005, was that "Musante [is having] a conniption because he thinks the portfolio manager sold out to SP [sic] without understanding the nuances."[723] In any case, the wise attempt to exclude him was thwarted, as Mr. Storz forwarded the e-mail to Mr. Hodara, and Mr. Hodara responded in shock: "Are you going to

[717] FM01567.

[718] Sawyer Tr. at 142.

[719] Sawyer Tr. at 142.

[720] FM01568.

[721] FM01569-1605.

[722] FM01569-1605.

[723] FM01609-10.

send it to the Committee. Someone must. They did not include Tom on their distribution???"[724] Mr. Storz distributed to the full Committee as instructed.[725]

The exclusion of Post from the January settlement negotiations would lead to many problems. Mr. Musante testified that when he explained the deal to Mr. Hobart initially, Mr. Hobart indicated Post would consider it, but in February, Post "ultimately decided that providing the right of last refusal that was demanded by Silverpoint [sic] was something that they indicated that they were not willing to do and that they didn't care about the limited rights that they viewed they got in exchange for that."[726]

On February 3, 2005, Mr. Hobart and Mr. Straus had a long telephone conversation, in which Mr. Hobart expressed, in Mr. Straus' words, that "[h]e is not a happy camper." Mr. Hobart told Straus that the IRA was not neutral and "suggested that Skadden had merely been doing Silver Point's bidding."[727] Mr. Hobart expressed his disappointment with the substance of the documents, but it appeared Mr. Hobart's complaint went to the generally unenviable position of being a creditor of a chapter 11 debtor. Mr. Straus noted in an e-mail to his colleagues describing the conversation that Mr. Hobart "clearly strongly holds the position that he is being asked to trade a $50 million debt claim where he has a lot of contractual rights and a promise to repay for a chunk of equity where his rights are significantly limited, and he would much rather have a plan that has more debt."[728] Mr. Straus then went through Mr.

[724] COMM0030138-39.

[725] COMM0030102.

[726] Musante Tr. at 680.

[727] FM01609-10.

[728] FM01609-10.

Hobart's substantive points, some of which conflicted with the agreement and others which Mr. Straus noted had merit.[729]

The most interesting point about Mr. Hobart's February 3, 2005 conversation with Mr. Straus is that Mr. Hobart revealed at this early stage that he suspected trading violations by Silver Point. According to Mr. Straus, Mr. Hobart "is convinced that [Silver Point] violated the trading order and accumulated bonds with the benefit of inside information, and he made no bones about not trusting [Silver Point]."[730] On February 4, 2005, Mr. Hobart sent an e-mail to Mr. Storz with many comments as to the IRA, many of which were inconsistent with the deal. Mr. Storz forwarded the e-mail to Mr. Hodara with the message: "Please see below. I am in no position to address his e-mail (and Tom sent me one about 20 minutes ago) this afternoon."[731]

Akin did not appear pleased that it was relegated to a secondary role with respect to the corporate governance documents and as a result could no longer help its friends, Tom and Gary. On February 6, 2005, Mr. Straus forwarded the revised IRA, as well as revised charter and bylaws to AIG (but not Mr. Musante), Post, and Silver Point with the note that "this has been sent to a limited group of recipients, please forward this as appropriate within your organization."[732] Apparently Mr. Hodara did not receive the drafts until two days later and was not happy about it: "Well, my good friends at Skadden finally decided to send the attached to me 10 minutes ago. Some of you may already have it. Please review as appropriate."[733] Despite

[729] FM01609-10.

[730] FM01609-10.

[731] COMM0046409-11.

[732] COMM0029904.

[733] COMM0029904.

the fact that Skadden was now in control of the documents, he would continue to be involved: "The revised format is, in part, the result of conversations that Skadden had with Gary. AIG intends to have comments to us by mid-day Wednesday."[734] Curiously, Mr. Hodara finally decided to include Wilmington and SDI, forwarding the drafts to them the day after he received them.[735]

It appears that Akin was still negotiating for AIG against Silver Point. On February 9, 2005, Mr. Storz created an information rights rider for Mr. Musante as requested by Mr. Musante: "As requested, a rider describing the desired Information Rights is attached. Tom indicated he would be flexible on the 8-K information, but we should start with a request for the full array of information and scale it back if the company and Skadden resist."[736]

Akin continued to take AIG's and Post's comments and give them to Skadden as if Akin was the attorney for those two individual creditors adverse to a third creditor (Silver Point) rather than the attorney for the Committee. On February 10, 2005, Mr. Hobart sent an e-mail to Messrs. Musante and Hodara, stating that he "would like to discuss the investor agreement with you [Mr. Musante] and Akin (and AIG's counsel, if you would like) ASAP. I will be reaching out to Skadden and Silver Point on my own to protect Post's interests unless [I] hear from you soon."[737]

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[734] COMM0029904.

[735] COMM0029746.

[736] COMM0046404-06.

[737] PA10165.

On February 10, 2005, Mr. Straus sent an e-mail expressing frustration that he had not received comments on his previous draft from any party other than Silver Point.[738] Mr. Hodara forwarded the e-mail to Mr. Musante, who still was not on Mr. Straus' distribution list.[739] Mr. Musante wrote back, "Are we ready to send comments."[740] Mr. Hodara replied, "Still on w/gary. It will go out tonight. We lost half a day by not getting the draft till 2:30."[741] Mr. Musante remarked, apparently about Mr. Hobart: "Is he on the cliff or over the edge."[742] Mr. Hodara, responded, "On. Not so bad. Company will say yes to some no to others; he'll feel like part of the process and he'll move on."[743] Mr. Hodara was not willing to let Akin be removed from the process. He responded to Mr. Straus:

> We have reached out to each member of the Committee and have received comments from AIG and Post this afternoon and evening which we are collating so that you will receive them tonight in a manageable format. We have not received any comments from [Silver Point] and would appreciate if you would provide those to us tonight or tomorrow so that we are familiar with any remaining issues.[744]

On February 11, 2005, Mr. Storz sent marked up versions of the IRA and charter to Skadden and the Big 3 reflecting the comments of AIG and Post.[745]

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[738] COMM0134173-74.

[739] COMM0134173-74.

[740] COMM0134173-74.

[741] COMM0134173-74.

[742] COMM0134173-74.

[743] COMM0134173-74.

[744] PA10369-70.

[745] COMM0002336.

On February 13, 2005, Mr. Straus distributed revised drafts of the IRA and the charter.[746] Mr. Hodara promptly forwarded the drafts to Mr. Musante (who was still not being included on Skadden's distribution list).[747] Mr. Musante remarked: "Some of that is just completely asinine."[748]

Unfortunately, the January 25, 2005 agreement did not address the indenture, which seems to have been forgotten until the week before the Plan Supplement deadline of February 18, 2005 was a source of dispute. AIG and Post wanted the indenture, like the charter and the IRA, to include many restrictions on Silver Point. Skadden, in the meantime, added fuel to the fire by continuing to give the appearance that it favored Silver Point. Moreover, the failure to have included Post in the January 24 meeting was causing problems, as Post was continuing to object to many of the provisions that others thought had been finalized. As the February 18, 2005 deadline approached, therefore, the relationship between AIG and Post (and Akin to some extent), on one hand, and Skadden and Silver Point, on the other hand, became adversarial and antagonistic.

On February 13, 2005, Mr. Straus distributed comments to the indenture as initially distributed by Akin. Mr. Straus wrote that "[t]his document is being distributed to Silver Point directly; I would ask John Storz at Akin Gump to distribute it to AIG and Post if they need to be consulted on it, as I do not know what prior involvement they have had."[749] Mr. Storz had

[746] COMM0029490-92.

[747] COMM0029490-92.

[748] COMM0029490-92.

[749] COMM0167298.

negative things to say about Skadden, including its apparent favoritism for Silver Point. He forwarded the document to Mr. Hodara:

> Look what the cat dragged in. Just so I understand the timetable properly: we delivered the indenture on January 18th, Skadden sits on it for 26 days, gives us comments on a Sunday afternoon, and now demands that we forward comments in 2 days?
>
> I won't even begin to address the point raised by Mr. Straus regarding Silverpoint [sic] and his lack of knowledge concerning AIG's and Post's prior involvement.[750]

On February 15, 2005, Mr. Hobart provided lengthy comments to the indenture.[751] One comment that was controversial was that he wanted the indenture to prohibit the company from paying for consents for waivers or amendments unless all Noteholders were paid.[752] Mr. Straus generally rejected Mr. Hobart's comments with explanation.[753] On the payment for consent issue, he noted that it is common, appropriate, and often in the best interest of a company to solicit consents to be able to amend the indenture.[754] Mr. Hobart's suggestion would only make the consent process more expensive.[755] Mr. Hobart and Mr. Straus had several more exchanges debating the issues.[756]

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[750] COMM0167298.

[751] COMM0167461-62.

[752] COMM0167461-62.

[753] COMM0167461-62.

[754] COMM0167461-62.

[755] COMM0167461-62.

[756] COMM0134316-17.

During the same week, AIG accused Mr. Straus of refusing to talk to Mr. Wollmuth, AIG's attorney, causing Mr. Straus to write a long e-mail in his defense (in which he set forth the numerous attempts the parties made to contact each other).[757] On February 16, 2005, Mr. Musante had a conversation with Mr. Sawyer. In response to an e-mail from Mr. Hodara asking "How did your call with David S go?," Mr. Musante responded: "Ready to bite his head off. Keeps saying things about board approval that are absurd, such as the company carve out to the tags. I told him I don't care if god himself approved something, we didn't negotiate any such exception to the tag."[758] The allegations of retrading, a constant theme throughout the corporate governance negotiations, would continue.

An internal chain of e-mails between Mr. Hodara and Alan Laves, a corporate partner at Akin with a specialty in finance/lending, discussing some of the open issues highlight's Mr. Hodara's loyalties. Mr. Hodara wrote "So, are they saying they agree with us on three out of four?"[759] Mr. Laves responded "[t]hat's not how I read it" and continued with a long e-mail describing Skadden's position on the issues.[760] Akin's one-sided views all of a sudden registered with Mr. Hodara, because he responded to his partner, "you understand that Silver Point is on the Committee too and that we no more represent Post and AIG than Silver Point? . . . [D]o our comments to the Indenture that you circulated put us in the position of taking AiG [sic] and Post's side on everything?"[761] Mr. Laves replied:

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[757] COMM0134371-72.

[758] COMM0134371-72.

[759] COMM0305732-33.

[760] COMM0305732-33.

[761] COMM0305735-36.

> Yes, I understand that. . . The markup reflects my view of changes necessary to make the indenture match the terms sheet. That does make it consistent with the AIG and Post positions on the voting, affiliate transaction and consents issues. It is also consistent with Straus's email below, reflecting his current positions on the affiliate and consents issues. It is not clear to me whether Straus's e-mail is stating Skadden's position, the Company's position or SP's position.[762]

Mr. Hobart e-mailed additional comments on the indenture to Mr. Straus on February 17, 2005. He added, "there is a continual reference to the 'agreed' deal regarding corporate governance. Post has not been a party to the discussions between AIG and Silver Point."[763] Further revealing his bias, Mr. Hodara wrote to Mr. Hobart, "Excellent points on the Indenture. We are pushing the same logic."[764]

In light of the approaching filing deadline, Mr. Straus tried to finalize the documents on February 17, 2005 by sending a final e-mail to all parties with resolutions of issues. He wrote,

> After extensive discussion with Silverpoint, AIG and its counsel, and Post, Skadden Arps, as Company counsel, have prepared the following list of issues and resolutions to reflect what the Company is preparing to file tomorrow. We fully acknowledge that not all of these resolutions are going to be the optimum in the respective perceptions of each of Silverpoint, AIG, and Post, but we believe that they are fair and reasonable in the circumstances, reflect the deal between Silverpoint and AIG, and protect the interests of small stockholders, of which there may be many.[765]

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[762] COMM0305735-36.

[763] COMM0134379-81.

[764] COMM0134379-81.

[765] COMM0029405-06.

Many of Mr. Straus' proposals favored AIG and Post in many ways. For example, Silver Point, AIG and Post (if Post signed the IRA) were given veto rights over any amendments to the protective provisions in the charter and IRA.[766] It is unclear how this helps minority holders and may in fact serve to thwart the will of those other minority holders. Another example is the participation rights. The proposal provided that

> In the event of the sale of equity to Silverpoint [sic] or an affiliate . . . AIG (and Post if they are a party to the investors' rights agreement) would have the right to purchase their pro rata portion so as to ensure that by virtue of the issuance of those shares the stockholding percentage of AIG (and Post, if a party) would not be reduced. Such holders would also have the right to participate on a pro rata basis in sales of debt to Silverpoint or an affiliate.[767]

Once again, it is difficult to conclude how this provision benefits anyone other than AIG and Post. Mr. Straus gave in to Post's request to put the affiliate transaction provisions in the indenture and discussed the other resolutions. He added one additional requirement and a threat:

> SP, AIG and Post will deliver to Company not later than 200 pm Friday, February 18, written assurance that they will vote for the Plan with the issues above resolved in the manner described above. In the absence of such support, the Company will withdraw the Plan and refile a Plan containing substantive provisions including those set forth above, but without tag-along, drag-along or "last look" rights.[768]

After Mr. Hodara forwarded the above message to Mr. Musante (with the note, "Tom, he must just be forgetful"), Mr. Musante responded with two more issues. First, he stated that while AIG had agreed to a $5 million basket for affiliate transactions generally, the deal had

[766] COMM0029405-06.

[767] COMM0029405-06.

[768] COMM0029405-06, COMM0029407.

been that there was no basket for an affiliate transactions involving the U.S. assets.[769] Mr. Musante appears to be correct on this point and was willing to be flexible in agreeing to a de minimis basket of $1 million. He explained that "[p]rotecting our interest in the upside of the US assets (at least alongside SilverPoint [sic]) was a primary concern (actually THE primary concern) for AIG in its negotiation with Silver Point."[770] He also asked for any amendment to the indenture to require 75% approval or to only count the votes of Silver Point, AIG and Post if all three agree.[771]

As a result of receiving comments, Skadden agreed to revise the documents one more time, and sent a revised list of proposed resolutions around midnight on the morning of February 18, 2005. Two significant changes went against AIG and Post. One of those changes was to take the affiliate transaction provision out of the indenture. The other change was to eliminate the requirement of providing detailed information to stockholders if the notes were no longer outstanding.

Mr. Straus stated:

> We understand that feelings of the correctness of one's position are deeply held on all sides, and we encourage all parties to consider the real and practical implications of their agreements and their ongoing relationship in the restructured company, *with the oversight of a Board of Directors with fiduciary duties to all stockholders*, which we believe can overcome any distrust that may have emerged in the course of strenuous negotiation.[772]

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[769] COMM0134424-27.

[770] COMM0134424-27.

[771] COMM0134424-27.

[772] COMM0134458-61 (emphasis added).

He also urged the parties to consider what was in the best interests of all creditors: "[W]e hope that all parties will acknowledge that it is better for the Company and its creditors to complete the Chapter 11 process on a consensual basis than to remain mired in increasingly technical issues and drag out the reorganization."[773] The e-mail also contained the same threat as the previous proposal that if Silver Point, AIG and Post did not provide written assurances to FiberMark that they will vote for the Plan, "the Company will withdraw the Plan and refile a Plan containing substantive provisions including those set forth above, but without tag-along, drag-along, 'last look' or board designation rights."[774]

Skadden internal e-mails suggest that it sincerely viewed the proposal as a fair compromise. Mr. Straus wrote to Mr. Baker at 12:30 a.m. on February 18, 2005:

> Things have been very interesting today. Chaim spent much of the day alternatively reaming out me and Jeffrey about issues that were frankly more perceived slights or outright misunderstandings of what was actually being proposed than issues of real economic substance. Greg had what I think was a fruitful talk with him, and based on Greg's thoughts we changed our approach on information rights, which seems to be a real hot button for Chaim. I did have a series of fruitful discussions with David Wollmuth, and while the list of proposed resolutions (coming to you in a separate email) is probably not anyone's first choice, Jeffrey and I believe that it is fair to all and adequately reflects the business deal that Chaim cut with AIG. FYI, at David Sawyer's suggestion we have not sent this draft to Chaim—David is going to handle him internally in the morning.[775]

It appears that at Mr. Milmoe's suggestion, several pro-Silver Point changes were made, but he explained in a contemporaneous e-mail that he viewed the changes as fair and

[773] COMM0134458-61.

[774] COMM0134458-61.

[775] FM01863-64.

consistent with the deal and not because they were discussed with Silver Point. He wrote to Mr. Straus early on the morning of February 18, 2005: "The suggestions I made last night were not vetted in any way with Chaim; rather I was reacting to what I perceived to be his (not entirely misplaced) angst, and I may or may not have been on the mark. Work hard succeed!"[776] Mr. Straus responded that "the memo I sent last night encapsulates what we think has been agreed to or should be agreeable."[777]

AIG and Post were not agreeable. To them, this proposal was worse than the prior version, and they were unhappy. Mr. Wollmuth wrote:

> I don't know what to say – stunned at the moment. We will get back to you this afternoon. I have encouraged AIG to be practical and consider the real business aspects of this, but it is obviously a big change from the written position delivered yesterday afternoon. Is this really the final and best deal the company can put together?[778]

Mr. Straus replied, "I think that is really the best we can do, but I will know a little better soon."[779] Mr. Wollmuth responded, "Okay, please do what you can – I am trying, but I need some help."[780]

Mr. Straus explained to Mr. Wollmuth his views of the controversial changes:

> Just so it's clear where we are coming from (although I am sure you understand), the changes in the memo sent last night are not an attempt to retrade anything that had previously been agreed, but rather to reflect the more "bare bones" agreements that had been reached and to reflect points that SP said clearly

[776] FM01863-64.

[777] FM01863-64.

[778] FM01945-46.

[779] FM01945-46.

[780] FM01945-46.

> they did not agreed to but which we thought were reasonable compromises.
>
> Specifically, on the removal of the affiliate transaction covenant from the indenture – there are other standard covenants on leverage, restricted payments, mergers and liens that are going to protect against improper transactions, plus the provision is in the charter. I think it would be very difficult, even for a board dominated by SP, to approve affiliated transactions that took value from the company unfairly, lest they be hit with lawsuits.
>
> Likewise, on the information rights – by providing for unaudited quarterlies and audited annual reports but not SEC-standard reports, we are trying to address the concern that as a private company complying these days with SEC standard reporting can be very expensive. As a practical matter, however, it is likely that this company will remain leveraged, so the bonds will stay there. And, I would not want to be a board member that cuts out reporting to stockholders.[781]

On February 18, 2005, the parties were still trying to work out a compromise. Mr. Straus wrote Mr. Wollmuth an e-mail: "The word I got from SP was that Ed Holmes had left a message with Chaim asking for a couple of things but clearly [indicating] that they were not deal breakers. Chaim got back to Ed to say 'no.'"[782] Mr. Wollmuth responded with a question: "Just out of curiosity, did he ever explain WHY he needs to be able to amend to do the few kinds of affiliate transactions that are proscribed?"[783] Mr. Straus responded:

> I don't have an answer for that, but I also think that he won't do it because (i) (and you didn't hear this from me) there are other people besides Chaim who control SP's investments, and SP is not going to put itself in a position to be criticized by doing sweetheart deals, and (ii) there are "real" board members designated by SP and they are going to be mindful of

[781] FM01944.

[782] FM01951-53.

[783] FM01951-53.

> their fiduciary duties in approving anything that includes an affiliate, because otherwise it's a lawsuit waiting to happen, and you know how scared directors are these days about liability after Enron and WorldCom.[784]

The following communications demonstrate, however, that AIG and Akin knew that the proposal was better than the likely alternative. Mr. Wollmuth forwarded the e-mail to Mr. Hodara with a one word message: "Unbelievable."[785] Mr. Hodara replied: "What do you think will happen today? Are we going to hit the wall? Is Skadden just going to file this and play chicken with AIG or do you think, without the signed support letter, they will file the 'Delaware law' version without tags, ROLL, etc.?" Mr. Wollmuth responded:

> Tough to evaluate. I really am not sure what is best for the client. I think negotiations could take place after hitting the wall, but it is a big mess if it does. On the other hand, as proposed between the indenture and the revisions to the charter and rights agreement, we are all pretty much at the mercy of SP. What do you think the odds are if we fight in court?[786]

Mr. Hodara's answer proves that AIG should have accepted the proposal: "I think the odds in court are poor as the Judge knows she has a company ready to come out subject only to these issues. More importantly, she demonstrated at our last hearing that she does not seem to have a lot of concern for these issues."[787] He pointed out, however, that the fact that the indenture does not contain a provision on affiliated transactions, as required by the term sheet, might lead the court to question Silver Point's "games."[788] He was correct about the term sheet

[784] FM01951-53.

[785] COMM0134458-61.

[786] COMM0134458-61.

[787] COMM0134458-61.

[788] COMM0134458-61.

for the indenture in the Disclosure Statement requiring an affiliate transaction provision, but Skadden apparently thought that because this provision was already in the charter, it did not also have to be in the indenture. Mr. Hodara then gave the attorney for AIG some legal strategic advice: "You should push Skadden on that point: If it can't get a consensual deal and has to go the 'Delaware law' route, will it also go with normal high yield indenture provisions? If so, why won't it include them now?"[789] He also said to "push hard on Gary Hobart's point" about the term sheet in the Disclosure Statement requiring an affiliate transaction provision.[790]

Mr. Hobart indicated he was not pleased with the result:

> [I]t is disappointing that the company takes the position that Post has to accept a deal that was unilaterally crafted without regard for reasonable minority rights or the terms previously disclosed in court filings. Indeed, material provisions in the indenture. . . are in complete opposition to the term sheet that the company filed.[791]

Further evidencing his resentment about being left out, Mr. Hobart also stated that he had not been able to talk to Silver Point directly for over a month.[792] Mr. Straus responded that FiberMark and Skadden have acted as neutral mediators, and "I hope you would agree that it's better to get on with things and get the Company out of Chapter 11 rather than let it drag on longer."[793]

AIG and Post did not submit the consents requested by FiberMark. Nevertheless, FiberMark filed the Plan Supplement anyway, which incorporated the last set of proposals

[789] COMM0134458-61.

[790] COMM0134458-61.

[791] COMM0029399-01.

[792] COMM0029399-01.

[793] COMM0029399-01.

distributed by Mr. Straus, and a designation of directors.[794] The Plan Supplement stated that the documents remained subject to review by the Debtors and the Committee and thus were not final.

On February 18, 2005, Mr. Straus wrote to his team, prematurely:

> Thanks to all of you we seems to have rescued this plan from the ashes, at least for now. . . Silverpoint [sic] . . . has signed off on the stockholder documents and indenture, subject to refinement on drafting issues.
>
> Silverpoint has designated 5 directors . . . One of those directors is Alex Kwader, whom David Sawyer has indicated they will likely replace right after the emergence. As of today we have no evidence of whether they have filed a "yes" vote, although it is expected they will do so.
>
> *AIG appears to be on board with these documents* although they have not sent me, at this writing, confirmation that they have signed on. They have designated Greg Braun as their directors. *Jeffrey Berenson and I are speculating that they will not use the last-minute issue that cropped up – namely whether the amendment of the "affiliate transactions" provisions in the charter takes more than a 2/3 vote of the stockholders -- to vote against the plan.* We shall see.
>
> Post appears to still be an outlier. We have reserved a slot for a 7th director to be names prior to emergence, which will go to Post if they sign up. But as of this afternoon Gary Hobart's advice to me was that they had not yet decided and it was "in their general counsel's office." If Post does not sign up, a director has to be named "by the creditors' committee."[795]

[794] Plan Supplement Pursuant To Section 12.15 Of Joint Plan Of Reorganization Under Chapter 11, Title 11, United States Code Of FiberMark, Inc., Et Al., Debtors, dated February 18, 2005; Notice of Designation Of Directors Pursuant To Section 6.8(a) Of Joint Plan Of Reorganization Under Chapter 11, Title 11, United States Code Of FiberMark, Inc., Et Al., Debtors, dated February 18, 2005. The notice announced the Committee's designations as Greg Braun – as AIG's selection – and Harry Wilson, David Sawyer, Ian Millar, Elmar Schulte, and Alex Kwader – as Silver Point's selections.

[795] FM01958-59 (emphasis added).

FiberMark and Silver Point thought they had a deal. Mr. Berenson wrote an e-mail to Mr. Straus that he had a "[v]ery gracious call from Sawyer. He thinks we are done and AIG is on board."[796] Mr. Straus responded "I got one too."[797]

11. AIG and Post Reject Plan Supplement; Negotiations Continue

FiberMark and Silver Point were wrong. There was no deal. The next morning, Mr. Wollmuth described the state of affairs to Mr. Hodara:

> No deal with Post . . . or AIG. Plan supp filed, included much of what we got them to agree to. A little surprising to me that they filed the [IRA] and the Charter with the matters Chaim agreed to – not bare Delaware law as threatened. Even nominated Greg Braun as a director. Matters that were not agreed to were filed Chaim's way.[798]

The night before, Mr. Hobart had made his views known to Mr. Straus: "As I have repeatedly mentioned to you and Jan Baker, the company's resources are better spent on other matters and I remain confused as to why customary and basic minority protections, in both the corporate governance provisions and the indenture, are not acceptable to the Company or Silver Point."[799] He also made statements making it apparent that the exclusion of Post from the January 24, 2005 meeting was a big mistake, stating,

> it is disappointing that the company takes the position that Post has to accept a deal that was unilaterally crafted without regard for reasonable minority rights or the terms previously disclosed in court filings. Indeed, material provisions in the indenture that you are unilaterally putting before the court are

[796] FM01958-59.

[797] FM01958-59.

[798] COMM0144421-23.

[799] FM10960-62.

> in complete opposition to the term sheet that the company filed.[800]

He did give hope, however, that a deal was still possible. He asked for the opportunity to speak to FiberMark and Silver Point on these issues, indicating that he had not been able to address Silver Point directly for over a month, and stated that "I hope a resolution can be reached that is equitable to all involved without further expenditure of the company's limited resources."[801] It is interesting that Mr. Hobart did not think it was a waste of the estate's limited resources when Akin was spending months trying to negotiate these issues for the benefit of AIG and Post.

AIG, on the other hand, did not tell FiberMark that there was no deal until the following Tuesday. Apparently, the last minute issue raised by AIG about wanting a very high threshold for amending the affiliate transaction provision was a deal breaker. Mr. Straus wrote to his team:

> Now that we have had a long weekend to feel happy about our results, we find out this morning that AIG has not "signed on" to the current state of affairs. They are apparently still upset about the vote required to amend the affiliate transactions restrictions in the charter. It is currently stated at 66-2/3% (which David Sawyer points out is 103% of the position held by persons other than AIG and Post); they (AIG) are possibly offering a compromise at 90%. Although we spoke last week, SP could probably give on this points for optics without significantly altering the economics or practicality, Chaim has apparently put his foot down and may already have "gone off" again. Post is I believe, still far off the reservation.[802]

Early in the morning of that same day, Mr. Musante wrote an e-mail to Akin explaining that the amendment to the affiliate transactions provision (and specifically, a veto

[800] FM01960-62.

[801] FM01960-62.

[802] FM02160-62.

right for AIG) was AIG's one bullet issue, and if SP had agreed to that, the Plan Supplement would have been agreeable to AIG. He explained:

> With [sic] think there are a number of defects in the documents vis-à-vis minority holders. However, we decided institutionally we could live with all issues but one—the ability of SP [sic] to amend the affiliate limitations (and within their control). *We made this a bullet issue, make this amendable [sic] only with AIG/Post consent and we were done.* I believe Gary had more issues.
>
> However, Chaim said no to our bullet issue. So we are not on board with the proposed plan.[803]

Of course, as will be explained below, when Mr. Fortgang did agree to increase the threshold to amend the affiliate transactions provision, AIG continued to demand additional concessions. Indeed, the entire week of negotiations leading up to the Confirmation Hearing scheduled for February 28, 2005 was marked with AIG making additional demands, Silver Point making concessions for purposes of getting a deal done, and AIG again making additional demands.

Akin wanted to set up a Committee call to vote on the Plan Supplement documents filed by FiberMark, and Mr. Storz sent an e-mail to Messrs. Musante and Hobart to that effect on February 21, 2005.[804] Mr. Musante, apparently realizing the potential Committee vote in favor of those documents, seemed to regret bringing the issues to the entire Committee, as he responded to Mr. Storz's e-mail with two simple sentences: "Know I started this. Any way to stop it?"[805] Mr. Hodara sent Mr. Storz an e-mail, asking, "Why does Tom know [sic]

[803] COMM0145555-56 (emphasis added).

