Martin A. Sosland (18855645)
Vance L. Beagles (00787052)
Yolanda C. Garcia (24012457)
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201
Telephone: (214) 746-7700
Facsimile: (214) 746-7777

Ronit J. Berkovich (*pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Debtor and
Debtor in Possession

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re	:	**Chapter 11**
TEXAS RANGERS BASEBALL PARTNERS,	:	**Case No. 10-43400-DML-11**
Debtor.	:	

TEXAS RANGERS BASEBALL PARTNERS' RESPONSE TO THE AD HOC GROUP'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE TO THE AD HOC GROUP'S FIRST REQUESTS FOR PRODUCTION AND THE MOTION FOR EXPEDITED HEARING RELATED THERETO

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES
CASES

STATUTES

I. PRELIMINARY STATEMENT

At the Ad Hoc Group's request, the Debtor has engaged in extensive discovery, even though the Debtor has always maintained that the requested discovery was totally irrelevant to any issue (which has proven to be true thus far). To date, the Debtor has produced in excess of 80,000 pages of documents, which has provided the Ad Hoc Group with a vast collection of materials.

- After receiving the Ad Hoc Group's original request (which was later narrowed by agreement), the Debtor worked with an electronic-discovery vendor to facilitate the collection and review of documents.
- The Debtor collected electronic documents not only from the Debtor, but also from Hicks Holdings, and Weil, Gotshal & Manges LLP.
- These communications were from high-level executives including, but not limited to, Mr. Hicks, the Debtor's CFO, and the managing partner of Weil, Gotshal & Manges LLP's Dallas office.
- The materials included communications with Major League Baseball ("MLB") on topics including, but not limited to, the auction process, negotiations with the Greenberg/Ryan group, negotiations with MLB, negotiations with the Crane group, and MLB baseball's role in the process.
- The Debtor also collected and produced a wide array of documents from the "deal room" that had been used during the auction and bid process.

The Debtor made this production even though the Ad Hoc Committee refused to produce a single document in response to the Debtor's discovery requests.

This sizeable production was apparently not enough for the Ad Hoc Group. Despite the fact that the issues before the Court have been narrowed as a result of the Court's June 22, 2010 opinion, the Ad Hoc Group now maintains that it is entitled to more discovery. It claims that the pre-petition discovery it seeks is relevant to the issue of good faith under 1129(a), even though the United States District Court for the Northern District of Texas has previously held that it does not consider pre-petition conduct in making a determination of good faith under

1129(a)(3). *In re Texas Extrusion Corp.*, 68 B.R. 712, 723 (N.D. Tex. 1986), *aff'd*, 836 F.2d 217 (5th Cir. 1988), *cert. denied*, 488 U.S. 926 (1988). It also make this argument while contrarily arguing that it has no duty to produce a single document.

In their Motion for Expedited Hearing, the Ad Hoc Group makes a number of assertions regarding what they define as the Adjournment Agreement. The allegations contained in paragraph 3 of the Motion for Expedited Hearing are substantially correct, and the Debtor supported the entry of the Court's June 24, 2010 Order.[1] To provide context, the Debtor's entry into the Adjournment Agreement related to the engagement of William Snyder as Chief Restructuring Officer for the Debtor's partners, to make an independent assessment of the Plan. The Debtor believed that a 13-day adjournment would give Mr. Snyder additional (and sufficient) time to make his decision since he was only beginning his involvement in the case. However, when Rangers Baseball Express LLC ("RBE") filed its Reconsideration Motion, Debtor's counsel was reminded that the August 12, 2010, closing deadline in the asset purchase agreement with RBE is tied to the expiration of RBE's financing commitments. As a fiduciary, the Debtor did not believe it could risk creating a basis for the filed plan to terminate. When the Debtor realized this mistake, it came to the Court on June 25, 2010, to request a modification of the Court's June 24, 2010 Order, although a different one than that requested by RBE. The Debtor intended to request the Court to revoke only its stay of discovery and not the entire Order, to allow either a successfully mediated agreement or a contested confirmation hearing to come before the Court on July 22, 2010. Given the Debtor's need to change position on the continuance and to avoid any argument that this change prejudiced the Ad Hoc Group, the Debtor agreed prior to the June 25, 2010 hearing to voluntarily produce documents responsive to

[1] TRBP entered into the Adjournment Agreement with the Ad Hoc Group without consulting with any other party.

the Ad Hoc Committee's most recent requests[2] subject to any privileges, including the common-interest privilege between the Debtor and MLB. The Debtor did so even though discovery is stayed, even though the Debtor believes this Court has suggested in the past that such discovery was not relevant, and even though case law from within the Fifth Circuit shows quite plainly that the documents are not relevant.

