

Hearing Date: September 11, 2013 at 9:30 a.m. (EDT)

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Proposed Counsel to the Official Committee of Unsecured Creditors

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK**

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In re : Chapter 11
:
CENGAGE LEARNING, INC, *et al.*,¹ : Case No. 13-44106 (ESS)
: Case No. 13-44105 (ESS)
: Case No. 13-44107 (ESS)
: Case No. 13-44108 (ESS)
:
Debtors. : Jointly Administered
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**INITIAL OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS TO DEBTORS' MOTION FOR ENTRY OF AN ORDER
(A) APPROVING APPOINTMENT OF A MEDIATOR AND SCHEDULING
MEDIATION IN CONNECTION WITH CONFIRMATION OF THE DEBTORS' PLAN,
(B) SCHEDULING CERTAIN HEARING DATES AND DEADLINES IN
CONNECTION WITH CONFIRMATION OF THE DEBTORS' PLAN, AND
(C) SCHEDULING CERTAIN HEARING DATES AND DEADLINES IN CONNECTION
WITH CERTAIN CONTESTED ISSUES RELATING TO THE DEBTORS' PLAN**

¹ The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal taxpayer-identification number, include: Cengage Learning, Inc. (4491); Cengage Learning Acquisitions, Inc. (0935); Cengage Learnings Holdings II, L.P. (5675); and Cengage Learning Holdco, Inc. (0831). The Debtors' service address at their corporate headquarters is 200 First Stamford Place, 4th Floor, Stamford, Connecticut 06902.

The Official Committee of Unsecured Creditors (the “Committee”) of Cengage Learning, Inc. (“Cengage”) and its debtor affiliates (collectively, the “Debtors”), by and through its proposed counsel, Arent Fox LLP, hereby files this objection (the “Initial Objection”)² to the Debtors’ Motion for entry of an Order (A) Approving Appointment of a Mediator and Scheduling a Mediation in Connection with Confirmation of the Debtors’ Plan, (B) Scheduling Certain Hearing Dates and Deadlines in Connection with Confirmation of the Debtors’ Plan and (C) Scheduling Certain Hearing Dates and Deadlines in Connection with certain Contested Issues Relating to the Debtors’ Plan (the “Mediation and Scheduling Motion”).³ In support of this Initial Objection, the Committee respectfully states as follows:

INITIAL OBJECTION

1. The Debtors’ Mediation and Scheduling Motion was filed in direct response to the Committee’s Adjournment Motion and seeks two forms of relief: (a) the appointment of a mediator to mediate what the Debtors have determined are “Primary Confirmation Issues,”⁴ and (b) the establishment of three separate schedules including a Plan Confirmation Schedule, a Disputed Issue Schedule and an Intercompany Obligation Schedule, that contemplate in the aggregate, *thirty-four (34) different court-imposed deadlines*.

² The Committee will not repeat the arguments set forth in detail in the *Omnibus Reply to Responses to Motion of the Official Committee of Unsecured Creditors for an Order Continuing the Hearing on the Debtors’ Disclosure Statement and Plan or Reorganization* [Docket No. 425] which is incorporated herein by reference.

³ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Mediation and Scheduling Motion.

⁴ As a preliminary matter, the Committee disagrees with the premise that such “Primary Confirmation Issues” are ripe for mediation and are the only issues that will need to be determined before confirmation can occur. For example, at the beginning of these cases, the Debtors stated that avoidance of the “14,000 Disputed Copyrights” was a mere intercreditor issue. Since the Committee’s investigation however, the avoidance of these copyrights has been acknowledged to be an issue impacting the estates and unsecured creditors. Thus, until the Committee completes its investigation, the parties cannot assume that the Debtors have identified or correctly analyzed all of the complex issues or that the Debtors have not ignored or overlooked certain issues.

2. Based on this proposal, it appears the Debtors' primary objective is to force these issues to mediation without implementing a workable process. Instead, the Debtors' goal should be to have a *meaningful* mediation process in order to facilitate success. The Committee supports a properly structured and fair mediation process designed and timed to provide the best prospects for success and obtaining consensual resolutions. The Debtors' proposed path, however, will not lead there.

3. The Debtors seek to engage in mediation *before* the placeholder disclosure statement and incomplete proposed plan are revised and filed and a confirmation process is established; *before* any litigation, including any contested matter or adversary proceeding regarding the Disputed Assets or other disputes is commenced; *before* the Debtors have disclosed *any* valuation information or financial analyses; and *before* the Committee's on-going diligence and investigation into the complex case issues has at least been substantially completed.⁵ Thus, if the Court appoints a mediator in the next three days, as contemplated under the Mediation and Scheduling Motion, the mediator will have very little information to assist in mediating the purported "Primary Confirmation Issues." For example, under the Debtors' proposed schedule, the mediator will be required to have *three* mediation sessions *before* the complete, revised disclosure statement and plan are even scheduled to be filed by the Debtors. Similarly, the parties cannot be expected to mediate meaningfully without having relevant

⁵ It is apparent to the Committee that the slow pace of production of documents and information, whether consensually or through formal examination, and the complexity of the transactions being investigated will require the Committee to seek more time than provided under the Cash Collateral Order. Thus the Committee will shortly seek an enlargement of the shortened statute of limitations and claims preclusion and bar date. If extended, the proposed dates if adopted by the Court would also need to be reset at a later date. If the Court directs mediation or the parties agree to participate in mediation, these dates should in any event be enlarged. Given that the First Lien Secured Parties support mediation, the enlargement should be consensually provided by the First Lien Secured Parties as permitted under the Cash Collateral Order. If not consensually provided, the Court should enlarge the Investigation Deadlines as a condition of mediation.

information and facts and the opportunity to develop legal theories or positions. Once the parties have access to the information and data points upon which mediation would be based and after the issues have been adequately framed by the relevant pleadings, mediation would be appropriate. However, mediation now is premature and futile.