[804] COMM0145555-56.

[805] COMM0145555-56.

want to stop the call? Is it because he realized he will lose the vote and that will be the end of that?"[806]

On February 24, 2005, Mr. Straus sent revised versions of the documents. Given the parties' emotional reactions to prior drafts, Mr. Straus sent the following precautionary caveat:

> Although I believe the documents accurately reflect what has been agreed to, any variation between these documents and what anyone thinks may have been agreed to is solely the result of my not having been aware of an agreement and does not represent anyone's attempt to "retrade" or renegotiate. If there are any such discrepancies, please call them to my attention as soon as possible.[807]

The documents included several significant changes. First, *they reflected an agreement by Silver Point to change the threshold needed to amend the affiliate transactions provision of the charter from 66 2/3% to 75%*.[808] This represented a major concession by Silver Point to AIG in an attempt to reach consensus. It was one of several times in which Silver Point was asked to make a concession under the guise that Mr. Braun did not understand what he was agreeing to on January 25, 2005.[809]

The other change was more problematic. To clarify what was an ambiguous provision to conform with its understanding of the deal, Silver Point had asked Mr. Straus to add the word "related" to the sections on affiliate transactions.[810] The provision had previously read that "[t]he Corporation shall not, and shall not permit any Subsidiary to, [enter into] any

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[806] COMM0029387-88.

[807] FM03642-43.

[808] FM03642-43.

[809] Fortgang Tr. at 118.

[810] FM02172-73.

transactions or series of transactions. . .” subject to certain requirements and with the exception of certain baskets.[811] Skadden changed this provision so that it read “any transaction or series of *related* transactions.”[812] This had the effect of, for example, enabling Silver Point to engage in multiple affiliate transactions in one year, as long as each transaction did not exceed $5,000,000 (rather than capping the total of all transactions in the basket in any given year to $5,000,000).

On this issue, it appears that Silver Point and AIG had a true fundamental disagreement as to the terms of the deal that had reached by the parties. Mr. Straus wrote to Mr. Sawyer and Mr. Milmoe:

> UPDATE: Tom Musante just called me to advise that AIG does not agree to the insertion of the word “related” in the two places in Article IX of the charter. He disagrees that it is otherwise implied from the term “series of transactions” and thinks that this is a material change to his agreement. I need advice from David and Greg as to whether it is your understanding that this was included in the “deal.”[813]

Mr. Sawyer indicated strongly that the word “related” comported with his understanding of the parties’ deal: “Tom is not to have any more comments on the Docs as it pertains to the shareholder issues…if Greg Braun has an issue he should raise it…BUT the way you have drafted it is my understanding of the agreement. “Related” stays in!!!!”[814]

Mr. Musante had a strong reaction to the word “related.” Mr. DeFillipo reportedly told a Skadden attorney that the insertion of this word had “driven Tom Musante off

[811] PA12057.

[812] PA12057 (emphasis added).

[813] FM02172-73.

[814] FM02172-73.

the deep end."[815] *Silver Point soon relented on the issue and agreed to the removal of the word "related" if it resolved all outstanding issues.*[816] In the early morning hours of February 25, 2005, Mr. Straus circulated revised drafts of the agreements, which reflected the removal of the word "related" where it had previously been inserted.[817] At that point, Silver Point once again thought it had a deal.[818]

12. February 25 Flip Flops

Despite the removal of the world "related," on the morning of February 25, 2005, AIG, for reasons that are unclear, said that it did not agree with the documents. Mr. Straus wrote to his team: "Thanks for all your hard work. Please put down your pencils – we seem to have reached an irresolvable impasse and AIG has communicated that 'the deal is off.'"[819] Post also raised an entirely new issue on the indenture (arguing that a premium should be paid on acceleration), which Skadden quickly dismissed as a new economic point.[820]

Later that afternoon, the Committee held a call to consider the Plan. Silver Point, believing there was an agreement at the beginning of the call, was surprised to hear AIG state that it did not agree to the documents, although AIG did not say why.[821] It was decided that

[815] FM02176-78.

[816] FM02176 (emphasis added).

[817] FM03647.

[818] Sawyer Tr. at 167; Fortgang Tr. at 121.

[819] FM03650.

[820] PA12773-75.

[821] MacDonald Tr. at 121-22.

parties should have additional time to review the latest drafts of the documents and that Akin would poll Committee members over the weekend.[822]

On February 25, 2005, AIG filed an objection to the Plan, and Post filed a joinder to AIG's objection.[823] Several of the bases on which AIG and Post objected were inconsistent with their support of the Plan as Committee members. For example, AIG argued that the proposed substantive consolidation was improper, the Plan improperly impaired certain classes and the classification of claims into classes 9 and 10 was improper.[824]

AIG and Post also objected on the basis of the Plan Supplement. They argued that the Plan violated sections 1129(a)(2) and 1125 of the Bankruptcy Code, as the Disclosure Statement was not accurate insofar as (i) it provided that the indenture would contain a restriction on affiliate transactions, which it does not, (ii) it omitted the fact that the indenture does not comply with the Trust and Indenture Act.[825] They argued that the Plan was not proposed in good faith, in violation of section 1129(a)(3).[826]

At that point Skadden decided it would not proceed with confirmation at the February 28, 2005 hearing and so advised both the Court and the U.S. Trustee.[827] AIG wanted to

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[822] Sawyer Tr. at 170; MacDonald Tr. at 123.

[823] Objection of AIG Global Investment Corp. to Joint Plan of Reorganization Under Chapter 11, Title 11, United States Code of FiberMark, Inc., Et Al., Debtors, dated February 25, 2005; Joinder in Objection of AIG to Joint Plan of Reorganization Under Chapter 11, Title 11, United States Code of FiberMark, Inc., Et Al., Debtors, dated February 25, 2005.

[824] Objection of AIG Global Investment Corp. to Joint Plan of Reorganization Under Chapter 11, Title 11, United States Code of FiberMark, Inc., Et Al., Debtors, dated February 25, 2005.

[825] Objection of AIG Global Investment Corp. to Joint Plan of Reorganization Under Chapter 11, Title 11, United States Code of FiberMark, Inc., Et Al., Debtors, dated February 25, 2005.

[826] Objection of AIG Global Investment Corp. to Joint Plan of Reorganization Under Chapter 11, Title 11, United States Code of FiberMark, Inc., Et Al., Debtors, dated February 25, 2005.

[827] FM03651-52.

negotiate further, perhaps thinking it could get more concessions from Silver Point as time went on. According to an e-mail by Mr. Straus, "Milmoe and I told Wollmuth that we need to work to cut this off on Saturday. He is pushing for Monday [morning] – I told him [that] was not going to work, we are waiting to hear back from him."[828] Straus also sent an e-mail to him team stating that "Wollmuth . . . said his guys don't think they can orchestrate an 'agreement' this afternoon because of 'all the other documents' (e.g., financing documents from the bank, etc.). They would like to have until Monday to resolve this, at which point Wollmuth 'thinks they can get there.'"[829] Eventually Skadden agreed to give AIG until Saturday.[830]

An e-mail from Mr. Straus to his team on the evening of February 25, 2005 indicated that AIG told him they agreed to the documents containing the corporate governance provisions: the IRA, the bylaws, and the charter (subject to removal of the two instances of related).[831] He further stated that "I am given to believe from this conversation [with Mr. Wollmuth] that AIG will not have further comments on any of the other documents (indenture, security agreement, pledge agreement, and intercreditor agreement)."[832]

The same e-mail described the Committee meeting in "this long and depressing saga" as follows:

> There was a Creditor's Committee meeting this afternoon. Apparently, AIG sat silent and did not acknowledge that they had a "deal" with SP. I gather that this might have been on the

[828] FM03622.

[829] FM02199.

[830] FM02200.

[831] FM02200.

[832] FM02200.

> instructions of "higher ups" at AIG. In any event, Akin Gump has been taking their role as Creditor's Committee Counsel very seriously. I believe that John Storz is trying to deliver an endorsement of the Committee, but they are doing it in a peculiar way since they are telling them things like "The indenture doesn't have x, y and z provisions that are standard in high yield indentures" including such things as the affiliate transactions covenant, which we all know has been removed on the negotiation of the creditors. I gather also that Chaim was on the call, and that he did not do his position any good, as the report I have is that Wilmington was getting nervous.[833]

13. February 26-27, 2005: Split Committee

The FiberMark board met on Sunday, February 27, 2005.[834] By then, it became apparent that AIG and Post would not withdraw their votes to reject the Plan, while Silver Point stated that it would. The board decided that if there was no agreement among the Big 3, FiberMark, it would "go nuclear" and withdraw the Plan.[835]

During that weekend, AIG and Post tried to sway the other two members of the Committee to their positions. Mr. Sawyer testified that Mr. McFarlen told him on February 26, 2005 "that he wanted to move the plan out of bankruptcy as fast as he could and that while he didn't understand a lot of the issues, he felt that voting to support the plan would be the fastest way out and that's how he was leaning."[836] Silver Point also spoke to Wilmington and learned Wilmington would be voting for the Plan.[837] Post tried to influence Wilmington by asking Mr. Hodara to forward the following message to Wilmington:

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[833] FM02200.

[834] FM03659.

[835] FM02202.

[836] Sawyer Tr. at 174-75.

[837] CB002050; Sawyer Tr. at 175.

> Prior to, and during the filing, company provided info to every investor. Now . . . , none of the shareholders have info rights (except of course, Silver Pt [sic]). And bondholders' info rights can be waived or remedies blocked by Silver Pt. [T]he main effects of this ommission [sic] are twofold (and I believe sholly [sic] intentional): (1) chills any potential for a market to develop for the new securities. It is likely that holders will have to look solely to Silver Pt for liquidity resulting in huge discounts on pricing or no market at all, particularly for the little guy; (2) Affiliate transactions, excessive pay packages and other transactions will never be brought to light, thereby virtually guaranteeing the most extreme behavior.[838]

Mr. Hodara forwarded the message to Wilmington, copying Mr. Hobart, and demonstrating that his view was aligned with Mr. Hobart: "Gary is correct that even information rights can be taken away from shareholders, other than the big three, by a vote of a mere majority and, of course, there is no affiliate transaction at all in the Indenture."[839]

Mr. Beeler commented to Ms. Johnston that although these "seem like good points to me. . ., the 'small holders' argument' is for the most part hypothetical."[840] Ms. Johnston responded that Wilmington's position did not really matter, as FiberMark indicated it would withdraw the Plan and go with plain Delaware protection absent an agreement among the bondholders.[841] She noted, however, that "it would be a principled position to say that confirming asap is in the best interest of the really small creditors, who effectively have no voice at all in all this sturm und drang."[842]

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[838] CB002035-36.

[839] CB002035-36

[840] CB002035-36.

[841] CB002035-36.

[842] CB002035-36.

After an internal call between Wilmington and Covington, Ms. Johnston sent an e-mail to Mr. Hodara stating that they had read the documents, and

> [w]e believe that approving the documents in their current configuration as filed by the debtor, without further efforts by the committee to amend, is in the best interest of the unsecured creditor body as a whole, given the alternative of further delay in confirmation of the plan and a contested confirmation process. We are comfortable that Wilmington has discharged its fiduciary duties as a committee member in evaluating the documents and the situation. Please let us know before the commencement of the confirmation hearing if as counsel for the committee you disagree with this assessment of our fiduciary obligations.[843]

Mr. Hodara did not respond to Wilmington's request for clarification of its fiduciary duties prior to the Confirmation Hearing, and it does not appear that he ever responded, despite Wilmington's multiple requests for such clarification.[844]

On Sunday, February 27, 2005, Mr. Hodara revealed to Ms. Gray that AIG's knowledge of trading issues surrounding Silver Point may have caused it to withhold support for the Plan: "As to AIG, Fred first said that there was no issue larger that [sic] the document terms that caused the deal to blow, but later said that he thought *AIG would be looking into whether Silver Point's trading desk was properly screened*."[845]

AIG's hardening of its position upset Mr. Fortgang. He believed Silver Point had conceded much while AIG had conceded very little. He reiterated a threat he had made many times before. As reported on an e-mail to her colleagues on February 25, 2005, Ms. Gray said Mr. Fortgang told her

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[843] CB002046.

[844] CB002228; MacDonald Tr. at 117.

[845] FM02202.

> he doesn't think we should do this plan. There is no downside to AIG if we do this plan – he talked to Michelle and she was seeming pretty smug. He also said that Silver Point has the three votes necessary on the committee, but he still doesn't think we should do this plan. He wants us to pull the plan and go with plan vanilla Delaware provisions and if they have a beef with the indenture Silver Point will just cash them out.[846]

Mr. Straus responded, "I think it might be the right thing to do to pull the plan, but I think we have to make sure that the Company, Berenson and Skadden don't get tarred as being agents of SP."[847] Ms. Gray responded, "I think we should wait and see what plays out in the morning – even at the hearing – before we pull. Chaim could change his mind again, since he was the one a few hours ago to say that we should keep the plan and he could deliver committee support."[848]

On the same day, Mr. Fortgang told Ms. Johnston that he would support the Plan if Wilmington did.[849] She told her colleagues that by supporting the Plan, Silver Point was making a big concession. She noted,

> [G]iven his [Mr. Fortgang's] holdings it seems to me that we should recognize that anything he has given has in fact been a gift, as he would not have had to give any of it under a Delaware law plan. He said, among other things, that he had agreed to the 75% threshold on condition that was the last item request, but it appears that it was not the last thing AIG wanted. . . He appeared puzzled as to what AIG wants now.[850]

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[846] FM02204.

[847] FM02204.

[848] FM02204.

[849] CB002050.

[850] CB002050.

Wilmington recognized that if it did not side with Silver Point, the creditors to whom it owed a fiduciary obligation would have suffered a much worse fate: a Delaware plan.[851] As stated by Ms. Johnston, Wilmington viewed the Plan "as better for hypothetical small holders than a pure delaware [sic] plan."[852]

On Sunday, February 27, 2005, Mr. Hodara began to poll the Committee members to determine the Committee's collective vote regarding the Plan Supplement. Mr. Hodara was apparently only able to reach four of the five members that day.[853] Mr. Hodara testified that he left messages for Mr. McFarlen on both his office machine and his cell phone telling him that the Committee was trying to conclude the vote that they discussed during the Committee call on February 25.[854] Mr. McFarlen, however, had no recollection of receiving these messages.[855] As the Court convened for the February 28, 2005 hearing, the Committee stood two votes in favor of the corporate governance documents as drafted by Skadden (Silver Point and Wilmington) and two votes against (AIG and Post).[856]

14. February 28, 2005 Confirmation Hearing: FiberMark's Refusal to Cramdown

On February 28, 2005, the Court held a chambers conference where Mr. Hodara informed the Court of the Committee deadlock, and Mr. Baker advised the Court that the

[851] CB002050.

[852] CB002050.

[853] Hodara Tr. at 473.

[854] Hodara Tr. at 473.

[855] McFarlen Tr. at 98-99.

[856] Hodara Tr. at 474.

corporate governance issues had not yet been resolved.[857] Mr. Hodara informed the Court that the two open issues were Silver Point's demand for a right of first offer in exchange for the tag along and drag along rights and the percentage required to amend the indenture.[858] The Court's view on the first issue is unclear,[859] but it appears the Court stated that it believed a 60% threshold to amend the charter would be a fair compromise.[860]

Apparently, after the chambers conference finished, but before the Confirmation Hearing began, Mr. Hodara checked his voice mail and reviewed a message left for him by Mr. McFarlen.[861] Mr. McFarlen expressed SDI's vote in favor of the Plan Supplement.[862] On the record, Mr. Hodara advised the Court of that development and that the Committee, therefore, supported the Plan as filed.[863] Mr. DeFillipo, on behalf of AIG, then interjected that AIG had not been aware that the Committee approved the documents, but that it was still opposed to the Plan.[864] Moreover, he stated that AIG would like additional time to prepare for a cramdown. Specifically,

> if your Honor intends and the Debtor intends to proceed to try to confirm [the Plan], we would like a brief opportunity to take discovery since our objection deadline was not until

[857] CB002163.

[858] CB002173.

[859] Ms. Johnston understood from that the Court said that the tags and drags would be in the charter and would, therefore, benefit everyone; however, she was unclear how this resolved the issue. CB002173-74. She asked Mr. Hodara for clarification, and he provided the same answer, which did not further her understanding. CB002266.

[860] CB002173-74.

[861] Hodara Tr. at 482-84.

[862] Hodara Tr. at 482-84.

[863] February 28, 2005 Confirmation Hearing Tr. at 5.

[864] February 28, 2005 Confirmation Hearing Tr. at 8.

> Friday and we were working on negotiating rather than litigating, but if we are going to litigate a cram down plan, we think there are a couple of factual issues that would be materially improved in terms of taking up the Court's time and the parties' time in this courtroom if we could have some brief discovery, including valuations issues and things like that. .[865]

Mr. Baker alleviated Mr. DeFilippo's concern by responding that notwithstanding the Committee vote, FiberMark would not cramdown the Plan on anyone.[866]

15. Evidence Suggests AIG Sought Delay in Confirmation to Investigate Claims Trading and Obtain Leverage in Negotiations; Akin Assists in Gathering Information, While Wilmington Vows to Stay Neutral

Interestingly, there is evidence to suggest that the reason AIG refused to agree to the deal despite Silver Point's concessions on the eve of the Confirmation Hearing was because it had learned of and viewed Silver Point's "suspicious" trading activity as a potential lever to use against Silver Point. AIG sought delay, believing that the assertion of trading violations by Silver Point would improve its negotiating position or maybe even its recovery (if Silver Point's claims were disallowed). Despite requesting documents and conducting examinations of AIG witnesses, the Examiner was unable to determine with certainty why AIG changed its positions during this time. As to these issues, AIG consistently asserted attorney-client privilege. For example, Ms. Levitt refused to testify as to why the January 25, 2005 agreement fell apart by the end of February.[867] Ms. Levitt, however, admitted that AIG discussed the potential remedies that

[865] February 28, 2005 Confirmation Hearing Tr. at 8.

[866] February 28, 2005 Confirmation Hearing Tr. at 11.

[867] Levitt Tr. at 71-72.

might be applied to Silver Point, including equitable subordination and similar concepts if Trading Order violations were established.[868]

Ms. Johnson reported to the Wilmington team on February 28, 2005 that Mr. Hodara told her there were two open issues on February 27, 2005: (i) whether to have the affiliate transactions provision in the indenture and (ii) whether the requirement to amend the indenture would be 66 2/3% versus a simple majority.[869] *Silver Point agreed to concede both of these in the hopes of reaching a consensual deal.*[870] It appears that Mr. Hodara and Wilmington both believed that these concessions by Silver Point meant there was a consensual deal.[871] Post then stirred up trouble, announcing that it would not sign the IRA because of the right of first offer.[872] Mr. Fortgang responded that he would not agree to the tag along and drag along provisions without the right of first offer, but apparently Post wanted its cake (the tag) and eat it too (no right of first offer for Silver Point, the condition it demanded).[873] Mr. Fortgang became upset and said he would no longer agree to the 66 2/3% requirement for amending the indenture.[874] AIG then said that because of Post's decision not to sign the IRA, it may also

[868] Levitt Tr. at 138-140.

[869] CB002713; CB002063.

[870] CB002713.

[871] CB011483.

[872] CB002173-74.

[873] CB002173-74.

[874] CB002173-74.

refuse to sign it, supposedly because it was relying on Post's support to invoke the registration rights in the future.[875]

It appears, however, that AIG and Post were really withholding their support of the Plan despite Silver Point's two last minute concessions because they wanted to pursue the trading allegations against Silver Point. Akin appeared more than willing to facilitate this tactical approach and the possible use of strategic litigation.

On February 18, 2005, Mr. Hodara had learned of the transfer of the SERP claims to Silver Point several days before FiberMark filed a motion to approve the SERP settlement.[876] The reaction of AIG and Post to this information is noteworthy. Mr. Hodara reported his discovery to his Akin colleagues:

> The transferors are: Steidle, Yousey, Kwader, Norrie, McBride, Boss and a German entity called FiberMark Gessner. The transfers are dated January 20 and 21. I think we have a duty to review some basic information about these claims in view of the Steidle and Yousey settlement on which the Debtor just asked the Committee to sign off.[877]

Mr. Hodara immediately asked Mr. Davis to research the law regarding insiders, particularly if a debtor's executives could transfer claims while concurrently negotiating a chapter plan governing treatment of such claims.[878] Mr. Hodara, foreshadowing events to come, then observed:

> I don't know which way this cuts in terms of the permeability of SP's ethical wall. If David doesn't know about these

[875] CB002173-74.

[876] Ex. 142.

[877] COMM0046237-38.

[878] COMM0046237-38.

> transfers, that's impressive. If he does know, I wish he would have said something when we were canvassing the Committee for views on the Motion. Indeed, if he knew, he should have recused himself from such consideration.[879]

Mr. Davis replied with his findings on February 22, 2005. He first explained that the transfers were not disclosed in the settlement motion.[880] After a discussion of Federal Rule of Bankruptcy Procedure 3001(e), which governs the filing of a notice of transfer of claim, Mr. Davis observed "it is not clear to me that the settlements were themselves improper."[881] Instead, Mr. Davis questioned the lack of disclosure of the transfer.[882]

On February 24, 2005, Mr. Hodara emailed Ms. Gray and Mr. Baker demanding an explanation as to why Skadden did not disclose the transfer of the SERP claims before the filing of the settlement motion.[883] Ms. Gray responded that Skadden had spoken to the attorney for Messrs. Steidle and Yousey and that the sale of the claims was for a fixed percentage, not amount, and that Messrs. Steidle and Yousey "would receive the same percentage recovery an any increased amount that was achieved through settlement or through continuing litigation."[884] Accordingly, because Messrs. Steidle and Yousey remained the economic parties in interest, Ms. Gray did not believe a disclosure issue existed.[885]

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[879] Ex. 142.

[880] COMM0046237-38.

[881] COMM0046237-38.

[882] COMM0046237-38.

[883] COMM0046085.

[884] COMM0046085.

[885] COMM0046085.

Mr. Hobart testified that Mr. Hodara informed him about the transfer of the SERP claims during the February 27, 2005 call in which Mr. Hodara was polling Mr. Hobart about Post's vote on the Plan Supplement documents.[886] As noted above, Mr. Hodara told Ms. Gray on February 27, 2005 that AIG was starting to look into allegations of Silver Point's trading.[887] In addition, Mr. Hobart left Ms. MacDonald a message on February 28, 2005 stating that he recently learned about a trade that occurred, presumably Silver Point's acquisition of the SERP claims, that he wanted to discuss with Wilmington.[888]

In connection with the trading issues, Ms. Johnston in a February 28, 2005 e-mail to Wilmington stated that if FiberMark filed a Plan based on Delaware corporate law, AIG and Post

> will then object to confirmation, and will seek discovery, probably of SP's acquisition of its position, *about which as I have previously reported Fred is extremely skeptical*. Apparently SP bought the SERP claims before the debtor announced [its] settlement with the [SERP] claimants—the timing looks suspicious. All very ugly.[889]

Mr. Gold and Mr. Storz subsequently spoke with Mr. Musante. Mr. Musante suggested holding a Committee call without Silver Point to discuss what response the Committee should pursue in light of the SERP transfers.[890]

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[886] Hobart Tr. at 298.

[887] FM02202.

[888] CB002189-90. Mr. McGinley was skeptical, writing to Ms. MacDonald, "I'd proceed with caution-since when has Gary become your big friend-just last weekend he would not correspond directly with you, he went through Fred to relay info to WTC-Food for thought." CB002189-90.

[889] CB002173-74 (emphasis added).

[890] COMM0312035-36.

Subsequent to the conversation with Mr. Musante, the Akin attorneys discussed what objective might be furthered by investigating the SERP transfers and concluded that it is probably an attempt by Mr. Musante to obtain leverage in its negotiations with Silver Point.[891] Mr. Storz opened the debate, questioning why Mr. Musante intended to raise the SERP transfers before the entire Committee in connection with the corporate governance negotiations:

> I think we need to discuss among ourselves (perhaps with Tom) to determine what it is he really hopes to accomplish by airing this to the full committee [sic]. If this is supposed to be a leverage point, we need to have a better understanding of how much leverage it really provides in moving towards a deal that includes the type of minority protections we have been discussing.[892]

Mr. Hodara agreed that clarification from Mr. Musante was necessary and recommended a call between Mr. Musante and Akin.[893] Mr. Davis chimed in next and, after agreeing that a call with Mr. Musante was necessary, observed:

> First, we have a minimal ability, if any, to object to the transfers. Second, there is no smoking gun evidence of any impropriety with respect to the transfers. Third, its not clear that reversal of at least a select few suspect transfers ultimately would affect SP's leverage in these cases. [894]

Mr. Gold added:

> I am not sure what leverage a fight would ultimately provide AIG, POST [sic] or the Committee. The S&Y [sic] litigation involved an amendment to the claim not allowability [sic]. Accordingly, S&Y [sic] was [sic] going to have an allowed claim in some amount. The transfer references original

[891] COMM0312035-36.

[892] COMM0312035-36.

[893] COMM0312035-36.

[894] COMM0312035-36.

> amounts of the claims (as well as the other SERP claimants) indicating that Silver Point was inclined to purchase the claim regardless of whether S&Y were successful with the amendment litigation. So, assuming that there truly is a breakdown of the ethical wall (obviously a big assumption), what sensitive information did Silver Point really obtain? I think that Silver Point should have advised the Committee that it was purchasing the claim (or owned the claim) and should have abstained from voting on how to proceed with the litigation. However, Sawyer will no doubt say that he did not know that the claims were being purchased and therefore could not advise the Committee of something he did not know about (interestingly, Sawyer was the only one who contacted me regarding our recommendation). We know that purchasing claims is routinely done in bankruptcy cases. Unless we have strong evidence that the purchase of the claims is being done for some improper purpose, I am not sure what leverage is created.[895]

On March 7 and 8, 2005, Akin attorneys discussed in a series of e-mails whether the Trading Order would apply to the trade claims.[896] Mr. Hodara asked his team to look further into Silver Point's Note trades.[897] On March 8, 2005, Mr. Davis of Akin called Ms. MacDonald and asked if Wilmington monitored the beneficial ownership of bonds.[898] Ms. Johnston recognized that the call "suggests . . . that Akin is considering attacking Silverpoint's purchases."[899] Ms. MacDonald apparently informed Mr. Davis that tracking down the beneficial ownership of bonds is a difficult venture, and Mr. Davis explained the difficulties in an e-mail to his colleagues.[900] Mr. Storz became frustrated:

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[895] COMM0118796-98.

[896] COMM0119314-15.

[897] COMM0119314-15.

[898] CB002313-14.

[899] CB002313-14.

[900] COMM0119345-47.

> Without sounding like the difficult one, that is a bunch of b/s. I'm well aware of the need to go through DTC. However, the bottom line is that Skadden has bought into the theory that SP owns 55% of the claims and there must be some form of documentation available to demonstrate this. SP purchased bonds from somebody and there has to be written record of the transfers. Otherwise, what is Skadden relying on to get comfort, Chaim's good looks and charming personality?[901]

To Wilmington, it was clear that whether or not there was merit in the accusations against Silver Point, AIG and Post raised the allegations to obtain leverage in dealing with Silver Point. Ms. MacDonald testified that they started pointing fingers at Silver Point, because "[t]hey're losing control and I think this is a way of it's a tactic and to see if there is any. . . I don't know that there is . . . But I just think that you know they're not good sports and they're going to do whatever they can to delay the process."[902]

After learning on February 28, 2005 that AIG and Post made threats about investigating Silver Pont's trading activity, Mr. Hopkins remarked that "[t]his state of affairs is hard to fathom."[903] According to Mr. McGinley, "[t]hey are really acting like a bunch of juveniles."[904] Ms. Johnston concluded,

> My guess is that it is all about personality—I think the debtor-Alex Kwader in particular—has [developed] an animus for musante [sic] and hobart [sic], which is not surprising as they did not conceal their desire to fire him as soon as they were in control, back in the days when they thought they would be in control. It is also therefore not surprising that the company would prefer to work with SP [sic] than the committee. There is nothing but animosity between all three of the big guys, and

[901] COMM0119345-47.