However, despite this voluntary production during a discovery stay, the Ad Hoc Group continues to take the untenable position that the Debtor and MLB do not share a common interest and cannot shield a single document from production under the common-interest privilege. One need only look at the parties' papers and their location in the courtroom to understand that the Debtor's and MLB's legal interests are aligned, a common interest that the Debtor and MLB identified and agreed existed in late April as evidenced by the common-interest-privilege legend that appears on documents from that time period. The Court should not indulge the Ad Hoc Committee's legally unsupportable position.

II. ARGUMENTS AND AUTHORITIES

A. The Current Document Requests Seek Irrelevant Information.

Although the Debtor has consented to produce documents even though discovery is currently stayed, it is worth noting that the parties are before the Court to argue about whether the Debtor can assert a common-interest privilege with respect to documents that it is *voluntarily producing* and that are *totally irrelevant to any issue to be heard at confirmation*. Given that the Ad Hoc Committee has noticed four depositions for the Debtor, the Ad Hoc Group's foray into discovery will continue to drain the estate's resources between now and the July 9, 2010 hearing

[2] These requests are set forth on pages 2 and 3 of the Ad Hoc Group's Motion to Compel.

unnecessarily. Accordingly, the Debtor will address the Ad Hoc Group's inaccurate positions regarding relevancy.

While the Ad Hoc Group previously had sought discovery related to the question of whether the Debtor was "maximizing value" through the Plan, the Court's June 22 Decision has taken that issue off the table. As a result, the Ad Hoc Group's discovery related to the Debtor's pre-petition conduct is not relevant to any issue. Nonetheless, the Ad Hoc Group has re-characterized its need for discovery, by claiming that the discovery now is relevant to the good faith standard under 11 U.S.C. 1129(a)(3). But the Debtor's pre-petition actions are completely irrelevant to the good faith standard.

1. The "Good Faith" Standard of 11 U.S.C. § 1129(a)(3).

While "[t]he Bankruptcy Code does not define the term 'good faith,'" *In re Lernout & Hauspie Speech Prods. N.V*, 308 B.R. 672, 675 (D. Del. 2004), the Fifth Circuit has held that "[w]here the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of § 1129(a)(3) is satisfied." *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 802 (5th Cir. 1997). The good faith requirement "is to be read restrictively," *In re Bankston*, No. 09-10675, 2010 WL 1027806, at *8 (Bankr. W.D. La. Jan. 15, 2010), and "[a] debtor's plan may satisfy the good faith requirement even though the plan may not be one which the creditors would themselves design and indeed may not be confirmable." *In re Briscoe Enters., Ltd., II*, 994 F.2d 1160, 1167 (5th Cir. 1993). Significantly, Courts within the Fifth Circuit do not consider the debtors' pre-petition conduct in determining good faith under Section 1129(a)(3). *In re Texas Extrusion Corp.*, 68 B.R. 712, 723 (N.D. Tex. 1986), *aff'd*, 836 F.2d 217 (5th Cir. 1988), *cert. denied*, 488 U.S. 926 (1988) ("The test for good faith is not based on what the plan proponents' behavior prior to petition was. It is only based on the Plan itself and its acceptance."); *In re General Homes Corp*., 134 B.R. 853, 862 (Bankr. S.D.

Tex. 1991) (same); *cf. In re Block Shim Dev. Co.-Irving*, 939 F.2d 289, 292 (5th Cir. 1991) ("To be proposed in good faith, a plan must fairly achieve a result consistent with the Code. This requirement is viewed in the context of the circumstances surrounding the plan.") (internal citation omitted).

In evaluating the merits of a debtor's plan, courts have recognized that if a plan provides for the payments of all claims in full, this strongly supports a finding of good faith.[3] In addition, the Fifth Circuit has recognized that if a debtor "does not retain any equity interest" in its property under its plan, this also strongly supports a finding of good faith. *In re Briscoe Enters., Ltd., II*, 994 F.2d at 1167.