4. With respect to the proposed timeline and court-imposed deadlines, the Debtors propose replacing one unworkable set of deadlines with another, which, unfortunately, will likely bring all of the parties back before the Court without actual progress.⁶ For example (and there are other numerous examples), the proposed timeline requires the parties to serve discovery requests related to the new issues raised in the revised disclosure statement and plan *before* the Debtors are required to file full valuation and liquidation analyses as exhibits to the revised disclosure statement. The proposed schedule also expects the parties to stipulate to facts on the Disputed Copyrights just six days from now, even though the Debtors have acknowledged that after months of work, they only recently completed an analysis of the “1,500” Disputed Copyrights, are still conducting diligence on the “14,000” Disputed Copyrights, and will not file an action regarding the Disputed Assets until September 13, 2013.⁷ The Committee only

⁶ The consequences of setting impractical deadlines are already on display by virtue of the Debtors’ incomplete draft Disclosure Statement, which the Debtors’ filed as a placeholder simply to comply with the arbitrary deadlines imposed by the RSA.

⁷ Indeed, it was not long ago that the Debtors were only pursuing the “1,500” copyrights and giving away the “14,000” copyrights. At best, it appears the Debtors overlooked legal theories available to the estates. As a direct result of the Committee’s investigation and efforts, and pushing to preserve the “14,000” copyrights, a greater likelihood of recovery is available. Moreover, although the Debtors continue to represent to the Court that the Disputed Copyrights comprise approximately 15,500 copyrights, the recordation documents recently produced by Debtors show that the liens for a much larger number of copyrights, 19,510, were actually recorded with the Copyright Office within the preference period and are therefore avoidable. If the parties cannot yet even agree on the universe of Disputed Copyrights, it is clear that significant further investigation will be required. Moreover, once the universe of Disputed Copyrights is established, the valuation of those copyrights presents an even more daunting task. Each of those 19,510 copyrights will necessarily have a distinct market value, depending upon the sales history and projections for the books containing the copyrighted content. Adding further complexity, many of the textbooks at issue are second or later editions, which means that the current editions generating the revenues (and therefore value of the copyrights) are derivative works, containing content covered by multiple separate copyrights. In such instances, the amount of content attributable to each Disputed Copyright must be ascertained

recently received requested information necessary to identify the Disputed Copyrights (and have not yet received any of the information necessary to conduct a valuation of those 19,510 copyrights) and thus cannot reasonably be expected to stipulate to facts in six days. Moreover, the proposed deadlines provide no flexibility in the event these cases change or the Committee uncovers new information upon completion of its investigation.

5. At this juncture, it is premature and impossible to intelligently, fairly and reasonably set deadlines. This is particularly true with respect to unknown and not yet filed adversary proceedings and contested matters, including confirmation.

6. Indeed, the Debtors appear to be working backwards and ignoring the realities of these cases as well as the rights and needs of the Debtors' stakeholders, rather than working prospectively.⁸ But the cases have undoubtedly evolved since the Petition Date and the universe and scope of issues that need to be addressed have expanded and may continue to expand. What was once an extremely aggressive and idealistic timeframe for completing these cases under the best of circumstances is now an impossible one. The Debtors and the First Lien Secured Parties need to acknowledge the current circumstances, adjust, and work with the other constituencies in these cases to develop a realistic and viable path forward.

and value apportioned amongst the various copyrights included within each book. This analysis will require significant effort and expert testimony. Even prior to that analysis, however, it is clear that the 19,510 Disputed Copyrights have significant value because they include all of the Debtors' most recent copyrights (all those registered since 2010) as well as many thousands of older copyrights, comprising approximately one-third of the Debtors' entire body of copyrights going back several decades.

⁸ In support of the Motion to Shorten Notice regarding the Mediation and Scheduling Motion, the Debtors filed the Declaration of Dean D. Durbin, which provides, *inter alia*, that it is imperative for the Debtors to emerge from chapter 11 by year end. See *Declaration of Dean D. Durbin in Support of Debtors Motion to Shorten the Notice Period with Respect to the Mediation and Scheduling Motion* [Docket No. 417], ¶ 5. The Debtors also rely on the *Declaration of Michael Hansen in Support of the Debtors' Omnibus Reply in Support of the Debtors' Cash Colateral Motion and Cash Management Motion and in Response to Objections Therero* [Docket No. 185]. There are factual disputes about this underlying premise of the Mediation and Scheduling Motion set forth by the Debtors. Therefore, the Committee is entitled to discovery and an evidentiary hearing. It is not clear to the Committee whether the Debtors ever needed to emerge by year end, as was suggested in the Debtors' pleadings in the beginning of these cases. In any event, the Committee does not believe that to be true at this point either.

WHEREFORE, for all the reasons set forth herein, the Committee respectfully requests that the Court deny the Mediation and Scheduling Motion.⁹

Dated: New York, New York
September 11, 2013

ARENT FOX LLP

*Proposed Counsel to the Official Committee of
Unsecured Creditors*

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⁹ The Committee reserves its rights to supplement or amend this Initial Objection.