[902] MacDonald Tr. at 175.

[903] CB002173-74.

[904] CB002173-74.

> business rationality left through the back door some months ago.[905]

Ms. Johnston understood right away what AIG and Post were trying to do, and she e-mailed the rest of the Wilmington team on March 1, 2005,

> I do not think WTC should support a committee investigation into Silverpoint's [sic] trading. If the individual committee members think there was hanky panky they should hire their own counsel and investigate it, but it should not be a charge to the estate. If down the road they can prove substantial contribution more power to them. In the meantime the estate should not pay Akin's fees for the purpose.[906]

In response to a suggestion by Mr. Hopkins that such an inquiry would be within FiberMark's fiduciary duty, Ms. Johnston responded that FiberMark might not be impartial, but in any case, the allegations are based on pure speculation:

> I would be surprised given the current line up, if the debtors did such an investigation, and if they did, if AIG and Post were satisfied they had done a thorough independent job. Do you think if they don't do it is in the committee's fiduciary duty? So far as I have heard there is no evidence – only the circumstance that the claims were bought, thus enhancing [Silver Point's] negotiating position on the plan documents. But we knew from the outset that SP intended to continue to trade after it joined the committee—AIG and Post supported that. And *I am not sure what harm results to the estate as a consequence of the trading, except to AIG and Post.*[907]

Mr. McGinley realized right from outset it was improbable that Silver Point acted improperly, noting "does anyone think that Chiam [sic] would be that stupid to allow something

[905] CB002173-74.

[906] CB002195-97.

[907] CB002195-97 (emphasis added).

like that to happen???"[908] Mr. Hopkins admitted "he would be stunned" if Mr. Fortgang would allow that to happen.[909] He continued that if there is to be an investigation, it should be by FiberMark, as "Akin is not without preference."[910] Mr. McGinley countered that "the debtor is more aligned with Silverpoint than Post/Aig?\anyone [sic] else."[911] Wilmington, however, appeared determined to stay neutral.[912] Ms. MacDonald said it well in an e-mail to the Wilmington team on March 1, 2005, "As Meryl Streep said in OUT OF AFRICA, when asked how does Finland weigh in against Germany? She said we are the little country and will maintain our neutrality."[913]

The contemporaneous e-mails confirm that Wilmington was, in fact, the only member of the Committee truly concerned with the interests of smaller creditors, and that the Committee was being used as a vehicle by AIG and Post for their interests. Moreover, it is obvious that Mr. Hodara was aiding and assisting AIG and Post and not representing the full Committee or its constituency. The doubts expressed by Akin attorneys were never explicitly brought to the attention of the full Committee.

On March 2, 2005, after Ms. Johnston mentioned that Mr. Fortgang told her that Post had offered to sell its claim to Silver Point for a premium, Ms. MacDonald wrote:

> This is only going to deteriorate from here. Is there any way to signal the US Trustee that the committee's business is one

[908] CB002213-17.

[909] CB002213-17.

[910] CB002213-17.

[911] CB002213-17.

[912] CB002228-33.

[913] CB002246.

> and now the committee's time is really being spent on shareholder issues and not the restructuring of the business. If we can exit without doing WTC harm I think we should. A terrible storm is coming.[914]

Ms. Johnston responded:

> The problem is that the committee's work isn't done, really, it seems to me. There are probably still a few unsecured trade creditors out there whose claims have not been bought by vultures, even the vultures have standing as unsecured creditors, and if the debtor puts out an entirely new plan their rights should be protected. There may not be much to do, but we can't assume that now, and even if there isn't much, there will be something. The real problem is that it is not at all clear to me that Fred is in a position to do that cleanly and simply without being dragged off the course by AIG and Post into more internecine war.[915]

16. AIG and Post Make Ever Increasing Demands in March as FiberMark (Finally) Puts Its Foot Down

Emboldened by their newly found leverage weapon of allegations of trading improprieties against Silver Point, combined with their total distrust of Silver Point, AIG and Post started making even greater demands in March. In the first week of March, the parties continued to negotiate the same basic issues, while FiberMark and its advisors continued to consider withdrawing the Plan. Skadden noted that AIG's comments during this week were "overreaching" and almost unbelievable in certain repects.[916] For example, Skadden could not believe that AIG was now seeking a veto over amendments to the charter as long as it held just one share.[917]

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[914] CB011485-88.

[915] CB011485-88.

[916] FM02270-72.

[917] FM02270-72.

As the parties squabbled over the merits of a 66-2/3% threshold for amendment of certain provisions versus 75% and other minutia of corporate governance, FiberMark's value was deteriorating and its creditors suffering as a result. Mr. Hanley let the parties know, in no uncertain terms, the negative effects the delay was causing to the value of the company. On March 4, 2005, he sent the following e-mail to Messrs Musante and Sawyer:

> I know you are both immersed in trying to resolve POR matters. This note is a reflection of my narrow view of the impact on FiberMark of further delay in confirming the current plan and is not biased by any other consideration.
>
> 1. Employee morale is being affected by the uncertainty. Anxiety levels are gradually increasing at all levels of the organization.
>
> 2. Customers are playing along for now, but further delay will unquestionably increase the levels of backup sourcing efforts that are undoubtedly taking place already.
>
> 3. We are delaying important decisions on allocating capital, determining management and sales incentive plans for 2005, and implementing important quality and cost reduction programs (Plan B).
>
> *The value of FiberMark is being affected by the current uncertainty*. We hope that all matters get resolved as amicably as possible, as soon as possible. I thought you both should be reminded of these points, although I am sure the value of your investment in FiberMark is at the front of your thoughts these days.[918]

During this week, it became clear that Post was not going to sign the IRA. As a result, Silver Point would not get the benefit of the right of first offer with respect to Post, even though Post would get the benefit of the tag along rights, because those were in the charter.[919]

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[918] FM02271 (emphasis added).

[919] FM02297.

Skadden tried to convince Mr. Fortgang that it was in Silver Point's best interests to sign the IRA and continue to provide the tag and drag rights even without Post being on board.[920]

On March 7, 2005, at the request of FiberMark, the Court continued the Confirmation Hearing scheduled to March 17, 2005.[921]

On March 8, 2005, FiberMark, through Mr. Straus, sent the Big 3 a letter with drafts of the documents purporting to be in "definitive" form.[922] The letter was a plea for all parties to be reasonable and get past the distrust that had simmered throughout the negotiations. It further provided:

> The Company has also chosen to ignore the ultimatums issued by both sides, as well as various imputations of bad faith and misbehavior, not because the Company doesn't understand that the views are deeply held, but because the level of mistrust and suspicion evidenced by such imputations if embodied in corporate documents would render the Company unworkable. Frankly, the Company believes that the parties can and will work together on a business-like basis once the Plan has been confirmed.[923]

The letter then described the provisions of the greatest importance to the parties. FiberMark concluded with the urgent request:

> As noted, the Company believes that these provisions, now embodied in the attached documents, are fair, reasonable and workable. Given the hundreds of hours expended on these items, the high level of frustration expressed by all parties and *the damage that will be done to the Company if the process continues to drag on,* the Company is proposing these

[920] FM02297.

[921] Order Further Continuing Hearing To Consider Confirmation of Joint Plan of Reorganization Under Chapter 11, Title 11 of the United States Code of FiberMark, Inc., Et al., Debtors, dated March 7, 2005.

[922] Ex. 6.

[923] Ex. 6.

> documents in definitive form and will not entertain any further changes to them.[924]

This time, even Akin thought FiberMark was being reasonable. Mr. Storz wrote to his colleagues "I've only read the cover letter so far, but have to say for the most part I am pleasantly surprised with the general position taken by the Company and Skadden."[925] Mr. Hodara stated, "[t]hat was my gut reaction as well."[926] Then, for one of the few times in these chapter 11 cases, Akin raised the issue of holders other than AIG or Post.

Silver Point was willing to accept FiberMark's proposal "even given the fact that [] some of these terms were viewed from our point of view as retrades from the January 25 deal."[927]

In contrast, notwithstanding Akin's view that the proposal was reasonable and FiberMark's declaration that it would entertain no further changes, on March 10, 2005, Mr. Wollmuth, on behalf of AIG, sent Skadden an e-mail demanding veto rights and additional provisions that went beyond what AIG had requested in the past. For example, AIG raised the issue of affiliate financing for the first time, demanding that if affiliate financing can be approved without disinterested shareholder approval, such affiliate financing must be offered ratably to other "institutional shareholders."[928] Mr. Braun testified that he was not aware of any institutional shareholders other than AIG, Post, and Silver Point.[929] Mr. Braun also admitted

[924] Ex. 6 (emphasis added).

[925] COMM0119982-83.

[926] COMM0119982-83.

[927] Sawyer Tr. at 180.

[928] Ex. 54.

[929] Braun Tr. at 220.

that this was a new demand from AIG, testifying, "I don't believe [this provision] would have been in the prior discussions. It was a concern, but it was something that I don't believe, to the best of my recollection, that we pursued previously."[930] Asked why AIG decided to pursue this issue in March, Mr. Braun testified that,

> Once we became aware of the pension claim trading and the ... alleged trading in Solution Dispersions' claim, we became much more concerned on the issue and tried to propose a variety of issues along the lines that we thought would be fair to the company and to [Silver Point] in trying to reach something that was fair.[931]

AIG also asked for a veto right on amendments to the affiliate transactions provision of the charter as long as it continued to have as little as 5% of the outstanding stock.[932] In addition, AIG demanded that the IRA (other than the information rights provision) could not be amended without AIG's consent *regardless of whether AIG held any stock* (and the information rights could not be amended without AIG's consent as long as AIG held 5% of the stock).[933] AIG also demanded, among other things, that the information rights in the indenture include an MD&A provision.[934]

FiberMark responded to Mr. Wollmuth's e-mail with a March 11, 2005 letter.[935] The letter indicated that although FiberMark accepted some of the technical fixes, it would not make any substantive changes to the documents, because

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[930] Braun Tr. at 214-15.

[931] Braun Tr. at 217-18.

[932] Ex. 54.

[933] Ex. 54.

[934] Ex. 54.

[935] Ex. 56.

> the Company's proposal represented a careful balance of competing perspectives intended to impose a final, workable compromise rather than to provide a platform for further negotiations. *The Company has taken this proactive role because the negotiations have been poisoned by the passions and personalities of the individuals involved, obscuring what is in the best interests of the Company and all its creditors. No dispassionate professional would claim with a straight face that the Company's proposal, taken as a whole, is unworkable or meaningfully damages the legitimate interests of any party*. Accordingly, the Company will not accept substantive changes from any of the parties. To do so would simply open the door to further renegotiations which, given the substantial unanticipated time and expense thus far incurred in negotiating these documents, and the resultant consequential and negative impact on the Company's legitimate desire to emerge expeditiously from its bankruptcy proceeding, can no longer be tolerated.[936]

The letter then explained in detail why the specific new requests by AIG were improper and concluded that

> *The Company continues to believe that all parties, including the Company, are substantially better off if the transaction as proposed is approved by each of AIG, Post and SilverPoint [sic]. Failure to obtain such approval at this juncture will result in a substantial additional administrative and financial burden on the Company, with a resultant prospective diminution in value of the estate.*[937]

Despite FiberMark's declaration that it would not entertain further substantive changes to the documents, Mr. DeFilippo, on behalf of AIG and Post, responded with what was essentially a counterproposal in a letter dated March 11, 2005.[938] The counterproposal offered

[936] Ex. 56 (emphasis added).

[937] Ex. 56 (emphasis added).

[938] Ex. 57.

very few concessions from the March 10, 2005 e-mail and generally restated AIG's positions on the various issues.[939]

On March 11, 2005, FiberMark responded that it was "extremely disappointed that AIG and Post have continued to press for additional substantive changes in the documents under discussion."[940] Further,

> our review of Mr. DeFilippo's March 11 letter has led us to conclude that to a significant degree the latest AIG and Post counter-proposals have diverged further from the Company's position in ways suggesting that the interests sought not to be protected by AIG and Post represent views and preferences relating to external factors or assumptions that presume the absence of abundant Delaware law relating to director fiduciary responsibility, let alone the commercial realities of the marketplace. . . [None of these counter-proposals] are required by Delaware law, and at a minimum they seek to create veto rights that can be exercised by a small minority holder to thwart the will of the majority.[941]

FiberMark explained in detail its reasoning behind rejecting AIG's comments, including how they were attempts to obtain additional concessions at the eleventh hour and otherwise substantively unreasonable.[942] FiberMark noted that it "is becoming convinced that the continued refusal of AIG and Post to accept the Company's proposals. . . have little to do with real concerns about the best interest of the Company upon emergence from bankruptcy."[943]

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[939] Ex. 57.

[940] COMM0029138-44.

[941] COMM0029138-44.

[942] COMM0029138-44.

[943] COMM0029138-44.

It further reiterated its threat to withdraw the Plan if all parties did not agree to the proposals made.[944]

On March 14, 2005, Mr. DeFilippo sent a final letter on behalf of AIG and Post restating their positions and asserting that in their view, they have made "significant accommodations."[945] The letter stated that FiberMark's "suggestion that AIG and Post are not concerned with the interests of the Company on its emergence from bankruptcy is both gratuitous and irrelevant."[946] Further:

> We agree that there is a level of distrust that has built up in this case, but that distrust arises from the actions of others, and not AIG or Post. For example, *we have become very disturbed over facts we recently learned about the actions of the controlling creditor and the Company with respect to purchases of various unsecured claims and the lack of disclosure, omission of full disclosure, or simply false disclosure that has been made in this regard*. The Company's announced intention to attempt to confirm a plan notwithstanding the rejection by the unsecured creditors will inflict substantial damage on the estate, its values, and creditors generally. Instead of taking the Company down a path that will lead to litigation, expense and delay, AIG and Post urge the Company to modify its position and accept those open points in our March 11 letter.[947]

Mr. Musante testified that the lack of disclosure, omission of full disclosure, and false disclosure all had to do with the trading in the SERP claims, although he was unable to

[944] COMM0029138-44.

[945] Ex. 108.

[946] Ex. 108.

[947] Ex. 108 (emphasis added).

articulate what disclosure insufficiencies were attributable to the "controlling shareholder," i.e. Silver Point, as opposed to FiberMark.[948]

On March 15, 2005, the Debtors filed a notice continuing, without date, the Confirmation Hearing that had been scheduled for March 17, 2005 due to the Noteholders' "deadlock" on the corporate governance issues.[949] Finally, as a result of AIG's and Post's unreasonable demands,[950] on March 21, 2005, FiberMark withdrew the Plan.[951]

L. The Committee Initiates Its Investigation Despite Concerns About Fiduciary Duties

1. March 17, 2005 Committee Call

Akin and Mr. Musante decided that the Committee should investigate Silver Point trading activities and scheduled a conference call for March 17, 2005 to discuss two agenda

[948] Musante Tr. at 739-42.

[949] Debtors' Notice of Continuation, Without Date, of Hearing to Consider Confirmation of Joint Plan of Reorganization Under Chapter 11, Title 11 of the United States Code of FiberMark, Inc., Et Al., Debtors, dated March 15, 2005.

[950] The Examiner was unaware of any chapter 11 cases where the multitude of corporate governance provisions sought by AIG and Post were implemented consensually, let alone imposed over the objection of the largest future shareholder. The Examiner, therefore, asked AIG's attorney on July 3, 2005 to provide examples of any cases where such provisions (at the levels demanded by AIG) were implemented either consensually or over a major shareholder's objection. On July 7, 2005, AIG's attorney responded, providing cases where certain corporate governance provisions were implemented, all of them consensually. Most of the provisions described in those cases were much less restrictive on the majority shareholder than the positions advocated by AIG and Post in FiberMark's chapter 11 cases. In a few instances where a provision that was arguably analogous was implemented, each such case involved the majority shareholder's agreement to *one* such restrictive provision. None of the cases provided by AIG involve corporate governance provisions approaching the levels AIG and Post were demanding. The fact that neither the Examiner nor AIG's attorney could find even a single example where the corporate governance provisions advocated by AIG and Post were implemented further supports the Examiner's conclusion that AIG's and Post's demands were unreasonable and constituted a breach of their fiduciary duties.

[951] Debtors' Notice of Withdrawal of Joint Plan of Reorganization Under Chapter 11, Title 11 of the United States Code of FiberMark, Inc., Et Al., Debtors, dated March 21, 2005.

items: (i) the status of the plan of reorganization, plan documents and the confirmation hearing, and (ii) claims trading activity generally of Silver Point.[952] Silver Point protested the allegedly biased presentation of the issue and asked Mr. Hodara to add a third agenda item – whether AIG and or Post breached their fiduciary duties as Committee members during the negotiations of the Plan Supplement.[953] Mr. Hodara relayed this request to the Committee in the early morning hours of March 17, 2005 and added the issue to the agenda.[954] Although Mr. Hodara complied with Silver Point's request, he and his fellow Akin attorneys thought little of Silver Point's request. At one point, he characterized the agenda item to Mr. Davis as "utter bullshit."[955] Mr. Hodara testified that this was so

> Because any investigation of AIG and Post with respect to the negotiations as distinct from Silver Point in my mind to this day is utter bullshit. The three of these guys were in this thing together from Day 1 all the way through, except to the extent Post was kept on the sidelines.[956]

On the morning of March 17, 2005, however, neither Mr. Sawyer nor Silver Point's attorney was available for the Committee call and Mr. Sawyer requested that such meeting be moved to another day.[957] Ms. Johnston thereafter informed Mr. Hodara that Wilmington did not believe the Committee call should go forward without Silver Point, given the

[952] COMM0136413-16.

[953] COMM0136413-16.

[954] COMM0136413-16.

[955] COMM0046045-6.

[956] Hodara Tr. at 539.

[957] COMM0136413.

highly contentious nature of the agenda items.[958] Mr. Hodara, however, believed that the call should proceed and that the Committee, even without Silver Point, should decide what to do next once the call commenced.[959] Ms. Johnston responded by stating that Wilmington would not participate and that, without either Wilmington or Silver Point, the Committee would be unable to proceed because a quorum of members would not be present.[960] Ms. Johnston then emailed Mr. Hodara to amplify Wilmington's stance:

> Fred, to be clear (because I am afraid I was intemperate in our call earlier) it is WTC's [sic] position that the committee should not do anything that could be perceived as taking sides in the ongoing dispute between Silverpoint, AIG and Post. This means *it is our view that the Committee should not investigate the question of Silverpoint's trading activity, whether or not there is merit in that question, because such an inquiry is unavoidably tainted with partisanship. Similarly, the Committee should not investigate Silverpoint's allegations that AIG and Post have not acted as fiduciaries in their conduct in the case, because that inquiry is similarly related to Silverpoint's position in the case. The Committee should stand back and let the three noteholders resolve their differences however they feel it is best.* Negotiation has failed, apparently, so presumably they will litigate. But under no circumstances should the Committee be anything other than neutral in these wars.[961]

Nevertheless, Mr. Musante insisted that the call proceed, stating "Let's convene the meeting and determine what to do."[962] Accordingly, Akin, AIG and Post conferenced, despite the fact that Silver Point and its attorney were unavailable and despite Wilmington's

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[958] COMM0136413.

[959] COMM0136413.

[960] COMM0043423-25.

[961] COMM0136433 (emphasis added).

[962] COMM0043426-29.

refusal to participate.[963] Akin, AIG, and Post, *without a quorum or a Committee vote*, decided that Akin should contact the U.S. Trustee concerning the circumstances regarding the transfer of the SDI claim and SDI's resignation from the Committee.[964] AIG also indicated that it would contact the U.S. Trustee independent from Akin's efforts to discuss the investigation of Silver Point's trading activity.[965] There appeared to be no attention paid to the enforcement provisions of the Trading Order.

2. Mr. Hodara Contacts The U.S. Trustee

Mr. Hodara contacted Mr. Purcell of the Office of the U.S. Trustee on March 17, 2005.[966] Mr. Hodara discussed with Mr. Purcell his view of Silver Point's trading activities in respect of the purchase of the SDI claim and what he had learned from Mr. McFarlen.[967] Only after Mr. Purcell pointed out that reviewing the claim assignment or agreement might be helpful to ascertain the facts did Mr. Hodara request such agreement from Mr. McFarlen and, upon receipt, he forwarded the document to Mr. Purcell.[968]

Mr. Hodara asked Ms. Berchem to review the assignment of claim agreement and report back to him.[969] Ms. Berchem reviewed the assignment of claim, noting that although the

[963] MacDonald Tr. at 145.

[964] COMM0046178 – 79.

[965] COMM0046178 – 79.

[966] COMM46096.

[967] Hodara Tr. at 514.

[968] COMM0136458 – 67.

[969] COMM0136458 – 67.

assignment was "fairly standard" there were a couple of notable caveats.[970] After some initial confusion, Akin recognized one such caveat was Paragraph 5.(a) of the assignment, which would permit SDI to remain on the Committee, even though it had sold its claim, as an agent of Silver Point.[971] (The facts and circumstances surrounding the assignment of claim form and whether Silver Point acted improperly in connection therewith are discussed in greater detail in this Report).

As a follow up to their telephone conversation, on March 18, 2005, Mr. Purcell requested from Mr. Hodara a detailed letter describing what Mr. Hodara had told him during the March 17, 2005 call. Mr. Purcell requested that Mr. Hodara provide his understanding of the circumstances leading to the Committee's vote on February 28, 2005 in favor of the Plan.[972] Mr. Purcell also requested a summary of Silver Point's trading activity.[973]

3. March 21, 2005 Committee Telephonic Meeting

The Committee telephonic meeting originally scheduled for March 17, 2005 was held on March 21, 2005. All Committee members participated at the beginning of the call.[974] Three items were slated for discussion:

1. Status of Plan of Reorganization, Documents and Hearing;
2. Claims Trading Activity Generally and of Silver Point
3. Did AIG and Post Breach a Duty in the manner of their negotiations of the plan?[975]

[970] COMM0120193 – 05.

[971] COMM0120193 – 05.

[972] COMM0046096.

[973] COMM0046096.

[974] COMM0043422.

[975] COMM0043422.

After initial discussion of Silver Point's claims trading activity, Mr. Hodara warned Silver Point that it would be asked to leave the call when the subject of Silver Point's trading arose.[976] Mr. Friedman, Silver Point's attorney, responded by stating the request was inappropriate.[977]

Attention turned to the transfer of the SDI claim. Mr. Hodara reported that at his suggestion Mr. McFarlen informed the U.S. Trustee of the transfer and announced that SDI had resigned from the Committee.[978] Mr. Hodara then noted that he had spoken to the U.S. Trustee and that the U.S. Trustee had requested that Akin provide a timeline of events relevant to Silver Point's claims trading.[979] Mr. Friedman added that Silver Point had also spoken with the U.S. Trustee and anticipated meeting with Mr. Purcell on March 22, 2005 to discuss the transfer of the claims of SDI and Mr. Kwader.[980]

The meeting then turned to the issue of whether Silver Point should participate in Committee deliberations regarding Silver Point's trading activity.[981] Mr. Friedman expressed Silver Point's view that the U.S. Trustee was better equipped to investigate Silver Point's claims trading as the U.S. Trustee, as opposed to other Committee members. The U.S. Trustee, unlike AIG and Post, had no economic interest at stake in the investigation.[982] He further argued that

[976] Ex. 66.

[977] Ex. 66.

[978] Ex. 66.

[979] Ex. 66.

[980] Ex. 66.

[981] Ex. 66.

[982] Ex. 66.

Silver Point should be permitted to participate in the discussion of Silver Point claims trading because Silver Point was not conflicted, at least not more so than either AIG or Post.[983]

Mr. Musante disagreed and expressed his view that Silver Point was conflicted and that it should be excluded from Committee consideration of Silver Point's trading activities and the prospect of an investigation by the Committee of Silver Point's claims trading activities.[984] Mr. Hodara also determined that AIG and Post were not conflicted as to this agenda item even though their economic interests would be increased by the pursuit of an investigation.

In that context, Wilmington suggested that a Committee investigation would appear tainted to the Court and that all other members of the Committee besides itself, including AIG and Post, were conflicted.[985] Ms. Johnston also expressed her belief that Silver Point should not be asked to leave the call in the event that the Committee considered initiating an investigation into Silver Point's trading.[986]

Mr. Musante persisted, however, and after consultation with Mr. Hodara regarding the construction of the Committee's bylaws regarding conflicts of interest, Mr. Musante ruled that Silver Point was conflicted and requested that Silver Point leave the call.[987] The Committee's bylaws provide the Chairperson with the authority, with the advice of the Committee's attorneys, to excuse any member from any meeting or consideration of any matter

[983] Ex. 66.

[984] Ex. 66.

[985] Ex. 66.

[986] Ex. 66.

[987] Ex. 66.

on the basis of conflict of interest.[988] Mr. Friedman and Mr. Sawyer disconnected, but did so under protest.[989]

Mr. DeFilippo, attorney for AIG, added that he had spoken to the U.S. Trustee on March 18, 2005 and that the U.S. Trustee would not object to an investigation undertaken by the Committee.[990] Mr. Hodara, at this juncture, suddenly announced, despite Akin's prior conduct, that Akin could not pursue an investigation of Silver Point because of conflict of interest concerns.[991]

The remaining three Committee members then discussed whether to conduct the investigation jointly with the U.S. Trustee. Before a vote could be taken to resolve that question, Wilmington withdrew from the Committee call, indicating that it was not in a position to vote on the question of whether the Committee should proceed with an investigation.[992]

Thereafter, the only remaining Committee members, AIG and Post, voted to (i) engage special conflicts counsel to investigate Silver Point's claims trading activities; (ii) authorize such counsel to investigate Silver Point's claims trading transactions and report back to the Committee with its findings; and (iii) require, before the Committee formally seeks approval of such counsel's retention by the Court, that (a) the Committee communicate with the U.S. Trustee and get its feedback with regard to the Committee's investigation of Silver Point and (b) such counsel discuss with the non-conflicted members of the Committee matters related to its

[988] COMM0028834 – 46.

[989] Ex. 66.

[990] Ex. 66.

[991] Ex. 66.

[992] Ex. 66.

engagement (including the terms of its engagement and the scope of its investigation).[993] The law firm first selected subsequently informed the AIG and Post of a conflict of interest and AIG and Post decided to retain Klee Tuchin Bogdanoff & Stern ("Klee Tuchin") as special conflicts counsel.[994]

Prior to ending the call, AIG and Post determined that the third agenda item, whether AIG and Post breached a duty in the manner of their negotiations, could be taken up on any subsequent Committee call in which Silver Point participated.[995] Although Mr. Davis subsequently suggested to his colleagues that Akin call a meeting or conduct a poll regarding this agenda item, noting that the bylaws only required Silver Point to raise the issue once,[996] there is no evidence that a discussion of this item ever actually occurred. This ruling is inconsistent with Mr. Musante's ruling excusing Silver Point from the discussion and determination of the charges against it.

After the call, on March 25, 2005, Ms. Johnston sent Mr. Hodara an email requesting that Akin prepare and circulate minutes of any meeting held by AIG and Post in Wilmington's absence.[997] Although Mr. Hodara acknowledged receipt of the e-mail minutes later,[998] the minutes of the March 21, 2005 meeting, required careful drafting and were not

[993] Ex. 66.

[994] Ex. 66.

[995] Ex. 66.

[996] COMM0046045-46.

[997] CB2517.

[998] CB2517.

distributed until March 31, 2005,[999] and only after repeated requests from Wilmington.[1000] Ms. MacDonald was so frustrated that she uncharacteristically emailed Mr. Hodara the following statement:

> Stall, stall, stall regarding those minutes. On the call with Skadden perhaps we can ask to receive all communications directly and not through committee counsel to get the info sooner.[1001]

4. Wilmington Protests the Committee's Investigation

On March 22, 2005, Ms. Johnston wrote to Mr. Hodara reaffirming that:

> Wilmington believes that the Committee should not take steps to investigate the Silverpoint [sic] trades until Committee counsel has first discussed the issue with the US Trustee [sic] to learn the parameters of the US Trustee's [sic] investigation and to determine the best and most efficient way to proceed, and then report back to the Committee as a whole.[1002]

Ms. Johnston further stated "Wilmington will not participate in Committee calls or meetings designed to further the proposed investigation or in any other way relating to the disputes between the noteholders until the Court provides some guidance to the parties."[1003] Ms. Johnston then objected to purported Committee decisions or resolutions emerging from the March 21, 2005 call reiterating that in Wilmington's view AIG and Post were not disinterested and thus not

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[999] Ex. 66.