2. The Documents Requested by The Ad Hoc Group Are Not Relevant to the Issue of Good Faith Under 11 U.S.C. § 1129(a)(3).

None of the documents the Ad Hoc Group requests are relevant to good faith, all resulting in unnecessary and wasteful discovery. According to its Motion, the Ad Hoc Group currently requests:

a) documents reflecting communications with Baseball;

b) documents relating to any bids to purchase the Debtor;

c) documents relating to the decision to file the Chapter 11 Case or the Plan;

d) documents relating to any appraisals or valuations of any bids to purchase the Debtor or the Debtor's assets;

e) documents relating to the Land Sale Agreements, including, without limitation, communications with third parties;

[3] *See In re Madison Hotel Assocs*., 749 F.2d 410 (7th Cir. 1984) (payment or reinstatement of all creditors in full was important factor in determining plan was filed in good faith); *In re Cypresswood Land Partners, I*, 409 B.R. 396, 425-26 (Bankr. S.D. Tex. 2009) ("As payment of claims is one of the twin pillars of bankruptcy, this result underscores that the Amended Plan is proposed in good faith.") (internal citation omitted); *In re Ferch*, 333 B.R. 781, 785 (Bankr. W.D. Tex. 2005) ("Accordingly, the Debtor now proposes to pay all creditors' claims with interest. . . . The Debtor will stay in business. All of the evidence reflects that the Debtor will be able to make these payments. . . . The good faith requirement of 11 U.S.C. § 1129(a)(3) is, therefore, satisfied.").

f) documents relating to the allocations of the purchase price to be paid under the Greenberg APA for the sale of the Debtor and the BRE Property;

g) documents relating to any transfers of assets made by the Debtor or any of its affiliates on or around May 23, 2010; and

h) documents relating to the financial ability of the Greenberg Group to close on the sale transaction contemplated in the Plan.

(Mot. at 4.)

Current Document Requests (a), (b), (c), (d), (e), and (g) are focused on obtaining information about the Debtor's pre-petition conduct, although the District Court for the Northern District of Texas has held that "[t]he test for good faith is not based on what the plan proponents' behavior prior to petition was. It is only based on the Plan itself and its acceptance." *See In re Texas Extrusion Corp.*, 68 B.R. at 723. In addition, Current Document Requests (a), (b), (d), (e), (f) and (h) seek information that may assist the Ad Hoc Group in understanding the Debtor's decision to proceed with the Greenberg/Ryan Group (also pre-petition); but whether the Ad Hoc committee approves of the Plan is irrelevant to this Court's good faith analysis. *See In re Briscoe Enters. Ltd., II*, 994 F.2d at 1167 ("A debtor's plan may satisfy the good faith requirement even though the plan may not be one which the creditors would themselves design and indeed may not be confirmable."). Pursuant to *In re Texas Extrusion Corp.* and *In re Briscoe Enterprises*, the Current Document Requests seek information that is not relevant to the good faith determination under Section 1129(a)(3).

In addition, the Plan provides for a payment in full of TRBP's creditors and results in TRBP losing all ownership interest in the assets being sold under the plan, facts which strongly indicate the Plain has been proposed in good faith. *See In re Briscoe Enters., Ltd., II,* 994 F.2d at 1167; *In re Madison Hotel Assocs*., 749 F.2d 410 (7th Cir. 1984); *In re Cypresswood Land Partners, I*, 409 B.R. at 425-26; *In re Ferch*, 333 B.R. at 785.

3. The Ad Hoc Group Has Failed to Demonstrate that the Requested Documents Would be Relevant to the Good Faith Determination.

The Ad Hoc Group offers three reasons for why its requested documents would be relevant to this Court's determination of good faith under 1129(a)(3). (Mot. at 7.) None of these reasons demonstrates relevance.

First, the Ad Hoc Group asserts the proposition that "a plan is not proposed in good faith when the purpose of the proceeding is solely to take advantage of Bankruptcy Code provisions that do not apply outside of bankruptcy" and claims that the documents it requests "are directly relevant to whether the Plan was proposed with the legitimate and honest purpose to reorganize or for the sole purpose of avoiding certain contractual obligations owed to the First Lien Lenders outside of bankruptcy." (Mot. at 6, 7).