[1000] CB2716, CB2657, CB3745.

[1001] CB2716. The call with Skadden described above refers to a call that Skadden scheduled with Akin to discuss whether the Committee had authorized the Klee retention application. As discussed above, Wilmington did not participate in the Committee's decision to retain the Klee firm. When Skadden learned of this, Skadden sought confirmation from Akin that the retention was duly authorized by the Committee.

[1002] COMM0028951.

[1003] COMM0028951.

entitled to vote on (i) initiating the investigation, (ii) hiring special counsel for the investigation or (iii) any other issue relating to the dispute between the Noteholders.

5. Continued Discussions With The U.S. Trustee

In the days following the March 21, 2005 Committee call, and as part of the dialogue that began on March 17, 2005, Akin exchanged a series of correspondence with the U.S. Trustee. On March 22, 2005, Mr. Hodara responded to Mr. Purcell's March 18th e-mail by providing a timeline of activities relevant to Silver Point's claims ownership that had been prepared largely by Mr. Musante.[1004] Notably, Mr. Musante submitted his construct of a timeline to Mr. Hodara on March 20, 2005 based on his recollection of conversations with Committee advisors and comments made by Mr. Sawyer and Mr. Fortgang.[1005] Mr. Hodara modified Mr. Musante's work product so as to eliminate certain information and transmitted it to the U.S. Trustee.

On March 22, 2005, Mr. Purcell e-mailed Mr. Hodara requesting a written statement addressing whether he or the Committee had a suspicion that there was a violation of the Trading Order, and if so, the specific facts relied upon in support of its suspicion.[1006] It appears that this request resulted from Mr. Purcell's questioning whether Akin complied with the Trading Order, which required that any of the parties charged with enforcing the screening wall procedure, including the Committee's attorneys, file a notice of such suspicion and other information with the Court if that party suspected a violation.[1007]

[1004] Ex. 70.

[1005] Musante Tr. at 368-69.

[1006] COMM0046090.

[1007] Ex. 64.

On March 24, 2005, Mr. Hodara responded to Mr. Purcell's March 22, 2005 request by providing a statement that the Committee had commenced an investigation of the trading activity of Silver Point to determine whether there was reason to believe Silver Point had violated the order or the screening wall process.[1008]

On March 25, 2005, Mr. Purcell wrote a letter to Mr. Hodara stating that Mr. Hodara did not adequately address the questions he raised in his letter dated March 22, 2005 and asking for a response to such inquiry.[1009] Mr. Purcell stated:

> I note that, to date, the United States Trustee still has not received the requested written statement from you setting forth the concerns orally expressed to me in our telephone conversation on March 17, 2005. In that conversation, you informally raised three issues, specifically in Paragraph 5(a) of the Solutions Dispersions, Inc. assignment of claim addressing continued service by Mr. McFarland on the creditors committee; the timing of the assignment of claim from Alex Kwader to Silverpoint; and your concern that the Silverpoint representatives serving on the creditors committee [sic] seemed to know the percentage holdings of Silverpoint [sic] in the debtor.[1010]

Mr. Purcell requested again that Mr. Hodara provide a written statement detailing his concerns and identifying whether he believes any of these issues led to a suspicion that the Trading Order was violated.[1011] Mr. Purcell asked Mr. Hodara to reconcile, in writing, his oral statement that no member of the Committee has violated his or her fiduciary duty.[1012]

[1008] COMM0000665.

[1009] Ex. 69.

[1010] Ex. 69.

[1011] Ex. 69.

[1012] Ex. 69.

On March 30, 2005, Mr. Hodara replied to Mr. Purcell's letter dated March 25, 2005, recounting that the Committee had suspicion of a violation of the Trading Order.[1013] Mr. Hodara prefaced his response by reciting the American Heritage Dictionary's definition of suspicion as proof that Akin's understanding of the term was in accordance with standard usage.[1014] Mr. Hodara then indicated that the "Committee does not have sufficient information to have a 'belief' that any member of the Committee has violated his or her fiduciary duty, but the Committee has reviewed objective facts that give rise to the noted suspicion."[1015] Mr. Hodara further explained that in order to acquit its fiduciary duty under the Bankruptcy Code, and under the Trading Order, the Committee must conduct a formal investigation of the facts that give rise to the suspicion of a violation. Moreover, Mr. Hodara informed Mr. Purcell that the Committee filed a motion to retain special counsel to conduct the formal investigation of Silver Point.

6. The Committee Proceeds: The Application To Retain Klee Tuchin

Although the Committee "resolved" to retain Ed Weisfelner as special counsel on March 21, 2005, Mr. Weisfelner was unable to participate because of, ironically, conflicts of interest. On March 23, 2005, Mr. Musante reported to Mr. Hodara that Post and AIG agreed to retain Klee, Tuchin as conflict counsel instead. Apparently, no one considered that the Committee already had conflicts attorneys—Mr. Anderson's firm. With respect to Wilmington, Mr. Mustante stated "[g]iven Wilmington's express view I see no point in polling them, but I

[1013] Ex. 65.

[1014] Ex. 65.

[1015] COMM0028778-82.

leave that up to counsel."[1016] The Committee, led by AIG and Post, over Wilmington's objection, proceeded with its decision to employ conflicts counsel. Wilmington was not apprised of the Committee's decision to file an application for special counsel in advance because, according to Mr. Hodara, Wilmington had expressed that it would not participate in any Committee calls without Silver Point.[1017]

On March 29, 2005, the Official Committee of Unsecured Creditors filed the Application of the Official Committee of Unsecured Creditors for an Order Authorizing and Approving the Retention *Nunc Pro Tunc* of Klee, Tuchin, Bogdanoff & Stern LLP as Special Counsel. This application became the basis of the Court's March 30, 2005 order directing the parties to address the potential appointment of an examiner. On April 13, 2005, the same date as the Court's order deeming the appointment of an examiner appropriate, the Court denied the Committee's application. Notably, Wilmington learned of the application from Skadden, prompting Ms. Gray to observe "*I think we are in the twilight zone in this poor little case*" and Ms. Johnston to respond "*I think it is a bit further out than mere twilight*."[1018]

7. The Committee's Professionals Debate The Merits Of An Investigation

Significantly, the decision to investigate Silver Point was the subject of intense debate between the Committee's lawyers. Mr. Hodara recognized the gravity of the situation on March 21, 2005 observing to Mr. Davis, in the context of a conversation regarding the

[1016] COMM0046031.

[1017] COMM0028791-93.

[1018] CB2682-84 (emphasis added).

Committee's duty to investigate, that "we are in very deep waters here."[1019] That same day Mr. Hodara wrote to Ms. Johnston

> I recognize the troubled waters into which I have waded. There is no easy way out, but your thoughts are welcome. In the meantime, we all just have to keep on doing what we think is the right thing, given our respective duties. A lot of grey area.[1020]

It is manifest that AIG and Post's decision to investigate Silver Point was motivated primarily by a desire to obtain leverage and concessions in the difficult and contentious negotiations they had been having with Silver Point over the prior six months. Even the Committee's Vermont counsel, Mr. Anderson, expressed concerns to Mr. Hodara on March 20, 2005 about Post's and AIG's supposed championing of minority shareholder rights.

Accordingly, Mr. Anderson advised Mr. Hodara that "we need to put some distance between us and AIG and Post when drafting the Committee's reply to the Debtors' Trading Motion."[1021] Mr. Anderson cautioned " We need to maintain our credibility as attorneys for the Committee that [sic] are working for the best interest of the Estate to confirm the plan. Try to avoid even the appearance of advancing AIG and Post's corporate governance agenda. It's a fine line to walk."[1022]

[1019] COMM0120238-39.

[1020] CB2494.

[1021] COMM0046045-46.

[1022] COMM0046045-46.

Mr. Hodara denied taking sides: "I don't think we have ever endorsed the provisions of one side or the other and this response is not the place to do it. AIG and Post have actually kept us out of that negotiation as much as Silver Point and the Debtor have."[1023]

During this time, the Akin team also conducted legal research to determine the ability and desirability of a Committee led investigation and the scope of a committee member's fiduciary duties.

[1023] COMM0046045-46.

VI.

THE TRADING ALLEGATIONS

A. The Assertions of AIG and Post

With the hardening of the breakdown of negotiations between AIG and Post and FiberMark as illustrated by the exchange of correspondence over the period of March 8 through March 14, 2005 and the deadlock in the four member committee, AIG and Post, with the assistance of Akin, sought to establish a strategic position that would give them bargaining leverage to overcome Silver Point's dominant and majority position in FiberMark's Notes and claims. As a consequence of the difficult, stressful and acerbic negotiations that had extended over four months, the level of distrust of Silver Point held by AIG and Post was all encompassing.

When FiberMark finally told AIG and Post on March 14, 2005 that it would make no further substantive changes to the corporate governance provisions, the asserted Silver Point trading violations became a pivotal strategic weapon for AIG and Post to obtain corporate governance provisions they deemed to be in their self interest, as stockholders and creditors of reorganized FiberMark. Mr. Musante, upon reflection during his examination, identified three areas of alleged improprieties by Silver Point:

> Silver Point's purchase of FiberMark securities and claims in January 2005 appeared a "tad covenient;"
>
> Silver Point's failure to disclose its purchase of Mr. Kwader's and other SERP claims during the Committee's consideration of the compromise and settlement of the discount rate controversy concerning the SERP claims of Messrs. Steidle and Yousey that indirectly benefitted Mr. Kwader; and

Silver Point's purchase of the SDI claim on February 25, 2005.[1024]

According to Alan Straus of Skadden, Mr. Hobart had asserted as early as February 3, 2005 that Silver Point had traded in FiberMark Notes with non-public information in violation of the Trading Order.[1025] However, Mr. Hobart never amplified or provided any support for this charge and did not pursue the accusation until the breakdown of negotiations in March 2005. In a follow-up interview with Mr. Hobart, on June 30, 2005, he offered no facts in support of any statement he may have made to Mr. Straus, other than the timing of Silver Point's purchase of additional Notes appeared to him "strange," as it had to Mr. Musante. He merely said that the fact that Silver Point may have purchased Notes and/or claims after the January 13, 2005 Committee vote indicated to him for some reason that Silver Point traders had inside non-public confidential information.

Akin, in what appears to have been a disguised effort to build a foundation for a resolution of the corporate governance issues by leveling the playing field to some degree, aligned itself with AIG and Post. This positioning became troublesome to the Committee's Vermont counsel, whose concern increased in the days leading up to the filing of pleadings relating to the alleged trade violations. Mr. Anderson urged Mr. Hodara to distance himself from AIG and Post.[1026]

[1024] Musante Tr. at 521-22, 529-30, 545.

[1025] Straus Interview, May 11, 2005.

[1026] COMM46042-4.

In fact, in an April 7, 2005 e-mail from Mr. Anderson to Mr. Hodara, Mr. Anderson told Mr. Hodara in very clear words his concerns over the actions that the Committee had been taking.

He suggested judicial mediation might be helpful to discuss certain issues:

> In general, whether both parties to the Committee deadlock have breached their fiduciary duties by refusing to compromise for the common good and obstinately pursuing their own self interest. Individually, whether the bankruptcy code imposes a fiduciary duty on Silver Point, as a committee member, to make some concessions on corporate governance that would not otherwise be required under Delaware law. Likewise, whether AIG and Post have a fiduciary duty to compromise on corporate governance issues that they cannot control under Delaware Law and that they may ultimately have to accept under a cram down plan. In short, whether AIG and Post have a fiduciary duty to stop filibustering.[1027]

Mr. Anderson further noted that Silver Point has a "legitimate complaint that the Committee has not addressed its concerns about AIG and Post."[1028] He also pointed out that "*every neutral or adverse . . . counsel, including Judge Brozman, has alleged that the investigation is a pretext*."[1029]

[1027] Anderson e-mail to Hodara, April 7, 2005 (no bates stamp).

[1028] Anderson e-mail to Hodara, April 7, 2005 (no bates stamp).

[1029] Anderson e-mail to Hodara, April 7, 2005 (no bates stamp) (emphasis added). Mr. Anderson may be referring to the Joinder of General Electric Capital Corporation, As Administrative Agent for the DIP Facility Lenders and Prepetition Credit Facility Lenders, Respectively, in Support of (I) Debtors' Motion for Order Establishing Expedited Procedures for, and Safeguarding Estate Resources Sought to be Used in Connection with, Resolving Claims Trading Issues that Have Aggravated Intercreditor Dispute and Halted Plan Confirmation Process and (II) Response of Wilmington Trust Company to Debtors' Motions (the "GECC Joinder"), dated April 4, 2005. Former Bankruptcy Judge Tina L. Brozman, currently of Bingham McCutchen LLP, represents GECC in FiberMark's chapter 11 cases. The GECC Joinder provides: "In light of the peculiar facts of these intercreditor disputes, however, GECC views the suggestions forecast in the Special Counsel Motion [the Klee Application] as an outgrowth of, and possibly a tactical position taken by, certain Noteholder Members to further their negotiation and/or litigation position with respect to the corporate governance dispute."

In his interview with the Examiner, Mr. Anderson stated that he told Mr. Hodara that in his opinion the trading violations were "a non-starter" undertaken by AIG and Post in their own self interest.[1030] He reported that in his opinion Mr. Musante did not give a damn for the interest of others and that AIG may have been in breach of its duties as a member of the Committee.[1031] He described AIG and Post's new-found mission as "champions of minority shareholder rights" as "transparently disingenuous."[1032]

B. The SERP Claims

Although AIG, Post and Akin initially asserted that Silver Point's acquisition of the SERP claims violated the Trading Order, they have since conceded that the Trading Order does not apply to trade and employee claims, such as the SERP claims, as such claims are not Securities under the Trading Order. Since these initial assertions and after reviewing the terms of the Trading Order, they have shifted their positions to claim that Silver Point breached its fiduciary duties because it did not disclose the purchase of Mr. Kwader's and other SERP claims during the consideration of the compromise and settlement of the discount rate controversy between FiberMark and Messrs. Yousey and Steidle.

1. The Sale of the SERP Claims

Mr. Kwader's initial discussions regarding the sale of his claim were with Libertas Partners ("Libertas"), an active purchaser of FiberMark trade claims.[1033] Libertas contacted FiberMark to indicate its desire to acquire employee claims, a message that was

[1030] Anderson Interview, June 27, 2005.

[1031] Anderson Interview, June 27, 2005.

[1032] COMM46042-4.

[1033] Kwader Tr. at 67-68.

communicated by FiberMark to employees, including Mr. Kwader.[1034] As a result, Mr. Kwader called Libertas on or around January 17, 2005.[1035] After receiving an offer of sixty-two cents on the dollar from Libertas, Mr. Kwader asked Skadden to advise him as to the propriety of selling his claim.[1036] Skadden advised that there was nothing improper about Mr. Kwader pursuing a sale of his claim.[1037]

Mr. Kwader also knew that Silver Point was buying claims and he called Mr. Zughayer to ask whether Silver Point might be interested in his SERP claim.[1038] Mr. Zughayer directed Mr. Kwader to a claims trader at Silver Point, Brian Jarmain.[1039] After some negotiation, a price of 65% was agreed to between Silver Point and Mr. Kwader, which was in line with what Silver Point and other entities were paying for employee claims at the time.[1040] As he had with Libertas' offer, Mr. Kwader sought advice from Skadden regarding the sale to Silver Point.[1041] Mr. Baker responded approvingly: "I have no hesitation about your doing this deal. In my prior dealing with Silver Point, I have found them to be honest people who will

[1034] FM 00865.

[1035] Kwader Tr. at 67– 69.

[1036] FM450.

[1037] Kwader Tr. at 80.

[1038] Kwader Tr. at 81.

[1039] Kwader Tr. at 81.

[1040] Ex. 92; SP000000061; Jarmain Tr. at 32-33.

[1041] AK14.

stand by their word, and I am comfortable with your proceeding. This strikes me as a good result for all concerned."[1042]

In addition to negotiating the purchase of Mr. Kwader's claim, Mr. Kwader and Mr. Jarmain discussed the potential sale of other SERP claims to Silver Point.[1043] Following this discussion, FiberMark transmitted a list of other SERP claimants to Silver Point.[1044] FiberMark also contacted individual SERP claimants to advise them of interest from both Libertas and Silver Point.[1045] In a series of transactions on January 20-21, 2005, Silver Point acquired Mr. Kwader's SERP claim, as well as those of Peter Norrie, Stephen Steidle, Peter Yousey, George McBride and Jim Boss, most of whom were former FiberMark employees.[1046]

Each of the sellers executed an assignment of claim agreement, assigning his claim to Silver Point, which provided in part:

> In the event that the amount of the Assigned Claim is increased pursuant to Final Order of the Bankruptcy Court, Assignee agrees to immediately pay Assignor via wire transfer a sum equal to (x) the increase in the amount of the Assigned Claim (the "Additional Claim Amount") multiplied by (y) the Purchase Rate.[1047]

Very importantly, this provision assured that the assignor, and not Silver Point, would benefit from an increase in the allowed amount of any SERP claim.

2. The SERP Settlement

[1042] AK14.

[1043] Kwader Tr. at 89.

[1044] SP485-86.

[1045] FM869.

[1046] Kwader Tr. at 89; Ex. 92.

[1047] SP0000000099-106.

Critical to the AIG "suspicions" in relation to Silver Point's purchase of the SERP claims is the SERP settlement. Prior to the sales of the SERP claims in January 2005, on December 30, 2004, Messrs. Yousey and Steidle, former FiberMark employees, each filed motions with the Court to amend their respective proofs of claim, asserting that their claims as initially stated were based upon incorrect valuations that were provided by FiberMark.[1048] Messrs. Yousey and Steidle, who were represented by an independent attorney, further asserted that the seven percent discount rate provided by the SERP was unreasonable and that a five percent rate should apply.[1049] Applying a lower discount rate would lead to a higher amount for the SERP claims. FiberMark responded on January 17, 2005 and opposed the motions on the basis that the appropriate discount was seven percent as provided by the SERP.[1050] The Committee submitted a pleading supporting the position taken by the Debtors.[1051] Mr. Kwader submitted a pleading that asked "in the event that this Court determines that a different rate should be used in connection with the SERP claim of participants Stephen Steidle and Robert Yousey, my serp Claim should be adjusted accordingly. The same rate should be used in calculating the amount of all SERP claims."[1052]

[1048] Motion to Amend Proof of Claim of Stephen Steidle, dated December 20, 2004 and Motion to Amend Proof of Claim Of Robert Yousey, dated December 30, 2004.

[1049] Motion to Amend Proof of Claim of Stephen Steidle, dated December 30, 2004 and Motion to Amend Proof of Claim Of Robert Yousey, dated December 30, 2004.

[1050] Debtor's Response to (I) Motion To Amend Proof Of Claim For Stephen A. Steidle (Claim No. 499), (II) Motion to Amend Proof of Claim For Robert F. Yousey, Jr. (Claim No. 497), and (III) Claimants Steidle and Yousey's Opposition to Debtors' Sixth Omnibus Objection to Claim, dated January 17, 2005.

[1051] Hodara Tr. at 495. Response to Debtors' Response To (I) Motion To Amend Proof Of Claim For Stephen A. Steidle (Claim No. 499), (II) The Motion To Amend Proof Of Claim For Robert F. Yousey, Jr. (Claim No. 497), and (III) Claimant Steidle and Yousey's Opposition to Debtors' Sixth Omnibus Objection To Claims, dated January 18, 2005.

[1052] Response of Alex Kwader to Debtors' Sixth Omnibus Claims Objection Pursuant to 11 U.S.C. §§ 502, 506 and 507 and Fed. R. Bankr. P. 3007 and 9014 To Certain (A) Executory Contract Claims, (B) No Liability Employee

After negotiations, FiberMark and Messrs. Steidle and Yousey ultimately resolved their controversy by agreeing to the use of a six percent discount rate.[1053] Notably, the six percent rate was to be applied to all SERP claims, including Mr. Kwader's,[1054] a fact known to Akin.[1055] Importantly, Mr. Kwader was completely screened by FiberMark from participating in any discussions relating to the motions by Messrs. Steidle and Yousey, FiberMark's response thereto, and the SERP settlement.[1056] In fact, he had no participation or knowledge of the negotiation of the settlement.[1057] Indeed, far from encouraging any settlement with Steidle and Yousey, Mr. Kwader supported the use of the *higher* discount rate. Mr. Kwader explained

> When these guys, both these guys filed this motion claiming that a 7 percent discount rate was either unfair or not contemporary or whatever they said in the motion, that it ought to be 5 percent or whatever they said, I remember telling our counsel that we got to fight that because the plan is the plan. And it says right in the plan 7 percent.[1058]

Skadden filed a motion on February 1, 2005 to approve the SERP settlement. The motion did not disclose that the SERP claims had been transferred to Silver Point. That information did not become publicly available until it appeared on the docket on February 15,

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Claims, (C) Retiree Benefit Claims, (D) Misclassified Claims, (E) Indemnified Claims, (F) Deferred Compensation/SERP Claims and (G) Duplicate Different Debtor Claims, dated January 14, 2005.

[1053] Motion to Approve Compromise and Settlement – Debtors' Motion for an Order Approving Stipulation Resolving SERP Claim Matters Involving Stephen A. Steidle and Robert F. Yousey, Jr. and Adjusting Other SERP Claims Utilizing Stipulated Discount Rate, February 1, 2005.

[1054] Motion to Approve Compromise and Settlement – Debtors' Motion for an Order Approving Stipulation Resolving SERP Claim Matters Involving Stephen A. Steidle and Robert F. Yousey, Jr. and Adjusting Other SERP Claims Utilizing Stipulated Discount Rate, February 1, 2005.

[1055] FM334-36.

[1056] FM 00260; Kwader Interview, June 28, 2005.

[1057] Kwader Tr. at 60; FM260.

[1058] Kwader Tr. at 62-63.

2005, one day after the deadline for objecting to the SERP settlement. Silver Point had in fact sent the notice of transfer of the SERP claims to FiberMark's claims agent, Logan & Company, Inc. ("Logan"), on February 2, 2005,[1059] almost two weeks prior to the February 14, 2005 objection deadline (albeit a few days after the expiration of the 10-day period for filing such notices). In another of a multitude of coincidences, the reason the notice of transfer was not sent to Logan earlier is that Silver Point moved to a new office space in the days prior to February 2, 2005. Because of a fault in Logan's procedures, Logan did not file the notice of transfer on the docket until February 15, 2005, one day after the deadline for objecting to the settlement.[1060]

In the meantime, on February 2, 2005, Akin distributed a memorandum to the Committee members.[1061] As was typical practice for the Committee, no Committee meeting or discussion was held to discuss the settlement motion. No Committee member objected, and the Committee did not file an objection.

Mr. Sawyer told the Examiner in his interview that subsequent to receiving the memorandum, he had a conversation with Mr. Gold and asked Mr. Gold to explain the calculations and other details to him.[1062] After the explanation, Mr. Sawyer agreed that the settlement was reasonable.[1063] Mr. Sawyer said that at the time he was not aware that Silver Point had purchased the SERP claims.[1064]

[1059] Transfer of Claim, including transfers of Robert F. Yousey and Stephen A. Stiedle, docketed February 15, 2005. The Transfer of Claim was stamped as received by Logan on February 2, 2005.

[1060] Transfer of Claim, including transfers of Robert F. Yousey and Stephen A. Stiedle, docketed February 15, 2005.

[1061] Exhibit 65.

[1062] Sawyer Interview, June 30, 2005.

[1063] Sawyer Interview, June 30, 2005.

[1064] Sawyer Interview, June 30, 2005.

On February 3, 2005, Mr. Hobart forwarded the Akin memorandum to Messrs. Sawyer and Musante with the note, "David, you cool with Alex and three other managers getting an additional $526k of claims at this point? You're [sic] call."[1065] Mr. Sawyer told the Examiner that he believes he responded to Mr. Hobart's e-mail either in writing or via a telephone conversation and told Mr. Hobart that he supported the settlement based on the same logic Mr. Gold used in explaining it to him.[1066] Although Mr. Sawyer had access to Silver Point's daily reports of positions, he testified that at the time of his conversation with Mr. Hobart, he did not have knowledge that Silver Point had acquired the SERP claims.[1067]

As to Silver Point's role in the Committee's consideration of the discount rate settlement, it appears that Mr. Sawyer did not know during the course of the Committee's consideration of the discount rate settlement that Silver Point had acquired the SERP claims.[1068] Even if Mr. Sawyer had known about Silver Point's acquistion of the SERP claims, there was no Committee meeting to discuss the SERP Settlement and no party objected to the proposed discount rate. Moreover, Akin agreed with Skadden's analysis of the reasonableness of the SERP Settlement, and no Committee member objected to the SERP Settlement. These facts, combined with the fact that any change in the discount rate would have inured to the benefit of the sellers, not Silver Point, undermine any claim that Silver Point may have inappropriately influenced the Committee's decision on this issue. Mr. Hodara's testimony that the Committee

[1065] Exhibit 65.

[1066] Sawyer Interview, June 30, 2005.

[1067] Sawyer Interview, June 30, 2005.

[1068] Sawyer Telephonic Interview, June 30, 2005.

might have reconsidered its support of the settlement had it known of the transfer of the claim to Silver Point is not credible.[1069]

Furthermore, although notice of the assignment of the SERP claims appeared on the docket on February 15, 2005, and was seen by the Committee at least as early as February 18, 2005,[1070] no Committee member or Akin made any significant effort to raise any issues with respect to these transfers until after negotiations regarding the Plan Supplement broke down. No one asked Mr. Kwader about his SERP claim transfer prior to asserting the transfer may have been a violation of fiduciary duties.[1071] As such, the allegations of impropriety with respect to the SERP claims appear to have more to do with gaining leverage in negotiations over the corporate goverance issues than anything else.

Mr. Hodara knew from a February 24, 2005 e-mail from Ms. Gray that Silver Point would not be obtaining the economic benefit of the settlement.[1072] Yet, shockingly, it does not appear that Mr. Hodara informed AIG and Post of this very important fact. Both Mr. Musante[1073] and Mr. Hobart[1074] testified that they were unaware that Silver Point would not obtain the economic benefit of the settlement. Similarly, in the Klee Application, wherein the Committee first attacked Silver Point for its purchase of the SERP claims, Akin failed to disclose this very important fact.

[1069] Hodara Tr. at 496-99.

[1070] Ex. 142.

[1071] Kwader Telephonic Interview, June 28, 2005.

[1072] COMM0046085. Ms. Gray's e-mail stated that Messrs. Steidle and Yousey "would receive the same percentage recovery an any increased amount that was achieved through settlement or through continuing litigation."

[1073] Musante Tr. at 541.

[1074] Hobart Interview, June 30, 2005.

Finally, there is no evidence that Silver Point acquired Mr. Kwader's claim in order to influence Mr. Kwader or FiberMark or that Mr. Kwader sold his claim to Silver Point to seek favor from Silver Point. No one at Silver Point ever promised Mr. Kwader future employment; rather Silver Point made it clear that such decision would be left to the new Board of Directors.[1075] Further, Mr. Kwader's subsequent designation as one of Silver Point's six directors of reorganized FiberMark was the result of happenstance, not the result of a *quid pro quo* exchange. Indeed, Mr. Sawyer initially informed Mr. Kwader that he would not be selected by Silver Point because, in the wake of the wave of corporate scandal of the 2000's, Silver Point had a preference for outside, independent directors.[1076] However, on the verge of the deadline to submit Board designees, one of Silver Point's initial selections indicated that he needed more time to obtain clearance before his selection could proceed.[1077] As a result, Silver Point asked Mr. Kwader if it was acceptable to submit his name in as a placeholder until Silver Point's original choice obtained that clearance.[1078] There is no evidence that Mr. Kwader was selected by Silver Point in order to curry favor or as part of a scheme by Silver Point. Further, Mr. Kwader limited his discussions as to the sale of his claim to Mr. Jarmain, and they did not discuss any Committee business.[1079]

[1075] Kwader Telephonic Interview, June 28, 2005; Sawyer Telephonic Interview, June 30, 2005.

[1076] Kwader Telephonic Interview, June 28, 2005; Sawyer Telephonic Interview, June 30, 2005.