The cases the Ad Hoc Group cites for its legal proposition, however, address the standard under 11 U.S.C. § 1112(b) used to determine whether a bankruptcy petition should be dismissed—an entirely different, and significantly broader "good faith" standard——not the standard under 11 U.S.C. § 1129(a)(3) at issue here.[4] Numerous courts, both within the Fifth Circuit and outside, have noted that "it is important to recognize that there is a legal distinction between the good faith that is a prerequisite to filing a Chapter 11 petition and the good faith that is required to confirm a plan of reorganization."[5] Thus, even assuming, *arguendo*, that the Ad

[4] *See NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)*, 384 F.3d 108, 112 (3d Cir. 2004) ("This appeal tests the limits of the good faith requirement applicable to petitions filed under Chapter 11 of the Bankruptcy Code. Appellant . . . . appeals from an order of the District Court affirming the Bankruptcy Court's denial of its motion to dismiss for lack of good faith."); *In re Mirant*, No. 03-46590, 2005 WL 2148362, at *5 (Bankr. N.D. Tex. Jan. 26, 2005) ("Movants seek dismissal of MirMA's bankruptcy case pursuant to section 1112(b) of the Code based on MirMA's alleged lack of good faith in filing its petition for relief.")

[5] *Pacific First Bank v. Boulders on the River, Inc. (In re Boulders on the River, Inc.*), 164 B.R. 99, 103 (B.A.P. 9th Cir. 1994); *In re Madison Hotel Assocs.*, 749 F.2d at 425 ("The district court's decision failed to make this legal distinction between the good faith that is required to confirm a plan under section 1129(a)(3) and the good faith that has been established as a prerequisite to filing a Chapter 11 petition for reorganization."); *In re Landing Assocs., Ltd.*, 157 B.R. 791, 812 (Bankr. W.D. Tex. 1993) ("Bank United relies on the legal standard established in several

Hoc Group's legal proposition that "a plan is not proposed in good faith when the purpose of the proceeding is solely to take advantage of Bankruptcy Code provisions that do not apply outside of bankruptcy" was correct, it is irrelevant to this Court's determination of good faith under Section 1129(a)(3).[6]

Second, the Ad Hoc Group cites a single case from the District Court of Delaware for the proposition that "courts consider conflicts of interest that would prevent the debtor or its agents from proposing a plan in good faith under 1129(a)(3)," and claims that the "documents requested . . . are directly relevant to . . . whether the Debtor had conflicts of interests that prevented it from filing the Plan in good faith . . . ." (Mot. at 7.) The Ad Hoc Group's argument errs on several levels.

As an initial matter, *In re Coram Healthcare Corp.*, the case cited by the Ad Hoc Group, involved egregious facts not present here. In *In re Coram Healthcare Corp.*, the debtor's CEO had an "separate employment contract with one of the debtor's largest creditors under which he was being paid almost $1 million per year" and the court, in an attempt to protect the debtor, held that this "continuous conflict of interest by the CEO of the Debtor precludes the Debtors from proposing a plan in good faith under 1129(a)(3)." 271 B.R. 228, 235-36, 239

---

bad-faith filing cases for this proposition. However, a different legal standard is employed when evaluating good faith for plan confirmation purposes under § 1129(a)(3).") (internal citations omitted).

[6] Additionally, *Integrated Telecom Express* does not stand for the broad proposition offered by the Ad Hoc Group. *See* Mot. at 6 (stating the *Integrated Telecom Express* stands for the proposition that "a plan is not proposed in good faith when the purpose of the proceeding is solely to take advantage of Bankruptcy Code provisions that do not apply outside of bankruptcy"). *Integrated Telecom Express* involved a "a Chapter 11 petition filed by a financially healthy debtor, with no intention of reorganizing or liquidating as a going concern, with no reasonable expectation that Chapter 11 proceedings will maximize the value of the debtor's estate for creditors, and solely to take advantage of a provision in the Bankruptcy Code that limits claims on long-term leases." 384 F.3d at 112. The Third Circuit held that, on those facts, the petition was not filed in good faith. *Id*. But that is not to say that the Third Circuit has established a general rule that a party may not file a petition solely to take advantage of a Code provision—indeed parties normally file for bankruptcy to take advantage of the Code's protections—and the Third Circuit has affirmed a finding of good faith when "[t]he Bankruptcy Court found the primary purpose of the petition was to cap [a landlord's] claim pursuant to § 502(b)(6)." *Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters., Inc.)*, 324 F.3d 197, 211 (3d Cir. 2003).

(Bankr. D. Del. 2001). Despite the voluminous discovery already presented to the Ad Hoc Group, there has been no evidence presented that a similar conflict exists here. Nor is the discovery sought narrowly tailored to address that issue.