[1077] Kwader Telephonic Interview, June 28, 2005; Sawyer Telephonic Interview, June 30, 2005.

[1078] Kwader Telephonic Interview, June 28, 2005; Sawyer Telephonic Interview, June 30, 2005.

[1079] Kwader Tr. at 93-94; Jarmain Tr. at 52.

C. Transfer of SDI's Claim

SDI, an original member of the Committee, held a relatively small trade claim in the amount of approximately $50,000.[1080] SDI was interested in serving on the Committee because FiberMark was a "a top ten customer for it" and SDI wanted to see FiberMark emerge from chapter 11.[1081] As Mr. McFarlen explained, SDI "wanted to insure that FiberMark remained in operation and was not split up and sold off to the highest bidder."[1082]

1. The Sale of the SDI Claim

Mr. McFarlen was contacted regularly by many entities seeking to purchase SDI's claim after the FiberMark cases commenced.[1083] In April 2004, Mr. McFarlen was, by his account, "getting an offer, I would say at least one a week, and maybe more than that."[1084] Silver Point was one of these entities. Mr. Richard Dalessio, a sourcer on the public side at Silver Point, contacted Mr. McFarlen to express Silver Point's interest in purchasing the SDI claim at least as early as June of 2004.[1085] Mr. Dalessio continued to contact Mr. McFarlen every few months through 2004, resulting in approximately six conversations.[1086] Throughout 2004,

[1080] Jarmain Tr. at 66. The assignment of claim form states that SDI's claim was $53,230. Ex. 96.

[1081] McFarlen Tr. at 10; Ex. 97.

[1082] Ex. 97.

[1083] McFarlen Tr. at 75-76.

[1084] McFarlen Tr. at 76.

[1085] Dalessio Tr. at 18-19.

[1086] Dalessio Tr. at 20.

however, Mr. McFarlen refused to sell his claim to any person, primarily because SDI "wanted to stay on the committee and make sure that we had a voice in trying to bring the company out of bankruptcy."[1087] Mr. McFarlen assumed that if he sold his claim he could no longer sit on the Committee.[1088]

Outside interest in purchasing the SDI claim increased as 2005 began.[1089] By February 2005, SDI had became more receptive to selling its claim. Mr. McFarlen explained that SDI became interested in cashing out its claim, because "I felt like the input I had on the committee, the issues that I could effect that would help FiberMark and our view of what FiberMark needed had already been settled."[1090] Furthermore, the price offered for FiberMark trade claims had increased, as SDI was receiving offers of 60-65% at that time.[1091]

On February 15, 2005, Libertas contacted Mr. McFarlen to purchase the SDI claim after it became aware that SDI had elected the Cash Option.[1092] Libertas offered 65% with the condition that SDI revoke its election of the Cash Option.[1093] While considering the Libertas offer, Mr. McFarlen was once again contacted by Mr. Dalessio of Silver Point, who also offered to purchase the SDI claim.[1094] Mr. McFarlen acknowledged his interest in selling, but stated for

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[1087] McFarlen Tr. at 77; Dalessio Tr. at 20.

[1088] McFarlen Tr. at 78-79.

[1089] McFarlen Tr. at 79.

[1090] McFarlen Tr. at 81-82; Jarmain Tr. at 80. Mr. McFarlen had in fact elected the Plan Cash Option to receive a cash payment equal to 52% of the allowed amount of the SDI claim.

[1091] Ex. 97.

[1092] Ex. 89.

[1093] Ex. 97.

[1094] McFarlen Tr. at 80.

the first time to Mr. Dalessio that he was on the Committee.[1095] McFarlen told Mr. Dalessio that the primary reason that he did not want to sell his claim was his desire to remain on the Committee, as FiberMark was "an important client" of SDI.[1096] Mr. Dalessio brought the issue to his superior, Mr. Jarmain.[1097] Mr. Jarmain, a law school graduate who had never practiced law, decided to accommodate Mr. McFarlen's desire, and unilaterally determined to and did insert a new paragraph to the assignment of claim.[1098] Paragraph 5.(a) of assignment of claim stated:

> Assignee acknowledges and agrees that Assignor is currently a member of Debtor's Creditors' Committee, and that subsequent to the closing of the assignment herein, Assignor shall have the right to participate in and witness the meetings of such committee as Assignee's agent, at Assignee's direction, and in Assignee's best interest.[1099]

Mr. Jarmain sent the revised assignment of claim to Mr. Dalessio, who in turn sent it to Mr. McFarlen on February 23, 2005 for his review and execution[1100] with the admonition that time was of the essence because of the upcoming deadline for revoking the Cash Option election .[1101] Mr. Dalessio's e-mail stated that "In order to create a relationship with your firm and close this deal quickly, my boss wanted to create a friendlier AOC that allows you to

[1095] Dalessio Tr. at 21.

[1096] Dalessio Tr. at 21; McFarlen Tr. at 82-83.

[1097] Jarmain Tr. at 69.

[1098] Jarmain Tr. at 5. 69-70, 73.

[1099] Ex. 96.

[1100] Ex. 95.

[1101] Jarmain Tr. at 76-77; McFarlen Tr. at 90.

stay on the committee."[1102] Asked what he meant by the phrase "a friendlier AOC," Mr. Dalessio testified that he "was referring to the fact that we would let him stay on the committee; and two, just to make him feel more comfortable, salesmanship."[1103] He explained that "Brian and I are always trying to create relationships with firms so that if they're involved in another bankruptcy, they'll come to us."[1104] According to Mr. Jarmain, the purpose of Paragraph 5.(a) was "for him [Mr. McFarlen] to be able to attend the Creditors Committee meetings, as he requested, provided he did not do anything to hurt our interests."[1105] Mr. Jarmain said further that the word "participate" used in the paragraph was probably the wrong word.[1106] "I meant witness it, in that if he did come, he could not say anything or do anything else he had our consent."[1107] When asked if Paragraph 5.(a) meant SDI would have to vote at that time at Silver Point's direction and in Silver Point's best interest, Mr. Jarmain testified:

> I never thought of it that much. I never that about it that far ahead. I thought of it as this guy comes to a meeting with us, he cannot do anything or say anything that's against our best interests, that if he wants to monetize his claim and we're going to give him the money for it, but he wants to sit with us at the meeting, obviously he can't do something to hurt our interests.[1108]

[1102] SP 378-87.

[1103] Dalessio Tr. at 27.

[1104] Dalessio Tr. at 27.

[1105] Jarmain Tr. at 70-71.

[1106] Jarmain Tr. at 72-73.

[1107] Jarmain Tr. at 73.

[1108] Jarmain Tr. at 73.

On February 24, 2005, Mr. McFarlen forwarded the assignment of claim to his attorney for review, "because I did not like the wording of the document because it looked like we would be a puppet for Silver Point."[1109] He also sent an e-mail to Mr. Dalessio stating that "I've got my attorney looking over that agreement now. I'll get back to you as soon as I can."[1110] Unfortunately, Mr. McFarlen's attorney began his vacation on the date of receipt and did not review the document or respond to Mr. McFarlen.[1111] In the face of the revocation deadline, Mr. McFarlen elected to execute and return the assignment of claim to Mr. Jarmain,[1112] who effectuated the transfer on or about February 25, 2005.[1113]

Mr. Dalessio never discussed with Mr. McFarlen voting on the Committee.[1114] In fact, Mr. Dalessio was not even aware that there was a Committee vote upcoming concerning the Plan.[1115] Mr. McFarlen testified that he only dealt with Mr. Dalessio at Silver Point regarding the sale of the SDI claim and they did not discuss Committee business.[1116]

Similarly, Mr. Jarmain never discussed the SDI assignment with Mr. Sawyer, Mr. Fortgang, or Mr. Wilson.[1117] He was not aware that the Committee had voted 3-1 in January to support the Plan, that there was an upcoming Committee vote on the Plan, or that there was a

[1109] Ex. 97; McFarlen Tr. at 89.

[1110] SP 0390.

[1111] McFarlen Tr. at 89.

[1112] McFarlen Tr. at 89.

[1113] Ex. 96.

[1114] Dalessio Tr. at 25, 30-31.

[1115] Dalessio Tr. at 31.

[1116] McFarlen Tr. at 82-83.

[1117] Jarmain Tr. at 75-76.

Confirmation Hearing scheduled for February 28, 2005 to consider confirmation of the Plan.[1118] Further, Mr. Jarmain is not aware of anyone at Silver Point giving any direction to anyone at SDI in connection with Committee business.[1119] Mr. Sawyer similarly testified that he did not speak to Mr. McFarlen about the transfer.[1120]

Mr. Jarmain admitted that he has never seen a provision like Paragraph 5.(a) in any other assignment of claim and that he is not aware of any creditors' committee that had a member participant that did not hold a claim.[1121] He stated that "[l]ooking back at it," the clause is strange and he probably should have consulted counsel.[1122]

Silver Point promptly filed a notice of tranfer with Logan, and it appeared on the docket on March 1, 2005.[1123]

2. The Events Surrounding the February 2005 Confirmation Hearing

While this transaction was underway, the Committee took under consideration the approval of the Plan Supplement in connection with the Plan confirmation hearing scheduled for February 28, 2005.[1124] Mr. Hodara committed to poll Committee members on the Plan and Plan Supplement over the weekend of February 26-27, 2005.[1125]

[1118] Jarmain Tr. at 76.

[1119] Jarmain Tr. at 78.

[1120] Sawyer Tr. at 165.

[1121] Jarmain Tr. at 74.

[1122] Jarmain Tr. at 74.

[1123] Transfer of Claim, including transferor SDI, docketed March 1, 2005.

[1124] Hodara Tr. at 472-73.

[1125] Hodara Tr. at 473.

At the time of the commencement of the Confirmation Hearing on February 28, 2005, Mr. Hodara reported that he had been unable to communicate with Mr. McFarlen and consequently did not have SDI's vote on the Plan and the Plan Supplement.[1126] Mr. McFarlen testified that he had no recollection of a call or message from Mr. Hodara during that weekend.[1127] Nonetheless, Mr. McFarlen acknowledged his concern, interest and decision was to support getting FiberMark out of chapter 11.[1128]

After a mid-morning recess of the Confirmation Hearing, Mr. Hodara reported that he had received a voice-mail from Mr. McFarlen indicating a vote in favor of the Plan and corporate governance provisions.[1129] As a result, Mr. Hodara reported to the Court that the Committee voted to support the Plan by a three to two vote.[1130] Unfortunately, this still did not satisfy FiberMark's wish to avoid a cramdown Plan. The negative votes of AIG and Post assured that the cramdown would be necessary to confirm the Plan.

Mr. Hodara testified that he became aware on March 2, 2005 of the February 25, 2005 transfer and assignment of SDI's claim to Silver Point.[1131] He contacted Mr. McFarlen, who explained the circumstances surrounding the transfer and assignment.[1132] Mr. McFarlen further noted that he had decided that Paragraph 5.(a) would make him a puppet of Silver Point

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[1126] Hodara Tr. at 482-84.

[1127] McFarlen Tr. at 103-04.

[1128] Ex. 97.

[1129] Hodara Tr. at 482.

[1130] Hodara Tr. at 483.

[1131] Hodara Tr. at 483.

[1132] Hodara Tr. at 483-84 ; McFarlen Tr. at 110.

and, therefore, he resigned as member of the Committee.[1133] At Mr. Hodara's suggestion, Mr. McFarlen promptly called the U.S. Trustee to inform it of SDI's resignation from the Committee.[1134]

D. The Trading Order

The Trading Order is applicable to transactions involving "securities" of FiberMark as defined in Section 2(a)(1) of the Securities Act of 1933.[1135] By its terms, the Trading Order does not apply to transactions involving trade and employee claims:

> Committee members, acting in any capacity and engaged in the trading of securities as a regular part of their business, will not violate their fiduciary duties as Committee members or per se be in violation of securities law and, accordingly, will not subject their claims to possible disallowance, subordination, or other adverse treatment, by trading in the Debtors Securities during the pendency of the Debtors' chapter 11 cases, provided that any Committee member carrying out such trades establishes and effectively implements and strictly adheres to the information blocking procedures detailed in the Screening Wall Declaration. For purposes of this Order, the term "Securities" is used as such term is defined in Section 2(a)(1) of the Securities Act of 1933, including the following, but only to the extent they constitute securities thereunder: stock, notes, bonds, debentures, participations in, or derivatives based upon or relating to, any of the Debtors' debt obligations or equity interests.[1136]

Mr. Hodara agrees with that construction. For example, Akin's Rule 26 Declaration filed with the Court on June 15, 2005 in connection with their third application for compensation states:

[1133] McFarlen Tr. at 88, 110-11.

[1134] Hodara Tr. at 484.

[1135] Ex. 64.

[1136] Ex. 64.

> [T]rading of the Solutions' claim would not have been covered by the trading order as the claim was not a security.[1137]
>
> The transfer of the SERP claims was not subject to the trading wall order as that order only governed securities trading.[1138]

Mr. Musante testified that Mr. Hodara explained to him that "the better view" was that the Trading Order did not apply to trade claims.[1139]

1. Silver Point

A condition of Silver Point's appointment was the entry of the Trading Order.[1140] The clear implication of that requirement was that Silver Point intended to continue trading in FiberMark Notes to the extent that such trading would economically benefit Silver Point. Silver Point Committee Personnel, as defined in Silver Point's Screening Wall Declarations, filed the requested declarations almost immediately after Silver Point's appointment to the Committee.[1141]

Silver Point, a major distressed debt trader that manages approximately $3.8 billion, has extensive experience in compliance with applicable securities and other laws regulating trading of public securities. Silver Point's Information Barrier Policies And Procedures (Exhibit H admitted herewith), which pre-dated its involvement with FiberMark, established a screening wall designed to satisfy Silver Point's obligations under those laws. Upon joining the Committee, Silver Point agreed to be bound by the Trading Order as embodied

[1137] Akin Strauss Hauer & Feld LLP's Initial Disclosures Pursuant To Fed. R. Bankr. P. 7026 And Statement Of Positions And Scope Of Dispute, dated June 15, 2005, at 21.

[1138] Akin Strauss Hauer & Feld LLP's Initial Disclosures Pursuant To Fed. R. Bankr. P. 7026 And Statement Of Positions And Scope Of Dispute, dated June 15, 2005, at 21.

[1139] Musante Tr. at 248.

[1140] Sawyer Tr. at 44.

[1141] Ex. 64.

by the Declarations of Messrs. Fortgang and Sawyer (the "Screening Wall Declarations").[1142]

The Screening Wall Declarations include the following provision

> Silver Point Committee Personnel will not receive any information regarding Silver Point's trades in the Debtors' Securities in advance of the execution of such trades, except that Silver Point Personnel may receive such reports showing Silver Point's purchases and sales and ownership of the Debtors' Securities but no more frequently than weekly (provided that Silver Point Committee Personnel may receive the usual and customary internal reports showing Silver Point's purchases and sales on behalf of Silver Point or its clients and the amount and class of claims, interests or securities owned by Silver Point or its clients to the extent that such personnel would otherwise receive such reports in the ordinary course and such reports are not specifically prepared with respect to the Debtors).[1143]

a. Silver Point's Screening Wall

As required by the Trading Order, Silver Point maintains a screening wall consisting of an actual, physical separation between the traders and analysts (the "public side") on one side and the principal finance personnel (the "private side") on the other side; public side employees do not have access to the private side of this barrier.[1144] The two sides maintain separate fax and phone lines and separate files.[1145] Silver Point also provides to all employees its Information Barrier Policies and Procedures and every new employee is furnished with an audio version of a training session presented by Cleary Gottlieb,[1146] the original of which was

[1142] Ex. 64.

[1143] Ex. 64.

[1144] Sawyer Tr. at 11-12; Jarmain Tr. at 7-8; Dalessio Tr. at 6-7.

[1145] Sawyer Tr. at 49-51.

[1146] Ex. 90.

presented to Silver Point employees in the Fall of 2004 and the viewing of which is a planned annual event.[1147]

Silver Point's compliance officer, Marc Diagonale, testified that in his view Silver Point's screening wall is effective.[1148] Although Silver Point has daily morning firm wide meetings which both the private and public side employees can attend, Mr. Diagonale stated that material non-public information was not disclosed at those meetings and that he never had occasion to add a company to Silver Point's restricted list because of inadvertent disclosure of confidential information at a firm wide meeting.[1149] Mr. Diagonale monitored the e-mail communications of Messrs. Sawyer and Fortgang to ensure that confidential information held on the private side was not inappropriately transmitted over the screening wall to the public side.[1150] Mr. Diagonale was also present during the conversations between Mr. Wilson and Mr. Sawyer as to Silver Point's general views regarding corporate governance in order to ensure these discussions did not result in the transmission of confidential information about FiberMark.[1151] Where communications were potentially sensitive, Silver Point employees regularly routed correspondence through the compliance officer and took steps to ensure that only public information was discussed when public side employees were present.[1152] In addition to the

[1147] Wilson Tr. at 11.

[1148] Diagonale Telephonic Interview, June 30, 2005.

[1149] Diagonale Telephonic Interview, June 30, 2005.

[1150] Diagonale Telephonic Interview, June 30, 2005.

[1151] Diagonale Telephonic Interview, June 30, 2005.

[1152] Ex. 94; Wilson Tr. at 136-37.

compliance officer, Silver Point employs a general counsel knowledgeable in general corporate and securities laws.

As a result of Silver Point's internal information policy and the Trading Order, Silver Point public side employees limited any discussions with Silver Point Committee personnel to matters involving public information. Meetings between traders and analysts from the public side and Mr. Sawyer only concerned: post-emergence governance, valuation perspectives from the public side and the voting of Silver Point's position.[1153] As permitted by the Trading Order, Messrs. Sawyer and Fortgang receive regular daily reports showing Silver Point's position in all of its investments, including FiberMark.[1154] In one instance, Mr. Sawyer also requested and received an update concerning the FiberMark trade claims held by Silver Point on February 22, 2005.[1155] Mr. Sawyer explained that this request was made to make sure that all claims held by Silver Point "were voted given we were approaching a deadline."[1156]

b. Silver Point's Trading

[1153] Sawyer Tr. at 53-54.

[1154] Fortgang Tr. at 37-38.

[1155] Ex. 73.

[1156] Sawyer Tr. at 162-63.

Silver Point's purchases of FiberMark Notes during the FiberMark chapter 11 cases were driven by Silver Point's valuation of the Notes.[1157] Silver Point stopped purchasing FiberMark Notes for a period in November and December of 2004 because Mr. Wilson, the responsible public side Silver Point trader, became involved with two other restructurings.[1158] In January 2005, upon completion of those other restructurings, Mr. Wilson reconsidered the market for FiberMark Notes and the growth in Silver Point's managed funds and concluded that the price remained attractive, and resumed purchasing.[1159]

Also as Mr. Wilson explained, the increase in the size of funds managed by Silver Point enabled Silver Point to take larger positions in particular securities while maintaining the same ratio of that positions to the overall fund. The increased size of the fund enabled Silver Point, if desirable, to acquire majority positions in particular investments.[1160]

With respect to potential issues regarding inside information, there is no evidence of any improper communication of inside information by Silver Point Committee Personnel to public side employees. Mr. Wilson did not discuss committee business with Mr. Sawyer or Mr. Fortgang[1161] and did not purchase additional claims for the sole purpose of gaining control of FiberMark to combat AIG and Post.[1162]

[1157] Sawyer Tr. at 21.

[1158] Wilson Tr. at 107-08.

[1159] Wilson Tr. at 107-09.

[1160] Wilson Tr. at 36-40.

[1161] Wilson Tr. at 112-13.

[1162] Wilson Tr. at 33-34.

Indeed, Mr. Wilson was aware prior to certain of Silver Point's January purchases that public documents reflected FiberMark's intention to withdraw the Plan.[1163] Available public information did not report any positive developments in the chapter 11 cases during the January timeframe, yet Silver Point continued to buy Notes until January 28, 2005. The negative developments in the bankruptcy were not materially negative in Silver Point's view given the overall positive evaluation Silver Point had of FiberMark.[1164] Mr. Wilson explained that, although he was surprised to learn that a shareholders agreement had not been completed,

> I didn't know kind of the nature of the dispute. I didn't know if it was minor or major. When I thought it out, you know, from my owner personal perspective, I said 'What's our worst case scenario?' Our worst case scenario was this is a major dispute, I felt that we had a blocking position and no one else did, at least on an individual basis.
>
> Second, that our worst case scenario I thought was that we would be falling to the Delaware law which I was comfortable living under...[1165]

2. Post

a. November 2004: Post Explores A Potential Sale

In November of 2004, Mr. Hobart approached Silver Point's Committee representative, Mr. Sawyer, to inquire as to whether Silver Point was interested in buying Post's Notes.[1166] Mr. Hobart recalled

> I made it clear to David that if we can get liquidity, that is important to us, and if, and I was – I got the impression that Silver Point was interested in buying positions. And so I had a

[1163] Wilson Tr. at 114.

[1164] Wilson Tr. at 114-15.

[1165] Wilson Tr. at 82-83.

[1166] Hobart Tr. at 211-13; Sawyer Tr. at 146.

> conversation with David in the context of what are we going to do about this. David, I'm new to my firm. I believe that liquidity is important. I'm getting the impression that you guys are interested in buying positions, and I can inquire are you interested, and the substance of it was that I made an inquiry about whether they were interested in buying our position.[1167]

Significantly, Mr. Hobart discussed the possibility of a sale with Carl Goldsmith, the senior investment officer at Post.[1168] For example, on December 1, 2004, Mr. Hobart suggested to Mr. Goldsmith that the break down in negotiations regarding corporate governance might heighten Silver Point's interest in purchasing Post's position, [1169] an interesting observation from a Committee member charged with representing the entire general creditor constituency.

Mr. Sawyer informed Mr. Hobart that he was not involved in trading and that Mr. Hobart would have to talk to someone on the public side at Silver Point.[1170] Mr. Sawyer informed Harry Wilson, the portfolio manager, of Post's interest in selling its Notes. As a result, RJ Grissinger, a Silver Point trader, called Daniel Elperin, a trader at Post, to inquire about Post's Notes.[1171] Mr. Elperin offered to sell the Notes at 80%, a price higher than the then market price

[1167] Hobart Tr. at 212-13.

[1168] Ex. 45.

[1169] Ex. 45.

[1170] Hobart Tr. at 213-14; Sawyer Tr. at 146-47.

[1171] Grissinger Tr. at 26.

for the Notes, which was in the low seventies at the time.[1172] Silver Point rejected Post's proposal.[1173]

Mr. Hobart knew, as a former practicing attorney, that there were limitations on Post's ability to sell its position to Silver Point.[1174] He sought the advice of Mr. Hodara.[1175] Mr. Hobart asked Mr. Hodara several questions, including: (1) if Post resigned from the Committee, would Post still be bound by the Trading Order and (2) if Post did not have an ethical wall in place and did not comply with the procedures outlined in the Trading Order declaration, could Post sell to other Committee members.[1176] The Trading Order in paragraph 4 requires a Committee member that "wishes to trade" to file a declaration with the Court as a precondition to any such trading.[1177] Post "wished to trade" its Notes to Silver Point. Yet, Mr. Hobart did not file the requisite declaration. The fact that a sale was not consummated does not insulate Post from a finding that the attempt to sell constituted a breach of the Trading Order. Mr. Hodara discussed these questions internally with his colleagues at Akin and concluded "that [Post] selling their [sic] claim in these circumstances would be problematic."[1178] Mr. Hobart testified that Mr. Hodara advised him to consult with Post's outside attorneys if Post intended to sell.[1179]

[1172] Grissinger Tr. at 28; Wilson Tr. at 154-55.

[1173] Wilson Tr. at 162.

[1174] Hobart Tr. at 231.

[1175] Hodara Tr. at 427-28.

[1176] Ex. 166.

[1177] Ex. 64.

[1178] Hodara Tr. at 427-28.

[1179] Hobart Telephonic Interview, June 30, 2005.

Mr. Hobart and Post's attorneys now take the position that the discussion was only an exploration and because a sale did not occur, there could be no issue or breach of the Trading Order.[1180] They have suggested that if Post had decided to sell, it would have resigned from the Committee. It is hard to understand how resignation would have relieved Mr. Hobart and Post of possession of non-public confidential information that it was using to obtain a premium over market from Silver Point. Further, the actions of Post demonstrate that it was pursuing its own self interest to take advantage of the situation without any regard for the interests of the general unsecured creditors it was charged to represent as a member of the Committee.

b. January 2005: Post Renews Its Efforts

In January of 2005, the issue of the sale of Post's Notes was raised again. Mr. Hobart heard that Silver Point was in the market buying more bonds, and Post and Silver Point engaged in another discussion about a potential sale.[1181] These conversations in January were held directly between Mr. Grissinger and Mr. Goldsmith because Mr. Elperin referred Mr. Grissinger to Mr. Goldsmith.[1182] Post offered to sell its position at 72.5%, a decrease of 7.5% from the December proposal and a price that appears to have been below the then current market price. Silver Point countered with an offer of 68%.[1183] A sale was not consummated because Silver Point declined to raise its counter offer to meet Post's price. Mr. Wilson explained that Silver Point was wary about the offer:

[1180] Hobart Interview, June 30, 2005.

[1181] Hobart Tr. at 218; Grissinger Tr. at 35.

[1182] Grissinger Tr. at 36-37.

[1183] Wilson Tr. at 166; Ex. 68.

> It's just so unusual in this world for – it was a point where the market hadn't moved materially, both at a macro basis or FiberMark specifically. To move basically 10 percent down from 80 to 72 1/2 – you know, you just never see that.
>
> The whole combination of the principal to principal call, the rapid move downward in price just smelled of desperation; therefore, we said, 'Look, there's no reason for us to step up here. We might as well have them come down to our level.'[1184]

Again, Post was ready to jettison what it had described as its duty to protect the interest of all general unsecured creditors against potential predators such as Silver Point. Indeed, for the right price, Post was prepared to add to the dominance of Silver Point! While a committee member is not precluded from acting to protect its own interests, it may not use the information and knowledge gained as a Committee member to enrich itself. In such circumstances, fiduciary duties are implicated.

Post's offer to sell its bonds, at a premium was stimulated by the Big 3 dispute over corporate governance. In December 2004, Mr. Hobart knew that AIG and Silver Point had gotten close to a consensual deal on corporate governance issues, but one of the major sticking points was the right of first refusal demanded by Silver Point (in exchange for tags and drags) – a provision that Mr. Hobart strongly opposed.[1185] In that context, it is not difficult to assume that Mr. Hobart reference to the "heighten[ed] interest" of Silver Point to purchase Post's Notes was based on the belief that Silver Point would be willing to pay more for Post's Notes in order to remove this obstacle to an agreement.[1186] Mr. Hobart also believed that Silver Point would be

[1184] Wilson Tr. at 166-67.

[1185] Hobart Tr. at 220-21.

[1186] Hobart Tr. at 222.

more interested in Post's Notes for more control in the event that AIG and Silver Point could not reach a consensual agreement, and informed Ms. Choi and Mr. Goldsmith of that fact.[1187] Post's pursuit of a sale at a premium in December 2004 and later at what appears to have been discount to market in January 2005, at the least, was motivated by the non-public Committee information it possessed and is highly questionable.

[1187] Hobart Tr. at 224, 235-36; Ex. 45.

VII.

CONCLUSIONS OF EXAMINER

The Examiner reaches the following conclusions as a result of his investigation and analysis of applicable law:

E. The Transfer of SERP Claims

The Examiner Order charged the Examiner with responsibility to investigate

> ***the transfer of the Debtors' executives' claims, including but not limited to, the claims of Alex Kwader, and other persons who were employees of the Debtors at the time of the transfer of their claim(s), to Silver Point Capital, L.P., the nature and extent of the disclosure of those transfers and whether breach(es) of fiduciary duties to the estate resulted.***

The indisputable facts lead to the conclusion that there were no improprieties in the transfer of Mr. Kwader's claim and the SERP claims to Silver Point. As discussed, Silver Point did not stand to gain from the resolution of the SERP discount rate controversy because any increase or decrease in the value of the SERP claims transferred to Silver Point – including Mr. Kwader's claim – was passed on to the respective sellers.[1188] Consequently, Silver Point had no motivation to hide or conceal the transfer of these claims. Instead, the evidence demonstrates that the delay in filing of the notice of assignment of claim forms was the result of administrative delay (mostly by Logan).[1189] There is no evidence that Silver Point acquired Mr. Kwader's claim in order to influence Mr. Kwader or FiberMark. Both Silver Point and Mr. Kwader understood that Silver Point's designation of Mr. Kwader as a director was merely a placeholder.

Although Silver Point should have disclosed its acquisitions of the SERP claims and recused itself from any deliberations, the Committee would not have voted differently had

[1188] Kwader Tr. at 84-86; SP102-3.

[1189] Jarmain Tr. at 93-95.

Silver Point disclosed the transfers and recused itself from consideration of the settlement motion. Silver Point did not stand to benefit from the SERP settlement and Akin agreed that the SERP settlement was reasonable. Moreover, no Committee member objected to the SERP Settlement, and no Committee member questioned the propriety of the transfers to Silver Point until weeks after they were posted on the docket. These facts leads to the conclusion that objections related to these transfers were raised for the purpose of gaining leverage in the negotiations of the Plan Supplement, not because any entity had a justifiable and sincere suspicion of wrongdoing with respect to the transfers of the SERP claims. Accordingly, Silver Point did not commit a breach of fiduciary duty in connection with its purchase of the SERP claims.

As to any allegations that there was wrongdoing on the part of FiberMark or any of the SERP claimants in connection with the SERP settlement, the Examiner found no evidence or other information that Mr. Kwader or other persons who were FiberMark employees at the time of the transfer of their SERP claims to Silver Point breached their respective fiduciary duties to the FiberMark estates. Mr. Kwader was completely screened from discussion of the SERP claims settlement.

It is unclear why FiberMark and Skadden failed to disclose the transfer when this information was within the ambit of their knowledge.[1190] It would have been better practice to disclose the transfer. However, this lack of disclosure is of no material consequence, as no harm resulted therefrom. Silver Point did not have a stake in the resolution of the value of the claims, as under the assignment of claim, such value was passed on to the sellers.

[1190] FM450, AK14.

F. The Transfer of the SDI Claim

The Examiner Order charged the Examiner with responsibility to investigate

> ***the transfer of the claim of former committee member Solution Dispersions, Inc. to Silver Point.***

Silver Point's acquisition of the SDI claim did not violate the Trading Order and was not a breach of Silver Point's fiduciary duties. As explained below, trade claims are not securities and are not, therefore, governed by the Trading Order. The Examiner's investigation revealed no evidence that Silver Point acquired the SDI claim in an attempt to manipulate the Committee.

Patently, the inclusion of Paragraph 5.(a) as a provision of the assignment of claim agreement was contrary to the basic premise that one must be a creditor to serve on a creditors' committee. No professional experienced in bankruptcy or reorganization law would ever attribute any enforceability or validity to Paragraph 5.(a). It is also manifest that Mr. Fortgang would not have countenanced or acquiesced to the inclusion of such a provision in an assignment of claim agreement. There is no evidence that Silver Point intended to keep Paragraph 5.(a) hidden or secret. Silver Point followed the process of filing a notice of transfer with the Court. It was not a covert operation but rather a gross error of judgment by the public side of Silver Point. The sourcer, Mr. Jarmain, was anxious to buy the SDI claim. He appears to have agreed to give Mr. McFarlen the right to attend the Committee meetings without consideration of the ramifications of such arrangements. Obviously, SDI was motivated by getting the best return on its claim and negotiations with Libertas and then Silver Point resulted in a cash payment to SDI equal to 65% of the allowed amount of its claim. Mr. McFarlen

promptly resigned from the Committee when he learned it was improper to remain as a Committee member after the sale of his claim.

No actual harm resulted from the inappropriate inclusion of Paragraph 5.(a) in the assignment of claim form to accommodate Mr. McFarlen or the transfer of the SDI claim to Silver Point. The voice-mail affirmative vote by Mr. McFarlen on behalf of SDI on or about February 28, 2005 in support of the FiberMark Plan was of no consequence because FiberMark, as noted, at that time did not intend to pursue a cramdown plan.

Moreover, there is no evidence that Silver Point acquired the SDI claim in an attempt to influence or compel a favorable vote by SDI in connection with the February 28, 2005 Confirmation Hearing.[1191] Silver Point Committee personnel were not parties to and did not participate in the purchase of the SDI claim by Silver Point's public side trader. The consequence of the transfer was to stimulate the already highly charged distrust of Silver Point by AIG and Post.

The assertion of a conspiratorial scheme on the part of Silver Point linking the purchases of Mr. Kwader and other SERP claims and the SDI claim, while at the same time increasing its position in FiberMark Notes, does not withstand scrutiny and the consideration of the relevant facts. As Mr. Hodara advised Ms. Johnston, he was extremely skeptical of attacking Silver Point's trading activities.[1192] His skepticism was more than warranted. Nonetheless he aligned himself with AIG, a position, that deeply disconcerted his Vermont co-counsel, Mr. Anderson.[1193]

[1191] McFarlen Tr. at 83-84.

[1192] CB5664.

[1193] COMM046042-44.

G. The Quality of Committee Members' Screening Wall

The Examiner Order charged the Examiner with responsibility to investigate

> ***the quality of the "screening wall" Silver Point, and the other members of the Creditors' Committee, established in accordance with this Court's Order Approving Specific Information Blocking Procedures and Permitting Trading in Securities of the Debtors Upon Establishment of a Screen Wall (doc. # 684) (the "Trading Order"), whether it was breached, and whether the Trading Order was violated.***

1. *Silver Point*

As an initial matter, the Examiner observes that the Trading Order applies only to securities and, accordingly, that the integrity of Silver Point's Screening Wall is only an issue with respect to Silver Point's trading in FiberMark bonds and not trade claims, including the SERP claims and SDI's claim. The Examiner's investigation revealed no breaches of Silver Point's Screening Wall. There is no evidence that Silver Point's Committee personnel informed Silver Point public side employees of any confidential information or that Silver Point's purchases were an attempt to gain additional leverage in the negotiation of corporate governance provisions in the FiberMark plan of reorganization. That Silver Point Committee personnel knew of Silver Point's increasing FiberMark position is a result of the dissemination of daily reports listing all of Silver Point's holdings, information that Messrs. Sawyer and Fortgang were permitted to receive under the Trading Order.

The essence of the charges of violation of the Trading Order is the *ipse dixit* of Mr. Hobart and Mr. Musante's conclusion that the timing of renewed purchasing of FiberMark

Notes by Silver Point was a "tad convenient"[1194] or "strange"[1195] because of the continuing dispute over corporate governance and market price for FiberMark Notes. Other than their "convenient" conclusions neither Mr. Hobart nor Mr. Musante, or indeed Akin, has provided a scintilla of evidence that Silver Point traders had non-public information about FiberMark that had been furnished by either Mr. Sawyer or Mr. Fortgang and used for the economic benefit of Silver Point.

Silver Point was invited to become a member of the Committee because of the substantial position it had accumulated in FiberMark Notes. A condition for its joining the Committee was entry of the Trading Order. Silver Point intended to trade in FiberMark Notes as it determined to be in its economic best interests.

Silver Point, as a large hedge fund that manages approximately $3.8 billion, has in place a physical screening wall separating its trading activities (public side) from Silver Point's principal finance and related activities (private side). It has in effect Information Barrier Policies and Procedures that are updated periodically that are required reading for its employees. Silver Point also requires such employees to attend educational seminars to apprise them of their responsibilities under applicable laws and regulations. There is no evidence that the screening wall was breached in relation to FiberMark or that the public side traded in FiberMark Notes or claims while in the possession of non-public confidential information or that Silver Point Committee Personnel provided the public side with non-public confidential information about FiberMark and its affairs.

[1194] Musante Tr. at 244.

[1195] Musante Tr. at 409.

The Examiner found no evidence of any improper communication of inside information by Silver Point Committee Personnel to public side employees. Mr. Wilson's decisions to acquire FiberMark notes were not based on discussions with Mr. Sawyer or Mr. Fortgang. Rather, they were based on his belief that such Notes were undervalued. Silver Point was consistent in its efforts to acquire a larger interest in FiberMark throughout the chapter 11 cases – before and after it was a member of the Committee as an economically beneficial position for its investors.

The receipt by Messrs. Sawyer and Fortgang of regular daily reports showing Silver Point's position in all of its investments, including FiberMark, does not constitute a Trading Order violation.[1196] As set forth in the Declarations, "usual and customary internal reports showing Silver Point's purchases and sales on behalf of Silver Point or its clients and the amount and class of claims, interests or securities owned by Silver Point or its clients" were permissible "to the extent that such personnel would otherwise receive such reports in the ordinary course and such reports are not specifically prepared with respect to the Debtors."[1197] Thus, even assuming that Mr. Fortgang did, as alleged, announce the increasing position of Silver Point in FiberMark Notes and claims *after* the trades occurred, it was not be a violation of the Trading Order or his Declaration.

2. *Post*

Post violated the Trading Order. Post, as a Committee member, did not maintain a screening wall. Post Committee Personnel did not file with the Court a declaration or affidavit under the Trading Order.

[1196] Fortgang Tr. at 37-38.

[1197] Ex. 2.

Although Post did not exercise any trades of FiberMark Notes subsequent to the Commencement Date, there is evidence that Post wished to trade in FiberMark Notes. Pursuant to paragraph 4 of the Trading Order, "Any Committee member that wishes to trade in the Debtors' securities shall, as a pre-condition to any such trading *** cause to be filed with the Bankruptcy Court a declaration or affidavit of each individual performing Committee-related activities *** stating that such individual shall comply with the terms and procedures set forth in the Screening Wall Declaration." Post offered to sell all of its FiberMark Securities to Silver Point in December 2004 and January 2005. Post Committee personnel did not file any declaration or affidavit consistent with paragraph 4 of the Trading Order. Post contends that inasmuch as Silver Point rejected the sale proposals, it had no obligation or duty to comply with the Trading Order. In the circumstances, and especially the possession of non-public confidential information held by Post Committee personnel, Post's conduct may be considered a violation of the Trading Order under the terms thereof. Nonetheless, no actual harm resulted as the actual sale was not consummated.

3. *AIG*

AIG did not execute any trades in FiberMark Securities subsequent to the Commencement Date and did not maintain a Screening Wall pursuant to the Trading Order. Because AIG did not engage in any trading activity or demonstrate any wish to trade, AIG did not violate the Trading Order.

H. The Dispute Among Committee Members Regarding Corporate Governance

The Examiner Order charged the Examiner with responsibility to investigate

> ***the dispute among Committee members regarding corporate governance issues and whether any Committee member breached its fiduciary duty to act in the best interest of all creditors***

1. AIG Breached its Fiduciary Duties as a Committee Member

a. AIG's Fiduciary Duties

The members of the FiberMark Committee, including AIG, owe fiduciary duties to all FiberMark general unsecured creditors. See In re Barneys, Inc., 197 B.R. 431 (Bankr. S.D.N.Y. 1996) ("[T]he committee and its members have a fiduciary duty to all creditors represented by the committee."); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 717, 722 (Bankr. S.D.N.Y. 1992), aff'd 140 B.R. 347 (S.D.N.Y. 1992) ("The Committee and its members owed a fiduciary duty to the class it represented, but not to the individual creditors within the class or to the estate"). The members of the Committee owe the general unsecured creditors the fiduciary duties of care and loyalty. In re Rickel & Assocs., Inc., 272 B.R. 74, 99 (Bankr. S.D.N.Y. 2002).

Recognizing the importance of a creditors' committee's fiduciary obligations to its constituents, the court in In re Johns-Manville Corp. stated:

> In the case of reorganization committees … *fiduciary duties are crucial because of the importance of committees.* Reorganization committees are the primary negotiating bodies for the plan of reorganization. They represent those classes of creditors from which they are selected. They also provide supervision of the debtor and execute an oversight function in protecting their constituent's interest.

26 B.R. 919, 924 (Bankr. S.D.N.Y. 1983) (internal citations omitted) (emphasis added). Further, the court noted that the "'whole body of law' imposes 'the most rigorous responsibilities for fair dealing' on fiduciaries who represent the rights of others." Id. at 925 (citing Young v. Higbee Co., 324 U.S. 204, 213 (1945)).

In discharging their duties to FiberMark's creditors, the law imposes on the members of the Committee "the most rigorous responsibilities for fair dealing." In re Johns-Manville Corp., 26 B.R. at 924. Committee members must be "honest, loyal, trustworthy and without conflicts of interest, and with undivided loyalty and allegiance to their constituents." Johns-Manville, 26 B.R. at 925. Moreover, the FiberMark Committee is required to "guide its actions so as to safeguard as much as possible the rights of minority as well as majority creditors." In re Bohack Corp., 607 F.2d 258, 262, n. 4 (2d Cir. 1979) (citing Woods v. City National Bank & Trust Co., 312 U.S. 262 (1941)).

While Committee members are free, within the parameters of their duties as members of the Committee to pursue their individual rights as creditors of FiberMark, Rickel, 272 B.R. at 100; they are not entitled to use their positions as Committee members to advance their own self-interests at the expense of FiberMark's other general unsecured creditors. Id. at 101. Further, Committee members are not permitted to *act through the Committee* in a way that would promote only that member's interests. In re Nat'l Equip. & Mold Corp., 33 B.R. 574 (N.D. Ohio 1983). Similarly, Committee members may not use the Committee to further the interests of only one category of creditors they represent, e.g., bondholders over trade creditors or large bondholders over small bondholders. In re Gen. Homes Corp., 81 B.R. 870 (Bankr. S.D. Tex. 1994).

Although some courts, in recognition of the need to induce creditors to serve on creditors' committees, have developed a qualified immunity for committee members to protect them from ordinary negligence claims, it is a very limited immunity. It does not apply if the Committee members engaged in willful misconduct, acted with reckless disregard for the probable consequences, or engaged in conduct without any authority (i.e., *ultra vires*). Pan Am Corp. v. Delta Air Lines, Inc., 175 B.R. 438, 514-15 (Bankr. S.D.N.Y. 1994). See also In re PWS Holding Corp., 228 F.3d 224, 246 (3d Cir. 2000). As noted by the court in In re Tucker Freight Lines, Inc.:

> At a minimum, [a committee's] fiduciary duty requires that the committee's determinations must be honestly arrived at, and, to the greatest degree possible, also accurate and correct. For a Creditors' Committee to urge rejection of a plan for reasons they knew, or would have known but for their recklessness, to be false would violate this duty and deprive them of any limited immunity they might otherwise hold under [section] 1103(c)(3) [of the Bankruptcy Code].

62 B.R. 213 (Bankr. W.D. Mich. 1986).

Based upon the facts, legal principles and the actions of its representative Mr. Musante, the Examiner has concluded that AIG as the Chairperson and a member of the Committee breached its fiduciary duties to the general unsecured creditors of FiberMark. AIG usurped the role of the Committee for its own purposes and engaged in self-interested and destructive conduct in the negotiation of corporate governance provisions for the reorganized FiberMark. The cumulative effect of the actions taken on behalf of AIG overwhelmingly establish a pattern of conduct rising to a willful disregard of the consequences to interests of the general creditor constituency as well as wrongful misconduct. As a direct result of AIG's actions to protect its own interests, the simple uncomplicated chapter 11 cases of FiberMark turned into

one of the worst examples of a chapter 11 reorganization gone awry to the prejudice of all parties and particularly, the entire general unsecured creditor constituency. The early exit from chapter 11 that all parties had predicted for FiberMark did not occur. In large measure it did not occur because of the actions pursued by AIG. The result has been an erosion in the value of FiberMark, representing actual harm to the general unsecured creditors to whom AIG owed its fiduciary duties and responsibilities.

b. AIG Used Its Position on the Committee to Further Its Own Interests Without Regard to the Interests of Other Creditors

AIG viewed the Committee merely as a conduit for accomplishing its own agenda. From the inception of these cases, AIG's representative, Mr. Musante, dominated and controlled the Committee. Rather than recognizing that the function of a Committee is to achieve the best results for all creditors through a congress of equals charged with representing diverse creditor interests, Mr. Musante used the Committee as an estate-paid vehicle for imposing his will on FiberMark, feeding his need for control, and procuring benefits largely for AIG.

Mr. Musante pursued and took control of the Committee and its activities from the date of its formation. He imposed his choice of professional advisors on the other Committee members. Opposition to his choice of financial advisors resulted in the denigration of Wilmington. It set the tone for Mr. Musante's domination of the non-Noteholder Committee members.

During the initial stages of the chapter 11 cases, Wilmington was the biggest obstacle to Mr. Musante's exercise of unfettered control and authority. When Mr. Musante attempted to include highly unusual provisions in the bylaws that would serve to give him

substantial power to take action without a Committee vote, only Wilmington pushed back to prevent such dominance. As a result, Mr. Musante simply ignored the bylaws and acted by himself on behalf of the Committee, with the support and concurrence of Akin and sometimes Post. The insights and input of Wilmington and SDI, generally, were not requested and they were often excluded from the considerations that AIG presented, allegedly on behalf of the Committee. As the Chairperson of the Committee, Mr. Musante minimized Wilmington's involvement in the Committee process and used threats to undermine Wilmington. Mr. Musante attempted to deprive Wilmington as an Indenture Trustee of the service of its attorneys, Covington. More egregiously, it appears Mr. Musante even threatened to have Wilmington removed from the Committee if it continued to fail to follow the lead of AIG. (Ironically, this occurred when Wilmington complained about AIG and Post's actions to involve Silver Point on Committee calls before Silver Point was a member.) It appeared as if Mr. Musante did not like the attempt of Wilmington, the only truly neutral member of the Committee, to act in a manner consistent with its fiduciary duties. Mr. Musante's actions in connection with Wilmington were improper and demonstrative of AIG's failure to discharge its fiduciary obligations to all general unsecured creditors.

c. Mr. Musante's Aggressive Self-Possessed Conduct on Behalf of AIG Caused Harm to FiberMark's Creditors

Mr. Musante's "aggressive" conduct and passion for control of the Committee and the reorganization process were not in the interests of the general unsecured creditor constituency but were instead intended to achieve the AIG agenda without regard to their consequences, including the damage it would cause to other creditors. Mr. Musante's view of the chapter 11 process as a war game with winners and losers rather than a process for the

rehabilitation and restructuring of a distressed business entity for the benefit of all stakeholders as contemplated by chapter 11 resulted in actual harm to the constituency AIG was supposed to represent.

Mr. Musante was so infuriated that FiberMark had initiated chapter 11 cases despite the demands to desist, that he decided to punish those who crossed him, which included Berenson, Skadden, and FiberMark management, especially Mr. Kwader. Instead of using the chapter 11 process as a forum for rehabilitation and accommodation among parties, Mr. Musante treated the debtors and their professionals in the wake of his intense anger with disrespect. His first response to opposition from FiberMark and its professionals, after anger, was to demean them and threaten and pursue litigation. In substance, Mr. Musante's mantra is "my way or no way."

The April 29, 2004 meeting between FiberMark and the Committee provided the opportunity for the parties to get past the unfortunate disagreements as to the commencement of the chapter 11 cases and begin to work together productively to preserve the value of FiberMark's estate for the benefit of all creditors. Instead, Mr. Musante created a "hostile" and "adversarial" environment by acting completely "unprofessionally," and "disrespectful" and "rude" toward FiberMark and its advisors. Such conduct by AIG as the Committee Chairperson was motivated by Mr. Musante's own personal animus, and was adverse to the interests of other general unsecured creditors. It instilled a destructive counterproductive environment for the chapter 11 cases. Again, the victims were the other general unsecured creditors who would suffer the loss of value caused by AIG's representative.

A quick and efficient exit from chapter 11 was doomed. As part of this program of retribution against FiberMark's professionals, he caused the Committee to file an objection to

FiberMark's engagement of Berenson, notwithstanding Berenson's agreement to remove the request to retain Berenson under section 328(a) of the Bankruptcy Code (ensuring that any fees paid to Berenson would be subject to review and objection at the end of the cases). Mr. Musante also tried to keep Berenson "out of the loop."

The negative effects of Mr. Musante's conduct are illustrated by the costly battle over the KERP. From day one of the chapter 11 cases, "Tom the Bull" Musante explicitly expressed his opposition to any type of severance or retention package for FiberMark management, due in large part to his animosity toward management for its decision to file chapter 11 cases. As a result of Mr. Musante's views, FiberMark knew Mr. Musante and the Musante-dominated Committee would strongly oppose any KERP and, therefore, decided to initiate the KERP process by filing a motion to approve a KERP. It was Skadden's belief that the KERP terms would be negotiated during the period between the filing of the motion and the hearing date, or else decided by the Court.

As another unfortunate occurrence in these cases, the strategy backfired and FiberMark incurred well over $1.5 million in professional fees and expenses as a result of the KERP litigation. It appears that if Mr. Musante had not conducted himself in the hostile manner that he did, FiberMark and the Committee could have, and likely would have, negotiated a KERP very similar to the one the parties ultimately stipulated to, without the substantial costs incurred and the huge amount of time expended and distraction caused by the KERP litigation, that, in reality, concerned a battle for control of the chapter 11 process and disciplining of Mr. Kwader and Skadden.

Several parties admitted and contemporaneous documents demonstrate that the KERP fight was as much about "control" and sending a message to the Court and FiberMark as

it was about the merits of providing a KERP to employees. The reduction of costs of the KERP were in large measure offset by the costs of the KERP litigation without quantifying the loss of time and distraction to the process. Even the three-day trial on the KERP resulted in a savings of only $375,000 from FiberMark's final proposal. The KERP battle was fought as a result of and in furtherance of the individual objections of Mr. Musante, and not in the pursuit of the best interests of FiberMark creditors as a whole.

d. Mr. Musante Usurped the Role of the Committee to Serve the Interests of AIG

Consistently throughout the administration of the chapter 11 cases, Mr. Musante, in pursuing the AIG agenda, excluded Wilmington and SDI from participation in the development of a plan, the determination of FiberMark's debt capacity and ability to service such debt, the development of the Cash Option, and the commitment fees payable to the Big 3 for backstopping the cash option and other matters usually determined by all the members of the Committee. As Wilmington representatives repeated and SDI agreed they were "outsiders."

From Mr. Musante's perspective, Wilmington was at the level of an officious intermeddler. According to Mr. Musante, Wilmington had no "skin in the game," and Ms. MacDonald lacked the experience to contribute anything to the process. It appears that SDI's involvement was not solicited. Mr. Musante viewed himself as the Committee. It was not until the breakdown of the corporate governance negotiations with Silver Point that he needed to cater to Wilmington and SDI. Even at that juncture he attempted to dominate the decision-making process. It was Mr. Musante who, effectively, made the decision to foreclose the sale process that had been initiated in June 2004 by establishing a floor price that he knew was unattainable in the circumstances. Prior thereto, he had allowed FiberMark and Berenson to expend time,

money and effort in seeking out a purchase price. Wilmington and SDI were not part of that process.

In similar fashion, Mr. Musante excluded Wilmington and SDI from the consideration of FiberMark's desire to include a Cash Option in the Plan for non-Noteholder claimants. Clearly, this was an issue for the entire Committee. Nevertheless, Mr. Musante decided that he and the other two Noteholders on the Committee would exclusively deal with FiberMark's request. The level of cash funding to be received by trade creditors in connection with the cash option should have been an issue for the entire Committee, especially given that it was an issue replete with conflict. Conflict existed between Noteholders and trade creditors, as well as between Noteholders such as the Big 3 who would receive a commitment fee and Noteholders who were denied a commitment fee even if they participated in the backstopping arrangements. Mr. Musante did not acknowledge the conflict or consider what decision was in the best interests of anyone other than AIG.

The Cash Option with the Noteholder funding mechanism and commitment fees for the Big 3 was a direct transfer of value from trade creditors to Noteholders. Mr. Sawyer's testimony corroborated the same. He testified that the Big 3 viewed the Cash Option as a way to pick up more claims at a greater discount (i.e., the lower the Cash Option payout, the greater the discount and the more value that is transferred from the trade creditors to the Noteholders who participate in the funding). Moreover the commitment fee was a transfer of value from all other creditors (other than those exercising the cash option) to the Big 3. Despite this patent conflict of interest, Mr. Musante persevered in furthering AIG's self interests. He did not follow the Committee bylaws in having the terms of the Cash Option approved by a majority vote of members, excluding those with conflicts (which would have included AIG).

The documentation required for the funding mechanism negotiated by Mr. Musante, including the documentation of the commitment letters, was extremely complicated and costly, yet it does not appear that Mr. Musante (or Post or Silver Point) ever considered the costs imposed on FiberMark. Instead, they only considered their own pecuniary benefits.

When FiberMark decided that the Cash Option was no longer significant because of the small number of creditors who elected the option, Mr. Musante rejected FiberMark's request to rescind the commitment fee inasmuch as it would not require any funds from AIG, Post or Silver Point. The response of the Big 3 that a commitment fee is a commitment fee, in the circumstances of being members of the Committee illustrates the placing of individual interests above the global interests of the Committee's constituency. The fact that the amount involved was small and that Mr. Hodara supported the rejection of FiberMark's request does not diminish patent self interest and disregard of the role of the Committee and all of its members.

As FiberMark required Committee consent for any plan modification, Mr. Musante threatened to withhold the Committee consent if FiberMark did not include language in any modification promising to pay the commitment fee. If the Committee was functioning according to its bylaws, the decision to approve the Plan modification proposed by FiberMark would have been put to a Committee vote with the conflicted members (AIG, Post, and Silver Point) recused as interested parties. Instead, those conflicted Committee members made the decision to compel payment of the commitment fee, regardless of the benefit that might result to other creditors from the Plan modification.

e. Mr. Musante as the AIG Representative Breached His Fiduciary Duties By Using the Committee as an Instrument to Serve AIG's Self-Interest to Pursue His Own Corporate Governance

Mr. Musante's most egregious behavior occurred when a bigger threat to his control than Wilmington surfaced on the scene – Silver Point. Until the emergence of Silver Point, AIG had been the largest creditor and would have been the largest shareholder of reorganized FiberMark.

The evidence supports the conclusion that AIG and Post's concerns about corporate governance had everything to do with protecting their own individual interests and nothing to do with the protection of other creditors interests. Any benefits to other minority holders that might flow from their negotiations would have been incidental and subsidiary to their objectives.

Delaware general corporate law provides protections for minority shareholders that have been deemed effective for those purposes. When AIG and Post believed they would be the controlling shareholders, they took the position that Delaware law provided sufficient protections for minority shareholders against a controlling shareholder. Only when they realized that they would be minority shareholders did they take up the cudgels of demanding corporate governance provisions well beyond those provided by Delaware law. Their sole objective was to benefit themselves and their ability to control the disposition of their shares and Notes of reorganized FiberMark without interference from Silver Point as a controlling shareholder. In the pursuit of that objective they were prepared to hold up the confirmation of a FiberMark Plan.

Notwithstanding their recognition that corporate governance issues represented as intercreditor situation, AIG and Post used Committee (and therefore estate) resources, including the Committee's attorneys, to draft corporate governance documents that worked to their own benefit. During October, AIG and Post continually provided comments on drafts of the shareholders agreement to Akin to ensure that the starting document they presented to Silver

Point would be as anti-Silver Point as possible. While using Committee resources, AIG and Post did not seek the input of Wilmington or SDI on the appropriate corporate governance regime to protect the interests of minority holders.

The draft term sheet AIG and Post first provided to Silver Point imposed severe constraints on Silver Point as a controlling shareholder. One example is that AIG and Post demanded that they each have a designated director as long as the relevant entity held only 10% of the stock, while Silver Point was limited to two designated directors regardless of whether it held 80% of the stock. AIG and Post did not advocate for any directors to be designated to represent the other shareholders (of which, at this point, there were 30%). In addition, the tag along and drag along rights were set at different thresholds, conveniently limiting Silver Point's liquidity while improving that of AIG and Post. Further, AIG and Post were given veto rights over any amendments if the relevant entity held as little as 10% of the shares. Providing one holder with the ability to extract hold up value before agreeing to something that 90% of shareholders believe is in the best interests of the company (including 100% of the other "minority holders" who AIG claims to be representing) is not in one's best interest other than the holder of that veto right. It is no surprise, then, that Silver Point rejected such one sided proposals and attempted to negotiate in good faith.

Although the introduction of Mr. Fortgang, another strong personality, into the negotiations contributed to the intensity, Mr. Fortgang's frustration as each Silver Point concession was met with new demands to enhance AIG's position, appears justified.