Additionally, courts within the Fifth Circuit, and other Circuits, place far more weight on the objective nature of the proposed plan than on the alleged internal motivations of a Debtor's executives, in determining whether a plan is proposed in good faith.[7] Here, as discussed above, the Plan's consequences evidence its good faith: the Debtor's creditors will be paid in full; the Debtor will retain no equity in the Rangers; TRBP's assets will be sold to a third party in a manner that will allow TRBP to expeditiously exit bankruptcy; and the Rangers will receive strong leadership from Messers. Ryan and Greenberg and remain a viable asset to the Dallas / Ft. Worth community. Finally, the Current Document Requests are significantly overbroad, if their purpose is to identify alleged conflicts of interest. Thus, additional discovery on purported conflicts of interest is not warranted.

Third, the Ad Hoc Group argues that its requested documents are "directly relevant to . . . whether the Plan is proposed by a means forbidden by law, in violation of section 1129(a)(3), insofar as it compels the Debtor and its affiliates to breach their contractual obligations . . . ." (Mot. at 7.) The Ad Hoc Group has failed to demonstrate how any of their Current Document Requests would provide evidence relevant to this purely legal issue.

[7] *See In re Ferch*, 333 B.R. at 785 ("Good faith under 11 U.S.C. § 1129(a)(3) is not a state of mind."); *In re MCorp Fin., Inc.*, 160 B.R. 941, 961 (S.D. Tex. 1993) ("A plan must be proposed in good faith, and the faith of the proposal is ascertained from the objective consequences of the plan, not the moral consciousness of the various proponents."); *Hohn v. Gay*, No. CV-08-0372-PHX-ROS, 2009 WL 886842, at *2 (D. Ariz. Mar. 31, 2009) ("Under Appellants' interpretation of § 1129(a)(3), any 'significant business relationship' between a trustee and a creditor implicates a bad faith conflict of interest . . . . This interpretation is squarely at-odds with Ninth Circuit case law requiring the good faith of a proposed reorganization plan to be determined by the extent to which it achieves a result consistent with the objectives and purposes of the Code.") (internal quotation marks omitted).

B. The Current Document Requests Seek Information Protected by the Common-Interest Privilege.

The Debtor has worked very hard to provide the Ad Hoc Group with the documents it has requested for the July 9, 2010 hearing. The Debtor has done so, despite the fact that:

- discovery is stayed;
- the requested discovery is not relevant to any issue before the Court; and
- the Ad Hoc Group has refused to produce any documents, instead wishing to engage in one-way discovery.

Now, the Ad Hoc Group also wants communications that the Debtor has rightfully withheld on the basis of the common-interest privilege.

By seeking to expose protected communications with MLB the Ad Hoc Group threatens to create a dangerous precedent. Specifically, every prepackaged bankruptcy plan involves a debtor negotiating pre-petition planning with certain creditors. *See United Artists Theatre Co. v. Walton*, 315 F.3d 217, 224 n.5 (3d Cir. 2003) ("'prepackaged bankruptcies' (or 'prepacks'), where the plan and disclosure statement are filed, and sufficient favorable votes on the plan are solicited and obtained, before the Chapter 11 case begins, leading to a prompt plan confirmation."). But a decision forcing the disclosure of pre-petition communications between MLB and TRBP would chill the pre-petition solicitation process inherent in every prepackaged plan because creditors potentially interested in supporting prepackaged plans would not be able to engage in frank discussions with debtors without fearing the disclosure of those negotiations were the plan to ultimately go forward. It is precisely to avoid this result that the common-interest privilege exists. Ultimately, communications between TRBP and MLB are protected by

the common-interest privilege, and none of the Ad Hoc Group's scattershot arguments establish the contrary.

1. The Common-interest Privilege Applies.

Courts have routinely recognized that debtors may share common-interest privilege with bankruptcy stakeholders. The common-interest doctrine applies where entities "undertake a joint effort with respect to a common legal interest," and to attaches to communications "made to further an ongoing enterprise." *In re Hardwood P-G, Inc.*, 403 B.R. 445, 459 (Bankr. W.D. Tex. 2009) (quoting *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007)). And although there must be a "palpable threat of litigation" for the doctrine to apply, this Court has recognized that "[b]ankruptcy itself constitutes 'litigation' for purposes of delineating privilege." *See Brown v. Adams (In re Fort Worth Osteopathic Hosp.)*, No. 05-41513-DML-7, 2008 Bankr. LEXIS 3156, at 844 (Bankr. N.D. Tex. Nov. 14, 2008) (Lynn, J.); *see also In re Hardwood P-G, Inc.*, 403 B.R. at 459 (same). The purpose of the common-interest doctrine goes "hand-in-hand with the purpose of the attorney-client privilege," including encouraging open, full, and frank communication to assist in rendering legal advice. *See In re Hardwood P-G, Inc.*, 403 B.R. at 459-60 (citations omitted).