Mr. Musante took advantage of FiberMark's position that it did not want to proceed by cramdown (and therefore wanted unanimous approval of the Plan Supplement by at least the Big 3 Noteholders) to exercise greater leverage than AIG's 20% position would

otherwise have warranted. FiberMark might have proposed a plan that provided for a simple Delaware law corporate governance regime. Such a plan would have been confirmable and would have left AIG, Post, and, significantly, *all minority shareholders* with fewer protections than the concessions that Silver Point had offered. Despite this knowledge, Mr. Musante continued to press for greater "minority protections," most of which would have inured disproportionately, if not exclusively, to the benefit of AIG (and Post). He also took the risk that AIG's atypical demands would cause FiberMark to withdraw the Plan (which it did), and thereby extend FiberMark's chapter 11 stay as well as result erosion to the value of the FiberMark and the recovery to creditors (which it clearly did).

AIG was negotiating from a position of weakness as if it were in a position of strength, because it had counterparties willing to make concessions in the interests of obtaining a consensus regarding the Plan Supplement. Mr. Musante was not in that mold. His rigidity doomed the negotiations. Any control benefits Silver Point would have had from its equity distribution under the Plan would have been, not a result of the Plan or the chapter 11, but a result of "the natural consequences of corporate law." In re Piece Goods Shops Co., L.P., 188 B.R. 778 (Bankr. M.D.N.C. 1995).[1198] Of course, shareholders may enter into an agreement with regard to corporate governance rights, but they are not required to do so. Moreover, when they do, it is usually because the majority shareholder agrees to certain limits in exchange for some

[1198] In In re Piece Goods Shops Co., L.P., an unsecured creditor objected to confirmation of the plan on the grounds that, among other things, the plan did not provide equal treatment to all creditors in the same class due to certain corporate governance provisions. 188 B.R. at 789. The majority holder had accommodated the committee and the debtor by giving up the right it had to elect all of the directors of the reorganized company in exchange for "drag-along" rights. Id. Such corporate governance provisions were held to "represent a give and take among Committee members and the Debtors…[and] were included in the Plan as part of the consensus reached on corporate governance." Id. The court found that special control benefits provided by corporate governance charters are not attributable to the disparate treatment of claims, "but rather [to] the natural consequences of corporate law." Id. at 790 (citing Delaware General Corporate Law § 215(c)). Accordingly, the court overruled the unsecured creditor's objections and confirmed the plan. Id. at 799.

benefits or concessions from other shareholders. AIG and Post were demanding a lot and offering little in return, and then blaming Silver Point for not coming to an agreement. Silver Point, for the sake of a consensus, offered AIG and Post enhanced rights that would have benefited only AIG and Post and other rights that would have benefited all minority shareholders. No person examined or interviewed, other than AIG and Post, could recall AIG and Post discussing the interests of "other" minority shareholders during the negotiation and as the Committee's Vermont attorney stated they only became the protectors of minority shareholders when they found that they would be minority shareholders. As Ms. MacDonald noted, even though the differences between AIG and Silver Point were not very substantive, for AIG, it was all about "control."

When Mr. Musante was unsuccessful in forcing Silver Point to comply with his demands, Mr. Musante changed the venue to the Committee, once again proving that Mr. Musante only used the Committee process when it served his needs. He generally had no need for the Committee, especially Wilmington and SDI, as he acted as the Committee, despite the Committee bylaws. Heading into the January 13 vote, and despite Mr. Hodara's efforts, to try to make sure that it did not appear as a "total set up for Tom", Mr. Musante knew he had the support of Post and the generally uninformed and naïve Mr. McFarlen. Therefore, he was ready to railroad Silver Point by imposing his Plan Supplement.

As an individual creditor, AIG did not owe fiduciary duties to other creditors, but through its pressing of its position on the Committee, use of Committee resources (Akin) to achieve its aims, and resort to the Committee process to achieve by a change of venue what it could not achieve by negotiation, AIG invoked its fiduciary obligations to act as a Committee member in furtherance of the best interests of all creditors and not just AIG or Post. This is also

what sets Silver Point apart from AIG. From the beginning and consistently throughout the cases, Silver Point viewed the corporate governance issues as an intercreditor matter subject to resolution among the Big 3 or failing that, resort to Delaware law. Unlike AIG, however, Silver Point did not use Committee resources or the Committee process to advance its position. Despite Mr. Fortgang's sometimes bombastic conduct, Silver Point demonstrated flexibility and a willingness to compromise and concede minority shareholder's rights, even when it was under no obligation to do so.

Wilmington's abstention from the January 13 vote and, indeed, its contemporaneous recognition that AIG and Post were representing their own interests and were, therefore, conflicted in the discussion of corporate governance issues, strongly support the Examiner's conclusion that AIG and Post used the Committee to pursue their own agenda. Wilmington represented the interests of all Noteholders and consistently throughout the chapter 11 cases took its role as a Committee member and fiduciary to all creditors very seriously. It had no reason to favor one side over another, and advocated the position that was best for *all creditors*. In that context, it is extremely noteworthy that in late December, when Mr. Musante brought these issues to the Committee, Wilmington took the position that if the Big 3 could not reach a consensual shareholders agreement, Delaware law should govern.

The January 13 vote forced by Mr. Musante elevated an intercreditor controversy and the distress of FiberMark. Mr. Musante compelled the vote even though it was recognized that the risk of delay caused by lack of unanimity could result in harm to parties if consensus was not accomplished. Importantly, it is undisputed that Silver Point's Plan Supplement enhanced minority shareholder rights beyond those provided under Delaware law.

The unreasonableness, inflexibility, and negativity of Mr. Musante are illustrated by the events of January 24-25, 2005. For one week only, Mr. Musante was not the primary representative of AIG in the negotiations. And, during that Musante-less (or at least Musante-light) week, AIG and Silver Point were able to hammer out an agreement that all sides thought was fair and reasonable. This was no coincidence. Mr. Musante's personality and emphasis on power, control, and retribution had dominated the negotiations while he was involved. In stark contrast, Ms. Levitt and Ms. Handley focused on *the issues*. Unlike Mr. Musante, they engaged in constructive dialogue with Silver Point to determine which issues were most important to Silver Point. They also outlined and considered which issues were most important to AIG versus which they could trade away in the negotiations. Unlike Mr. Musante, they considered their leverage (or lack thereof) and the potential consequences of not reaching a consensus (Delaware law, delay, etc.). They formed this opinion by engaging in dialogue with FiberMark about what corporate governance provisions it would propose (and likely confirm) if the parties could not ultimately reach a consensual resolution. Unlike Mr. Musante, they saw the need for accommodation of each party to enable consensus and progress to an exit from chapter 11 by FiberMark an event that would serve the interests of all creditors.

Once Mr. Musante reentered the negotiations, the old environment of accusatory and belligerent e-mails and telephone calls became SOP and the agreement of January 25, 2005 fell apart.

Although issues inevitably arise while documenting an agreement in principle, generally, parties interested in consensus will extend themselves during the documentation process. Instead, in this case, although Silver Point showed a willingness to compromise, AIG used the documentation process as an excuse to raise new issues, such as demanding ever

increasing thresholds to amend various governance provisions. On February 17, 2005 and in the Plan Supplement ultimately filed on February 18, 2005, FiberMark proposed what it believed to be a reasonable compromise on all open issues. Indisputably, the proposal enhanced minority shareholder rights beyond the provisions of Delaware law. Nevertheless, AIG voted against the Plan Supplement as a Committee member on February 27, 2005 (and filed an objection to the Plan as an individual creditor). As the Committee's Vermont counsel stated, Mr. Musante wanted to go "to the mattresses" and the devil with the rest of the creditors. His actions were wrongful as a Committee member and in blatant disregard of AIG's fiduciary duties to general creditors.

As March approached and FiberMark tried to broker a fair compromise in its March letters, AIG made this possibility impossible by making new and every increasing demands, essentially demanding the equivalent of veto rights over more events. In an extreme example, AIG demanded for the first time, that it have a complete veto right on any amendments to the shareholders agreement, then characterized as the Investors Rights Agreement ("IRA"). Under its new demand, if AIG owned only one share of FiberMark, and every other shareholder (holding 99.9%+ of the value of the company) thought it was in the best interests of reorganized FiberMark to make a certain amendment to the IRA, AIG would be able to veto that amendment as the holder of a single share of common stock. To hold up confirmation of a Plan and the emergence from chapter 11, with the knowledge that the Debtors' estates were losing value due to delay because of an insatiable desire for atypical governance provisions to protect its perceived self-interests and power, is willful misconduct made with reckless disregard of the consequences and a breach of the duties owed to all other creditors. AIG's highly intense and

elevated distrust and dislike for Silver Point is simply not enough to justify its counterproductive actions that inured to the prejudice and harm of the Committee's creditor consistency.

The circumstances surrounding the Silver Point purchase of employee claims and the SDI claim emboldened Mr. Musante to be more assertive in AIG's demands. AIG evidently believed that Silver Point's bargaining leverage had contracted as result of the threat of pursuing strategic litigation that would compel Silver Point to accede to AIG's demands. As Mr. Musante testified, in effect litigation often leads to compromise. AIG was, therefore, willing to forgive what it believed was conduct that destroyed the integrity of the chapter 11 process and specific order of the Court, if Silver Point gave it what it wanted. If AIG honestly believed that Silver Point engaged in trading violations or breached its fiduciary duties as a Committee member as asserted, no agreement could redeem those acts. Of course, Mr. Musante will say that the objective of the assertions was appropriate judicial sanctions against Silver Point that would remove it as an obstacle to his plans for FiberMark and its governance. However he may put it, AIG and Post with support of Akin were seeking to obtain bargaining leverage against Silver Point. With Akin's help they pounced on the Silver Point trading activities as a last resort to avoid the cramdown of a Silver Point supported plan. AIG breached its fiduciary duties by holding up confirmation to secure additional benefits to it while attempting to use the trading allegations as leverage.

AIG's use of the Committee to pursue its self-serving allegations against Silver Point is another example of AIG's improper use of the Committee and abuse of its position as a Committee member for its own benefit. Knowing that the impartial U.S. Trustee was pursuing an investigation against Silver Point (at the behest of AIG and Post), AIG somehow asserted that the Committee, at estate expense, should hire special counsel and pursue its own investigation

against Silver Point. This duplicative, wasteful, and vengeful decision by Mr. Musante, as a Committee member, constituted a breach of his fiduciary duties to all other creditors.

As discussed above, real harm was caused to the constituents to whom Mr. Musante owed fiduciary duties, and Mr. Musante was the primary cause of that harm. Accordingly, AIG should be accountable for the harm it has caused.

2. Post Breached Its Fiduciary Duties

As a member of the Committee, Post has the same fiduciary duties, described above. Although Post may not be as culpable as AIG for the counterproductive, hostile relationship between the Committee and FiberMark that caused harm to FiberMark's creditors and the intentional exclusion of Wilmington and SDI from the Committee process, Post breached its fiduciary duties as a Committee member by not acting in the interests of all general unsecured creditors (except when those creditors' interests just happened to be the same as Post's); rather, it pursued its individual self-interests. Post had one major objective in these chapter 11 cases and that was its own liquidity, i.e. to enhance its ability to exit its FiberMark position. In that respect, it wanted to restrict the rights of a majority shareholder, e.g., Silver Point, from taking any actions that might inhibit the liquidity of its position. Post also wanted to participate in the benefits that might occur if the majority shareholder sold its position or took certain other actions. Any argument that Post was acting to protect other creditors is dissipated by Post's conduct in offering to sell its FiberMark position to Silver Point (thereby, in Post's view, giving Silver Point more power to impose its will on the other holders) during the December 2004 and January 2005 period.

As stated above, Post was the first to suggest to Akin and AIG that they act to ensure corporate governance provisions to prevent Silver Point from getting "effective control"

of FiberMark. Thereafter, Post acted in concert with AIG to make the corporate governance controversy a "cause celebre" and thereby risking the delay, the potential loss of concessions made by Silver Point beyond the Delaware corporate law, and the erosion in value of FiberMark that finally ripened into fact.

In January and February, Post separated itself from AIG somewhat. Post was even less willing to negotiate during this period than AIG. Instead, Post made increasing demands and finally declared its intent not to sign the IRA. By refusing to sign the IRA and thereby taking a risk, to the detriment of all general unsecured creditors that Silver Point would back out of the concessions it had made to obtain a consensual deal, Post was seeking to obtain the advantages of the liquidity enhancing concessions offered by Silver Point in the charter (e.g., tag rights that primarily benefits large shareholders), while avoiding being bound by the agreed upon *quid pro quo* for such concessions, the right of first offer (or similar right).

It appears that Mr. Hobart asserted on or about February 3, 2005 that Silver Point was trading in FiberMark Notes while in possession of non-public confidential information. Yet, he did not pursue his assertion as long as it appeared that Silver Point might accede to Post's demands. It was only after it appeared that FiberMark had changed its position and would prosecute a cramdown plan, that Post actively supported pursuit of the alleged Trading Order violations. The clear implication is that Post, already distrustful of Silver Point, viewed the situation as giving it bargaining leverage to coerce Silver Point to accede to its demands. As more fully stated in the body of the Report, Post willfully ignored the interests of the Committee's constituency and acted in pursuit of its self interest. This attempt to extort veto rights and other concessions by threatening action for failure to accede to its demands, while ignoring the fact that all other creditors were suffering by the delay and risk that FiberMark

would withdraw the Plan, was undertaken solely in Post's self-interests. Post, as a result, breached its fiduciary duties as a Committee member with reckless disregard for the consequences for all other general unsecured creditors and as such its conduct was wrongful.

3. Silver Point Did Not Breach Its Fiduciary Duties

There is no credible proof that Silver Point breached its fiduciary duties as a member of the Committee. Silver Point was not compelled to enter into a shareholder agreement with AIG and Post. As suggested by Akin, Silver Point could have insisted during the negotiations with AIG and Post that the state of incorporation chosen by AIG and Post, i.e., Delaware, provides the correct corporate governance regime for reorganized FiberMark. It is not atypical for debtors to emerge from chapter 11 with shareholder rights governed solely by Delaware corporate law. See, e.g., IWO Holdings, Inc., case no. 05-10009 (PJW) (Bankr. D. Del. 2005) (a case in which AIG was the majority stockholder).

However, in the interests of a consensual chapter 11 plan, throughout the chapter 11 cases, Silver Point notwithstanding the descriptions of Mr. Fortgang's negotiating style, offered numerous concessions beyond Delaware law to increase minority shareholders protections (most of which would have inured to the sole benefit of AIG and Post while others would have benefited all minority shareholders). Neutral Wilmington, as the Indenture Trustee for all Noteholders, recognized early on that Silver Point was being reasonable in its efforts to accommodate AIG and Post, as well as benefit all of FiberMark's general unsecured creditors that would become shareholders under the Plan.

On numerous occasions Silver Point agreed to "one more concession," often at the request of Skadden, to placate AIG and Post and put an end to the loud and antagonistic negotiations. This conclusion is amply confirmed by the result of the January 24-25 meeting.

Generally, AIG and Post accepted the concession, but then made further or additional demands, including the demand for veto rights that may be described as unreasonable and that would have prevented Silver Point from taking certain actions even if it had the support of 100% of minority shareholders other than AIG and Post. By granting these veto rights to AIG and Post, Silver Point would have been acting contrary to the best interests of other minority holders.

There are numerous examples of this "give but no take" interaction throughout the chapter 11 cases. Examples from the one week in February following the filing of the Plan Supplement illustrate this well. Mr. Musante said that having a high threshold to amend the affiliate transactions provision in the charter was his one "bullet issue," and if Silver Point agreed to his demand, "we're done." Silver Point did agree to the bullet issue, but Mr. Musante was not done. In the same week, Silver Point relented by agreeing to delete the word "related" from the affiliate transactions provision, believing it would resolve all outstanding issues. It did not. Later, on the eve of the Confirmation Hearing, Silver Point conceded the two points Mr. Hodara claimed were the only remaining issues: whether to have an affiliate transaction provision in the indenture and whether the requirement to amend the indenture would be 66 2/3% versus a simple majority. Silver Point agreed to both these points, but to no avail. At this juncture, AIG and Post focused on Silver Point's trading activities. It appears that they concluded such activities might give them a weapon to offset the size and position of Silver Point or FiberMark's single largest creditor. Thus, even though Silver Point was willing to agree to each of the proposals made by FiberMark in March 2005 to bring the chapter 11 cases to a close, AIG and Post persisted in their quest for more concessions until even FiberMark could not tolerate them. AIG and Post continued to demand more.

Silver Point did comply with the Trading Order. It maintains an effective Screening Wall and separation of its public and private sides. As a hedge fund and investor and financier it is sensitive to its statutory and other obligations under the securities and other applicable laws as well as pursuant to the Trading Order. Similarly, Silver Point is sensitive to the fiduciary duties it assumed when it became a member of the Committee.

There is no substance to the assertions that Silver Point's purchases of the SERP claims or the SDI claims constituted a breach of its fiduciary duties. The purchases were made by public side traders. There is no evidence that they possessed non-public confidential information about FiberMark and its affairs at the time of the purchases or discussed such purchases with Silver Point Committee personnel prior to the execution of the purchases. As stated, the Examiner found no breach of the Silver Point Screening Wall. Mr. Musante's foundation for the investigation, that the purchase of Notes was "a tad convenient" and the purchase of the SERP claims and SDI claim were strange in the context of the chapter cases and timing does not sustain a conclusion that a breach of fiduciary duties occurred.

However, the circumstances of the trading activities and SDI assignment agreement did result, in some degree, to the Examiner's appointment and perhaps attendant delay in FiberMark's emergence from chapter 11. To a significant degree, the erosion in the value of FiberMark noted in the Report will be borne by Silver Point as the majority creditor. In addition, the Examiner's Recommendations include a recommendation as to Silver Point.

I. Other Matters Relevant and Necessary to the Examiner's Investigation

The Examiner Order charged the Examiner with responsibility to investigate

> ***any other matter the Examiner deems necessary and relevant to the complete and full investigation of the four enumerated areas included herein.***

Based upon the entire investigation, and as set forth in this Report, the Examiner has concluded that throughout these chapter 11 cases, there were certain periods when Akin failed to objectively represent the interests of the entire Committee and its constituency of all general unsecured creditors of FiberMark. Akin did not discharge its duties to represent the Committee in an objective, independent and disinterested manner.

From the inception of the pre-chapter 11 period involving the Ad Hoc Committee, Akin took instructions from Mr. Musante. That chain of command continued after the Commencement Date and, particularly, as to the corporate governance battle described in this Report. To avoid "mischief," Akin recommended that the Committee not keep minutes of its meetings. Clearly, Akin did not want a record to be made of the Committee's deliberations and actions. Basically, it instructed the Committee to opt for non-transparency in a world in which more or complete transparency in business affairs is mandated.

Akin did not candidly provide legal and strategic advice to the full Committee as to the numerous controversial issues that arose and critically affected the administration of the chapter 11 cases. This was especially true when such advice would have been contrary to the position taken by Mr. Musante on behalf of AIG. Thus, when internal Akin e-mails suggested that AIG's positions were wrong or weak, Akin failed to appropriately inform the full Committee or confront Mr. Musante. Indeed, Mr. Hodara often expressed support of Mr. Musante, notwithstanding Akin's internal views. Akin catered to Mr. Musante and his agenda. As the chapter 11 case progressed, Akin became more and more an advocate for AIG and, at times, Post rather than as the independent, impartial attorneys for the full Committee.

Rather than promoting dialogue with FiberMark and its professionals in a manner to overcome the acrimonious onset of the chapter 11 cases and the vitriolic relationships that

resulted and to achieve the goal of an expeditious reorganization of FiberMark and its exit from chapter 11, Akin adopted Mr. Musante's belligerent and acerbic attitude towards FiberMark's management, Skadden and Berenson on all issues that arose. Despite its claim to be a consensus builder, as the chapter 11 administration went forward, Akin's actions did not encourage reconciliation and collaboration to achieve the objectives of chapter 11. In that context, for example, rather than pursuing compromise and avoidance of the substantial expenses of litigation, such as that which resulted from the KERP controversy, Akin encouraged pursuit of "strategic litigation." A course of action that proved costly in time, expense and distraction that, overall, may not have been in the best interests of all general unsecured creditors on a cost/benefit analysis. The pursuit of that adversarial proceeding for a primary purpose of providing a platform to allegedly enlighten the Court as to the views of the Committee on the misdeeds of FiberMark and its professionals was extremely costly and improvident.

Subsequent to the KERP litigation, again, Akin appeared to be the tool of AIG, and, to a more limited extent, Post, in preparing corporate governance provisions that were designed to serve the interests of AIG and Post *vis a vis* the newly emerging major creditor, Silver Point.

Notwithstanding Akin's recommendation to add Silver Point to the Committee, Akin aided the objectives of AIG and Post to prevent Silver Point from taking "effective control" of FiberMark. As the intercreditor battle erupted, Akin consciously made the decision to align itself with AIG and Post, without consideration of the interests of all general unsecured creditors represented by the Committee. Although Akin gave lip service to Wilmington's claims of exclusion from Committee affairs, essentially, it did nothing to cure the exclusionary actions of Mr. Musante, or indeed, to keep Wilmington fully informed, as expressed in the internal e-mails

of the Wilmington team. Akin rarely consulted with Committee members other than AIG and, to a lesser extent, Post, even as to the important issues of the formulation of a Plan. When Akin did decide to include Wilmington and SDI, it was usually as a result of an afterthought, or to give the appearance of inclusion but without full participation by those Committee members.

Despite Wilmington's complaints as to the disfunctionality of the Committee, Akin did not risk incurring the wrath of Mr. Musante by taking the side of Wilmington. Resultantly, Wilmington, in particular, and SDI, continued to be treated as second class members of the Committee. It became so egregious that Wilmington considered complaining to the U.S. Trustee and putting Mr. Hodara "on the carpet." The lack of impartiality and objective representation of the full Committee by Akin is abundantly established by the record of this investigation.

Clearly, during the period October 2004 through January 2005, Akin represented the interests of AIG and Post in the formulation of the terms of a shareholder agreement and other corporate governance documents that would serve the objectives of AIG and Post *vis-à-vis* Silver Point. There is no indication during this period that Akin advised the full Committee in respect of the corporate governance issues or as to the overriding principle of protecting the rights of minority shareholders. As it became obvious that Silver Point had become the largest single creditor of FiberMark and would be a controlling shareholder, Akin modeled the proposed treatment of the shareholders agreement to meet the objectives of AIG and Post, e.g. Silver Point was not to have effective control of FiberMark. It intentionally pre-cleared the terms of the proposed shareholders agreement with AIG and Post to get their approval before sharing same with Silver Point, Wilmington and SDI, even after Silver Point became a member of the Committee. In a similar fashion and despite Akin's internal observations made during the initial

stages of the negotiations among the Big 3 that certain Silver Point positions were reasonable or correct and that Mr. Musante was being unreasonable, there is no indication that Akin ever informed Silver Point of its observations or informed the full Committee of same as the Plan Supplement controversy was moved to from an intercreditor issue to a Committee venue and decision, at Mr. Musante's direction.

The Akin position in support of Mr. Musante's position was so obvious at that point that, even Mr. Hodara became concerned. He recognized that observers would not be oblivious to the obvious. Accordingly, in anticipation of the telephonic meeting of the full Committee, in late December 2004, that Mr. Musante directed be held so that he could use the Committee process as the instrument to impose AIG-sponsored corporate governance provisions on Silver Point, Mr. Hodara instructed the Akin team to come up with other items to discuss during the telephonic meeting. Mr. Hodara did not want the meeting to appear to be a "total setup" for Mr. Musante. Akin's internal e-mails revealed serious apprehensions about the use of the Committee as proposed by Mr. Musante. The internal e-mails noted that the objectives of AIG and Post were to enhance the liquidity of their FiberMark positions. Akin decided not to raise the questions it perceived as to the propriety of the use of the Committee as the force for AIG and Post to overcome Silver Point. Akin recognized that AIG's use of the Committee as its instrument to further its own objectives and self-interests implicated the fiduciary duties owed by AIG as a Committee member.

Akin demonstrated its advocacy of the AIG proposals by characterizing them as "reasonable," and, thereafter, on or about January 4, 2005, distributing a memorandum to Wilmington and SDI comparing AIG's proposal to that provided by Delaware corporate law. However, Akin did not give the same consideration to Silver Point's proposed concessions as

compared to Delaware law or that Silver Point was prepared to agree to minority shareholder rights beyond those provided by Delaware corporate law. Curiously, Akin did not furnish Silver Point, a Committee member, with a copy of the above memorandum.

Throughout the corporate governance controversy and process, it does not appear that Akin advised and disclosed to the non-participant Committee members, Wilmington and SDI, the full implications of the dispute among the Big 3. No guidance was given to Wilmington and SDI as to the fiduciary duties of the Committee and its members to the constituency it represented, all of the general unsecured creditors.

The Akin bias in favor of AIG and against Silver Point became more evident as the chapter 11 cases moved into 2005, and, particularly, during the negotiations in February of that year. Interestingly, during that period, Mr. Hodara became concerned that the Akin partner assigned to work on the proposed new debt indenture might not have been aware that Akin, supposedly, was acting as attorneys for the Committee, and not as the attorneys for AIG and Post. Akin's contemporaneous e-mails also demonstrated its conclusions that AIG and Post would not win a cramdown fight if FiberMark prosecuted the confirmation of a Plan with Silver Point's support. Nonetheless, Mr. Hodara did not make any effort to persuade AIG to accommodate in any way Silver Point's needs or requests, so that needless and expensive confirmation litigation could be avoided with FiberMark's emergence from chapter 11 secured for the benefit of all general unsecured creditors. Akin never assumed a position of neutrality as to the corporate governance provisions but rather became a strong advocate of AIG and not the Committee's general unsecured creditor constituency.

Akin, in its role as an advocate of AIG and Post, seized upon the trading activities of Silver Point as a possible source of bargaining leverage for AIG and Post. Silver Point's

trading activity presented an opportunity for strategic litigation that might instill fear in Silver Point of sanctions, equitable subordination, disallowance of its claim, etc., all of which would compel Silver Point to make significant concessions and/or submit to the demands of AIG. Akin's conduct during the telephonic meeting of the Committee on March 21, 2005, and the events leading up to that meeting, vividly demonstrated that lack of objectivity on the part of Mr. Hodara. The events during that period of time speak for themselves. Mr. Hodara's every action, including the determinations as to which members of the Committee were subject to conflicts of interest that precluded their participation in the deliberations of the Committee, are difficult to comprehend. Silver Point was conflicted because it was the target of a potential investigation. Nevertheless, if the agenda item as to the conduct of AIG and Post and whether they breached their fiduciary duties was to be considered, according to Mr. Hodara, AIG and Post would not be conflicted and would be free to participate in the Committee's deliberations.

It appears that almost all parties involved, even Akin, as evidenced by its internal e-mails, recognized that the trading allegations and the desire for an investigation were a pretext for AIG and Post to obtain bargaining leverage against Silver Point. Nevertheless, Mr. Hodara did not advise the Committee of Akin's reservations. He did state to Ms. Johnston that he was "extremely skeptical" as to the soundness of an attack based on Silver Point's trading activities. However, it does not appear that he or Akin informed Mr. Musante or Post that the establishment of trading violations and breach of fiduciary duties by Silver Point were doubtful, unlikely or otherwise. In point of fact, it appears that at that time, Mr. Hodara did not even review the provisions of the Trading Order. Akin, as one of the entities charged with the enforcement of the Trading Order, did not deem it necessary to meet the notice and filing requirements of the Trading Order.

Mr. Hodara also ignored the sage advice and comments of James Anderson referred to in this Report, in his quest to serve the interests of AIG. Given the statements of Mr. Anderson as to the motives of AIG and Post and his descriptions of Mr. Musante's conduct, it is no wonder that after setting up Silver Point as a target, when Mr. Hodara suddenly announced that Akin had a conflict and could not pursue claims against Silver Point, he did not recommend Mr. Anderson, as the Committee's co-counsel, to pursue any investigation of the facts surrounding the trading issues — a choice that would have involved less time and expense to the administration of these cases.

Akin's performance of services on behalf of AIG and Post in furtherance of their self-interests and its lack of objectivity and disinterestedness in representing the Committee and the Committee members, exacerbated the tempest that raged in these chapter 11 cases. Such services were in disregard and not in the best interest of the Committee's constituency – all of the general unsecured creditors of FiberMark.

The foregoing constitutes the Examiner's Report in accordance with the issues set forth in the Examiner Order and the Appointment Order.

Dated: New York, New York
July 8, 2005

Respectfully,

/s/ Harvey R. Miller
Harvey R. Miller, as Examiner

WEIL, GOTSHAL & MANGES LLP
Attorneys for the Examiner
767 Fifth Avenue
New York, New York 10153
Telephone (212) 310-8000
Facsimile(212) 310-8007

By: /s/ Lori R. Fife
Lori R. Fife
A Member of the Firm

EXHIBITS

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On Docket
10/19/04

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

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In re

FiberMark, Inc.,
FiberMark North America, Inc., and
FiberMark International Holdings LLC,

Case No. 04-10463-CAB
Chapter 11
Jointly Administered

Debtors. :
----------x

ORDER APPROVING SPECIFIED INFORMATION BLOCKING PROCEDURES AND PERMITTING TRADING IN SECURITIES OF THE DEBTORS UPON ESTABLISHMENT OF A SCREENING WALL

Upon the motion (the "Motion") of the Official Committee of Unsecured Creditors (the "Committee") appointed in these chapter 11 cases concerning FiberMark, Inc. ("FiberMark") and certain of its subsidiaries and affiliates, debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the "Debtors"), by and through its undersigned proposed counsel, Akin Gump Strauss Hauer & Feld LLP, for the entry of an order pursuant to section 105(a) of chapter 11, title 11 of the United States Code (the "Bankruptcy Code"), approving specified information blocking procedures and permitting trading in the Securities (as defined below) of the Debtors in certain situations, and all exhibits attached thereto; and adequate notice of the Motion having been given; and no objections to the Motion having been filed; and the Court being satisfied that the relief requested in the Motion is necessary and in the best interests of the Committee, the creditors, and the Debtors' estates; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

The Motion is granted, subject to the terms and conditions of this Order.

Source: *Report of Harry Miller, Examiner*
Dated July 8, 2005
Exhibits A-H

7181278

Exhibit A

2. The information blocking procedures established by certain members of the Committee (collectively, the "Securities Trading Committee Members") described substantially in the Motion and in the form of declaration annexed to the Motion as Exhibit A (the "Screening Wall Declaration"), which are designed to prevent the misuse of Committee information and which are acceptable to the Office of the United States Trustee, are hereby approved.

3. Committee members, acting in any capacity and engaged in the trading of securities as a regular part of their business, will not violate their fiduciary duties as Committee members or per se be in violation of securities law and, accordingly, will not subject their claims to possible disallowance, subordination, or other adverse treatment, by trading in the Debtors Securities during the pendency of the Debtors' chapter 11 cases, provided that any Committee member carrying out such trades establishes and effectively implements and strictly adheres to the information blocking procedures detailed in the Screening Wall Declaration. For purposes of this Order, the term "Securities" is used as such term is defined in Section 2(a)(1) of the Securities Act of 1933, including the following, but only to the extent they constitute securities thereunder: stock, notes, bonds, debentures, participations in, or derivatives based upon or relating to, any of the Debtors' debt obligations or equity interests. For the avoidance of doubt, this definition does not apply to bank debt.

4. As evidence of its implementation of the procedures detailed in the Screening Wall Declaration, any Committee member that wishes to trade in the Debtors' Securities shall, as a precondition to any such trading after such Committee member's appointment to the Committee, cause to be filed with the bankruptcy court a declaration or affidavit of each individual performing Committee-related activities in the above-captioned chapter 11 bankruptcy cases on

behalf of that Committee member stating that such individual shall comply with the terms and procedures set forth in the Screening Wall Declaration.

5. This Order shall not preclude the Court from taking any action it may deem appropriate in the event that it is determined that a breach of fiduciary duty has occurred as a result of a defect in, or the ineffectiveness of, the implementation of the information blocking procedures herein approved.

6. This Order shall apply only to those Committee members that are engaged in the trading of securities as a regular part of their business. *

Burlington, Vermont
October 19, 2004

UNITED STATES BANKRUPTCY JUDGE

* IT IS FURTHER ORDERED that to the extent the parties charged with enforcing this screening wall procedure (namely, the Debtor, the Debtor's counsel, the Office of the U.S. Trustee, and the Committee's counsel) have reason to believe that any member of the Committee has violated this order or the screening wall process, they are to report such suspicion of violation by filing "a notice of suspected violation" with the Court promptly, and serve a copy of the notice on the Debtor, the Committee and the Office of U.S. Trustee; such notice shall specify the name of the subject Committee member, the facts that give rise to the suspicion of violation, what steps have been taken to avoid or diminish harm to the estate, if any, and the proposed remedy.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:	
FIBERMARK, INC.,	
FIBERMARK NORTH AMERICA, INC., and	**Chapter 11 Case**
FIBERMARK INTERNATIONAL HOLDINGS, INC.,	**# 04-10463**
Debtors.	**Jointly Administered**

ORDER

DIRECTING THE APPOINTMENT OF AN EXAMINER AND SPECIFYING EXAMINER'S DUTIES PURSUANT TO § 1104(c) and § 1106(b) OF THE BANKRUPTCY CODE

UPON the hearing scheduled by the Court's Order to Show Cause Why an Examiner Should not be Appointed dated March 30, 2005 and the Court's Case Management Order dated April 13, 2005 (doc. # 1402) and heard April 19, 2005, and further

UPON the appearances of Kevin Purcell, Esq. and Kim F. Lefebvre, Esq., for the United States Trustee, and all other appearances as stated on the record of the hearing held April 19, 2005, and further

UPON the Parties' consent, and further

UPON consideration of the entire record before the Court, and after oral argument, THE COURT FINDS that it is in the best interest of the estate for the Court to appoint an examiner.

The Court FURTHER FINDS that pursuant to 11 U.S.C. § 1106(a)(4), as incorporated by reference in 11 U.S.C. § 1106(b), is appropriate under 11 U.S.C. § 1104(c), and

THEREFORE, IT IS HEREBY ORDERED,

1. The United States Trustee's Office is directed to appoint an independent examiner to conduct an investigation into the following matters:

   a. the transfer of the Debtors' executives' claims, including but not limited to, the claims of Alex Kwader, and other persons who were employees of the Debtors at the time of the transfer of their claim(s), to Silver Point Capital, L.P. ("Silver Point"), the nature and extent of the disclosure of those transfers and whether breach(es) of fiduciary duties to the estate resulted;

   b. the transfer of the claim of former committee member Solutions Dispersions, Inc. to Silver Point;

   c. the quality of the "screening wall" Silver Point, and the other members of the Creditors' Committee, established in accordance with this Court's Order Approving Specified Information Blocking Procedures and Permitting Trading in Securities of the Debtors Upon Establishment of a Screening Wall (doc. # 684) (the "Trading Order"), whether it was breached, and whether the Trading Order was violated;

Source: *Report of Harry Miller, Examiner*
Dated July 8, 2005
Exhibits A-H

Exhibit B

d. the dispute among Committee members regarding corporate governance issues and whether any Committee member breached its fiduciary duty to act in the best interest of all creditors; and

e. any other matter the Examiner deems necessary and relevant to the complete and full investigation of the four enumerated areas included herein.

2. In order to meet his or her responsibilities, the Examiner has the authority to retain counsel, to issue subpoenas, and to require document production and conduct examinations under FED. R. BANKR. P. 2004, provided the Examiner exercises this authority in a manner which is consistent with the Examiner's obligation to complete the investigation in a prompt and cost-effective fashion.

3. The Official Committee of Unsecured Creditors and its members, Alex Kwader and other individuals who were employed by the Debtors when his or her individual claims were transferred to Silver Point, representatives of Solutions Dispersions, Inc. and all other parties in interest who have information that the Examiner deems relevant to this investigation shall cooperate fully with the Examiner.

4. The Examiner shall commence his or her investigation immediately upon the Court's approval of the United States Trustee's appointment of the Examiner.

5. The Examiner shall be compensated at ordinary hourly rates, with compensation to be paid in accordance with 11 U.S.C. § 330(a)(1), the Federal Rules of Bankruptcy Procedure, the District of Vermont Local Rules and the United States Trustee Fee Guidelines.

6. The compensation of the Examiner, including the compensation of his or her professionals' and the expenses of both, are limited and shall not exceed $200,000. Application and allowance of said fees will be paid under 11 U.S.C. § 330 as set forth in ¶ 5, supra. This limitation may be modified upon motion of the Examiner and for good cause shown. No compensation shall be paid to the Examiner or the Examiner's professionals without prior approval of the Court.

7. In the event that the Examiner finds that a Committee member or any other party has violated the Trading Order, has breached fiduciary duties, or has acted to intentionally thwart the plan confirmation process in these cases, the Examiner shall include in the report recommendations regarding (a) how the culpable conduct should affect the allocation of the cost of the Examiner; (b) whether such conduct warrants the imposition of sanctions against any such party, including without limitation, the avoidance of claims transfers or subordination of claims; and (c) any such other recommendations the Examiner has based upon the totality of his or her findings.

8. As set forth in its Exclusivity Order of even date, no proposed plans or disclosure statements may be filed by any party during the Examiner's forty-five (45) day investigation period, except that the Debtors may file a consensual plan during this time (with consensual defined to include the unanimous consent of all members of the Official Committee of Unsecured Creditors).

9. The Examiner shall file his or her report with the Court by **4:00 P.M. on June 8, 2005**.

10. The Court will hold a § 105(d) status conference on the status of the case and the Examiner's report and recommendations on **June 15, 2005 at 11:00 a.m.** at the Federal Building, 11 Elmwood Avenue, Burlington, Vermont.

SO ORDERED.

April 19, 2005
Burlington, Vermont

Colleen A. Brown
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:	:	
FIBERMARK, INC.	:	Case Nos. 04-10463 (CAB)
FIBERMARK NORTH AMERICA, INC. and	:	(Chapter 11)
FIBERMARK INTERNATIONAL HOLDINGS, LLC,	:	
	:	(Jointly Administered)
Debtors.	:	

ORDER APPROVING APPOINTMENT OF EXAMINER

UPON the application of the United States Trustee, and it appearing that Harvey R. Miller, a disinterested person (see 11 U.S.C. § 101(14)), has been selected for appointment by the United States Trustee as examiner in the above-captioned Chapter 11 cases, it is hereby

ORDERED that pursuant to 11 U.S.C. 1104(d) and Federal Rule of Bankruptcy Procedure 2007.1(c), the appointment of Harvey R. Miller, Esq. is approved.

Dated: Burlington, Vermont
April 22, 2005

COLLEEN A. BROWN
UNITED STATES BANKRUPTCY JUDGE

FILED
2005 APR 22 AM 11 49
US BANKRUPTCY COURT
DISTRICT OF VERMONT

Source: *Report of Harry Miller, Examiner*
Dated July 8, 2005
Exhibits A-H

Exhibit C

RECOVERY ANALYSIS

ENTITY	CLAIM AMOUNT[1]	DISTRIBUTION UNDER DECEMBER PLAN (70%)	DISTRIBUTION UNDER JUNE PLAN (54%)	DIFFERENCE
AIG – Class 9 Claims	$68,588[2]	$48,011	$37,037	$10,974
Post – Class 9 Claims	53,455	37,418	28,865	8,553
Silver Point – Class 9 Claims	178,034	124,624	96,138	28,486
Other Bondholders	45,523	31,866	24,582	7,284[3]
Class 10 Claims[4]	6,839[5]	4,787	3,693	1,094
Silver Point – Class 10 Claims	5,563	3,894	3,004	890
TOTAL	$358,000	$250,600	$193,320	$57,281

[1] All amounts are approximate based upon FiberMark's Disclosure Statement.

[2] In thousands.

[3] These two amounts combined equal the amount of the decline in the value of the recovery from the December Plan to the June Plan for all general unsecured creditors other than Silver Point, AIG and Post.

[4] Does not include the claims of Silver Point.

[5] To the extent that the amount of allowed general unsecured creditors is different from that estimated in the Disclosure Statement, these percentage recoveries are subject to change.

Source: *Report of Harry Miller, Examiner*
Dated July 8, 2005
Exhibits A-H

Exhibit D

FiberMark – Timeline of Relevant Events

Date	Event
March 30, 2004	Commencement Date (Docket 1).
April 6, 2004	Debtors file application to retain Berenson & Co. (Docket 63).
April 7, 2004	Committee appointed (Docket 65).
April 23, 2004	Committee objects to Berenson retention application (Docket 134).
April 29, 2004	Committee files application to retain Akin (Docket 192).
April 29-30, 2004	Meeting at Skadden between Debtors and Committee; tour of plant.
May 4, 2005	Committee files response to Berenson retention application (Docket 191).
May 19, 2004	Court authorizes Akin retention as Committee counsel (Docket 239).
May 21, 2004	Debtors file KERP motion (Docket 253).
June 1, 2004	Court authorizes Berenson retention (Docket 293).
June 4, 2004	Committee objects to KERP motion (Docket 307).
June 7, 2004	Meeting in Los Angeles between AIG, Post, Chanin, Akin and FiberMark.
July 8, 2004	Debtors file revised KERP (Docket 394, 395).
July 9, 13, 14, 2004	KERP hearing.
July 28, 2004	Court enters order extending exclusivity (Docket 452).
August 6, 2004	Court approves stipulation between Debtors and Committee (i) approving KERP and (ii) extending exclusivity to November 15, 2004 (Docket 484 and 486).
September 27, 2004	Committee files motion to establish a trading order (Docket 635).
September 28, 2004	Post circulates draft term sheet of Shareholders Agreement ("SA") and Registration Rights Agreement ("RRA").
October 19, 2004	Trading Order entered (Docket 684).
October 27, 2004	Silver Point appointed to Committee (Docket 705).
November 11, 2004	Silver Point files Trading Order declarations (Docket 733).
November 12, 2004	Debtors, with the support of the Committee, file their first proposed plan of reorganization (Docket 740).
December 7, 2004	Committee files Reply Statement Regarding The First Proposed Disclosure Statement (Docket 802).
December 14, 16, 2004	Disclosure Statement hearing.
December 16, 2004	Court approved Disclosure Statement and Solicitation Procedures (Docket 872 and 876).
December 17, 2004	Debtors file the Plan, schedule Confirmation Hearing for January 27, 2005, set a voting/objection deadline for January 20, 2005 (this deadline extended many times) (Docket 879 and 880).
December 17, 2004	Debtors file objection to certain SERP Claims (Docket 882).
December 23, 2004	Debtors began solicitation of votes on Plan
December 27, 2004	Debtors file motion for authorization to enter into a commitment agreement to fund class 10 cash payment option (Docket 913).
December 28, 2004	Committee is informed that AIG, Post and Silver Point have been unable to reach an agreement regarding shareholders rights.
December 29, 2004	Committee meeting to review AIG shareholders rights proposal.
December 30, 2004	Yousey/Steidle file motions to increase the amount of their SERP Claims (Docket 927 and 927).

Source: *Report of Harry Miller, Examiner*
Dated July 8, 2005
Exhibits A-H

Exhibit E

FiberMark – Timeline of Relevant Events

Date	Event
January 10, 2005	Yousey/Steidle file responses to SERP Claims objection (Docket 973).
January 11, 2005	FiberMark board meeting. Skadden informs the Committee's professionals that the Committee must resolve corporate governance issues and that the Company will not prosecute a cram down.
January 13, 2005	Committee meeting resulting in vote in favor of the Minority Rights: AIG, Post, and SDI for; Silver Point against; Wilmington abstention.
January 14, 2005	Kwader files response to objection to claim (Docket 1010).
January 17, 2005	Debtors file notice of intent to withdraw plan (Docket 1025).
January 17, 2005	Debtors file response to Yousey/Steidle pleadings (Docket 1020).
January 18, 2005	Committee files joinder to Debtors' response Yousey/Steidle pleadings (Docket 1034).
January 18, 2005	Court enters order authorizing entry into a commitment agreement relating to the funding of class 10 cash payment option (Docket 1037).
January 20-21, 2005	Silver Point purchases SERP Claims.
January 20, 2005	Debtors file the first modification to the Plan, changing the deadline for filing the Plan Supplement to three days prior to the Confirmation Hearing (Docket 1057).
January 20, 2005	Committee files a reservation of rights to protect its right to file an objection to the Plan (Docket 1064).
January 24, 2005	Series of meetings begin at Skadden involving Skadden, Berenson, AIG, and Silver Point to resolve corporate governance issues.
January 25, 2005	Debtors file report on status of plan process, advising the Court of the agreement in principle (Docket 1095).
January 26, 2005	Court enters an order further extending the exclusive periods to February 15, 2005 (Docket 1100).
January 26, 2005	Court enters stipulation and order between Debtors and Yousey/Steidle, stating that the parties have reached an agreement in principle resolving the SERP discount rate controversy (Docket 1101).
January 27, 2005	Original date of Confirmation Hearing. Confirmation Hearing adjourned until 2/28/05 (Docket 1116).
February 1, 2005	Debtors file SERP Settlement Motion (Docket 1138).
February 2, 2005	Silver Point files notice of transfer of SERP Claims with Logan & Co.
February 14, 2005	Objection deadline for SERP Settlement Motion (Docket 1139).
February 15, 2005	Notice of transfer of SERP Claims docketed (Docket 1191).
February 15, 2005	Debtors' exclusivity expires (Docket 1100).
February 16, 2005	Court enters order approving SERP Settlement Motion (Docket 1210).
February 18, 2005	Debtors file Second Modification to the Plan (Docket 1241).
February 18, 2005	Debtors file Plan Supplement (Docket 1243).
February 25, 2005	Creditors' Committee meeting ends without a vote on the Plan.
February 25, 2005	AIG files objection to Plan and Post file joinder thereto (Docket 1269).
February 25, 2005	SDI transfers claim to Silver Point.
February 27, 2005	Akin polls Committee members regarding Plan.
February 28, 2005	SilverPoint restricts its trading of Fibermark.
February 28, 2005	Confirmation Hearing, *but* Court adjourns until 3/7/05 after the Debtors

FiberMark – Timeline of Relevant Events

Date	Event
	advise of continuing Noteholder disagreement (Docket 1276).
February 28, 2005	Logan receives notice of transfer of SDI Claim.
March 1, 2005	Notice of transfer of SDI Claim docketed (Docket 1287, dated 3/2/05).
March 1, 2005	SDI resigns from the Committee.
March 7, 2005	Court enters order continuing confirmation hearing until 3/17/05 (Docket 1300).
March 8, 2005	Debtors send letter to Committee with documentation in "final form." Initiates an exchange of correspondence between AIG/Post and FiberMark regarding corporate governance documents.
March 15, 2005	Debtors file a notice continuing Confirmation Hearing without date due to continuing Noteholder disagreements (Docket 1319).
March 17, 2005	Akin contacts the U.S. Trustee, expressing concern about Silver Point's trading activities
March 18, 2005	U.S. Trustee sends a letter to the Committee requesting that Committee counsel transmit a written statement by March 22, 2005 providing the details of the expressed concerns, resulting in a series of correspondence between U.S. Trustee and Akin regarding Silver Point's trading activity. U.S. Trustee requests a meeting with Silver Point and the production of certain documents; meeting held on 3/23/05, documents produced on 3/22/05 and, in response to U.S. Trustee request of 3/25/05, on 4/1/05.
March 21, 2005	Debtors file a notice of withdrawal of Plan (Docket 1332), motion for dispute resolution (Docket 1333), and motion for reinstatement of exclusivity (Docket 1334).
March 21, 2005	Committee considers whether to investigate Silver Point's claims trading.
March 25, 2005	Wilmington files response to Dispute Resolution Motion (Docket 1342).
March 29, 2005	Committee files application to retain Klee Tuchin as special counsel (Docket 1352).
March 30, 2005	Court enters (i) order setting expedited hearing on the Special Counsel Application and (ii) the Examiner Show Cause Order (Docket 1354).
April 4, 2005	AIG and Post object to Debtors' motion to reinstate exclusivity (Docket 1376).
April 4, 2005	Committee files an objection to Debtors motion for an order establishing the safeguarding of estate resources sought to be used in the resolution of the claims trading issues (Docket 1378).
April 4, 2005	Silver Point files a response and partial joinder to Debtors' motion regarding the use of estate resources in connection with the resolution of claims trading issues (Docket 1377).
April 11, 2005	Debtors object to Committee application for retention of Klee Tuchin as special counsel (Docket 1394).
April 11, 2005	AIG and Post file statement regarding the appointment of an examiner (Docket 1395).
April 11, 2005	Committee files response regarding the appointment of an examiner (Docket 1396).
April 13, 2005	Silver Point responds to Committee's application for the appointment of special counsel (Docket 1401).

FiberMark – Timeline of Relevant Events

Date	Event
April 13, 2005	Court enters order denying Debtors' motion for order safeguarding estate resources sought to be used in connection with claims trading issue (Docket 1403).
April 13, 2005	Court denies Committee application to retain of Klee Tuchin as special counsel (Docket 1404).
April 18, 2005	U.S. Trustee files Statement Setting Forth the Name of Person Available to Serve as Examiner in the Case and Efforts to Verify the Candidate's Disinterestedness (Docket 1409).
April 19, 2005	Court enters Order Establishing Procedures for the Filing of Competing Plans and Denying Debtors' Motion to Reinstate Exclusivity Period (Docket 1421).
April 19, 2005	Court enters the Examiner Order (Docket 1422).

KERP Proposal Comparison[1]

	FiberMark Proposal I (KERP Motion) 5/21/04	Committee Counterproposal I (Meeting) 6/7/04	FiberMark Proposal II to Committee Counterproposal I (Follow-up Call) 6/9/04	FiberMark Proposal III (Letter from Mr. Baker to Mr. Hodara) 6/22/04	Committee Counterproposal II (E-mail from Mr. Hodara to Mr. Baker) 6/22/04	FiberMark Proposal IV (Letter from Mr. Baker to Mr. Hodara) 7/7/04	FiberMark Proposal V (Debtors' Response to Committee Objection) 7/8/04	Final Stipulation 7/14/04
Retention Amount: (total maximum payment under retention plan)	$5,266,239	$1,669,842 (Δ$3,596,397)[2]	$4,934,976 (Δ$331,263)	$3,654,700 (Δ$1,611,539)	Unable to determine amount of retention proposed. Proposed milestones for retention payments.	Unable to determine amount of retention proposed. Proposed milestones for retention payments.	$3,654,700 (Δ$1,611,539)	$3,279,700 (Δ$1,986,539) ($375,000)[3]
Severance Amount: (total maximum payment under severance plan)	$5,670,930	$1,942,092 (Δ$3,728,838)	$4,345,878 (Δ$1,325,052)	$4,233,378 (Δ$1,437,552)	Unable to determine amount of severance proposed. Proposed milestones for severance payments.	Unable to determine amount of severance proposed. Proposed milestones for severance payments.	$4,233,378 (Δ$1,437,552)	$4,099,866[4] (Δ$1,571,064) ($133,512)[5]
Discretionary Recognition Plan:	$500,000	Not discussed	Not discussed	$300,000 (Δ$200,000)	Not discussed	Not discussed	$300,000 (Δ$200,000)	$300,000 (Δ$200,000)

[1] This chart reflects the various proposals regarding the key employee retention and severance plans. Only the aggregate dollar amounts of the proposals are listed. In addition, parties adjusted certain other terms in each proposal, including, among others: the allocation of the payments, the timing of the payments, and adjustments of the payments based upon achieving certain milestones.

[2] Each (Δ) represents the difference in amount from FiberMark Proposal I.

[3] Difference from FiberMark Proposal V.

[4] COMM0255151-54. This amount, however, is not discussed in the Final Stipulation.

[5] Difference from FiberMark Proposal V.

Exhibit F

Source: *Report of Harry Miller, Examiner Dated July 8, 2005* Exhibits A-H

Glossary of Relevant Corporate Terms

Affiliate:	An affiliate of a specified person or entity is another person or entity controlling, controlled by, or under common control with, the specified person or entity. A company's directors and executive officers, as well as controlling stockholders of the such company, are generally deemed affiliates of such company.
Blocking Rights:	Rights granted to certain shareholders to vote on or approve certain specified transactions of a target (*e.g.*, borrowings, transactions with affiliates, the sale of the company). Blocking rights are one type of minority protection. Also often referred to as veto rights.
Cumulative Voting	A system of shareholder voting for a board of directors designed to give minority shareholders representation on the board. Under a straight voting system, each share of voting stock carries one vote for each position to be filled on the board. Under cumulative voting, all the votes can be cast for a single director (*e.g.*, the owner of a single share in an election for five directors would be able to cast one vote for each position under a straight voting system, but would be able to cast all five votes for a single position, or distribute them in any manner desired, under a cumulative voting system).
Demand Rights:	*See* "Registration Rights."
Drag-Along Rights:	The rights provided in a shareholders' agreement (or charter) to allow one or more of the shareholders holding a specified percentage of the shares to force other shareholders to sell their shares along with the initiating shareholder.
Exchange Act:	Securities Exchange Act of 1934, as amended. Legislation that regulates, among other things, securities markets, periodic reporting (Form 8-K, Form 10-Q, Form 10-K) by public companies, insider trading (Section 16), proxy solicitations and tender offers.
Form 8-K; Form 10-Q; Form 10-K:	Documents required to be filed with the SEC pursuant to Section 13(a) of the Exchange Act for the purpose of keeping current the public information available concerning public companies. Form 10-K is the annual report to be filed. Form 10-Q is the quarterly report to be filed. Form 8-K is the report to be filed upon the occurrence of a specified reportable event.
Information Rights:	Covenants to provide investors with information relating to the business, finances and prospects of a company.
Insiders:	Officers, directors and beneficial owners of 10% or more of the public equity securities of a company.
Inter-Creditor Agreement:	An agreement governing priority and other arrangements between various creditors.
Investors Rights Agreement	*See* "Shareholders' Agreement"
MD&A:	Short for "Management's Discussion and Analysis of Financial Condition and Results of Operations." A required part of the disclosure in a registration statement and a Form 10-K or Form 10-Q, where management describes the company's results of operations and liquidity.
Minority Protections:	Rights of minority shareholders providing protection against actions taken by controlling shareholders. May include blocking rights, tag-along rights, preemptive rights, etc.

Source: *Report of Harry Miller, Examiner*
Dated July 8, 2005
Exhibits A-H

Exhibit G

Piggyback Rights:	*See* "Registration Rights."
Preemptive Rights:	The right of a shareholder to participate in future issuances of equity by a company so as to allow the shareholder to maintain its proportionate ownership interest.
Registration:	The SEC's review process for securities intended to be sold to the public.
Registration Rights:	Rights to have securities registered in an offering. Demand rights are to require (*i.e.*, force) your shares to be registered. Piggyback rights are to "piggyback" onto another person's offering.
Registration Statement:	A disclosure document required by the Securities Act to be filed with the SEC to register securities to be offered publicly.
Right of First Offer (ROFO):	A provision in a shareholders' agreement that prohibits a shareholder from selling his or her shares unless he or she has first offered to sell his or her shares to the other shareholders at the price set by the selling shareholder.
Right of First Refusal (ROFR):	A provision in a shareholders' agreement that prohibits a shareholder from accepting an offer made by a third person to purchase such shareholder's shares until other shareholders are given the opportunity to purchase the shares on the same terms.
Right of Last Look (ROLL):	A provision in a shareholders' agreement that prohibits a shareholder from entering into a definitive agreement to transfer his or her shares to a third party until the other shareholders are given an opportunity to purchase such shares at the price the selling shareholder was willing to accept from the third party purchaser.
Rule 10b-5:	An SEC rule under the Exchange Act prohibiting material misstatements or omissions of fact in connection with the purchase or sale of securities.
Securities Act:	Securities Act of 1933, as amended. Legislation that governs the offer and sale of securities.
Shareholders' Agreement:	An agreement among the shareholders of a company regulating the management of the company and the ownership of its securities. It often contains provisions related to preemptive rights, drag-along rights, tag-along rights, information rights and blocking rights.
Supermajority Provision:	A provision in a company's certificate of incorporation similar to a supermajority statute.
Tag-Along Rights:	The rights provided in a shareholders' agreement (or charter) of non-selling shareholders to require the initiating seller to include the non-selling shareholders' shares (on a proportionate basis) in any sale by the selling shareholder of its shares. Also referred to as co-sale rights.
Veto Rights:	*See* "Blocking Rights."

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Dated July 8, 2005
Exhibits A-H

Exhibit H

Sealed