Here, it is readily apparent that the communications at issue occurred when there was a "palpable" threat of bankruptcy. Although a "palpable threat of litigation" means more than "a mere awareness that one's . . . conduct might some day result in litigation" according to *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 711 (5th Cir. 2001), at least one court in this Circuit has held that evidence of "palpable threats" can be found in the agreements of the entities claiming a common-interest privilege. *See, e.g.*, Power-One, Inc. v. Artesyn Techs. Inc., No. 2:05-cv-463, 2007 U.S. Dist. LEXIS 28630, *7-8 (E.D. Tex. Apr. 18, 2007) (holding that there was a palpable threat of litigation where signatories to a product-development agreement—even third-party

signatories—expressly contemplated in that agreement that the product the signatories were developing might be infringing).

The litigation at issue in this case—the bankruptcy—was even more imminent than the "palpable" patent infringement litigation at issue in *Power-One*. On and around April 26, 2010, it became apparent to both MLB and TRBP that bankruptcy (and hence, for privilege purposes, "litigation") was looming on the horizon. The Debtor was seeking advice from bankruptcy counsel and plans regarding bankruptcy planning with MLB were underway. Indeed, TRBP determined, in consultation with MLB, which ultimately provided necessary consent, that a chapter 11 filing designed to facilitate a sale of TRBP's assets to the purchaser pursuant to the Plan was necessary.

Not only was the threat of bankruptcy "palpable," there is little question that MLB and TRBP shared, and continue to share, a common legal interest. It was no accident that TRBP needed to walk arm-in-arm with MLB in moving forward with its Chapter 11 petition: TRBP was contractually obligated to seek MLB's consent before the Plan could be filed in prepackaged form. MLB was also, and remains, TRBP's de facto regulator, making MLB's approval necessary for any proposed sale, whether pursued within or outside of bankruptcy. And given the absolutely critical role that MLB played in making the Plan possible, the Ad Hoc Group's assertion that discussions between MLB and the Debtor are not privileged is puzzling, to say the least. In short, no sale, and hence no satisfaction of any creditors, is possible without obtaining MLB's approval.

In re Hardwood P-G, serves as an example of a case where the common-interest doctrine protected lenders in addition to the debtor. In that case, the bankruptcy court held that the common-interest privilege protected not only the debtor, but also a group of key lenders

(among others) at least in part because they "agreed to join forces for the ultimate purpose of confirming a liquidating plan of reorganization that recovered and distributed the debtors' assets . . . ." 403 B.R. at 461. In other words, because the lenders in that case were instrumental to the success of the bankruptcy itself, for example, because they "had agreed to fund a large portion of the debtors' bankruptcy and post-confirmation expenses," *id.*, it was clear that privilege protected the lenders in their efforts to make the plan happen.

In this case, neither a bankruptcy nor a sale could happen without MLB's consent, making MLB's cooperation likewise critical. The understanding between MLB and the Debtor that the discussions were protected by the common-interest privilege, thereby enabling full and frank communication, facilitated this communication and ultimately resulted in MLB consenting to the bankruptcy filing. *See United States v. El Paso Co.*, 682 F.2d 530, 538 (5th Cir. 1982). To suggest that the MLB has been unfairly deemed a "starter" while the Lenders have been "benched" would be to ignore the fact that without the MLB there would be nobody playing on the field—quite literally.

2. None of the Ad Hoc Group's Arguments Require Disclosure.

In resisting this conclusion, the Ad Hoc Group's suggest several arguments, none of which has any merit.

(a) Common-interest Privilege Not Limited to Co-Defendants.

First, the Ad Hoc Group opines that the common-interest privilege in the Fifth Circuit applies only to co-defendants. (Mot. ¶ 18.) This is a particularly peculiar argument since the Ad Hoc Group, which is not a defendant, has indicated that it would likely assert a common-interest privilege if it were forced to produce documents. Not only have bankruptcy courts in this Circuit expressly held that the common-interest privilege are *not* limited to co-defendants, *see Hardwood P-G*, 403 B.R. at 460, courts have held that the common-interest privilege

protects more than simply litigants. *See, e.g.*, *In re Quigley Co.*, No. 04-15739, 2009 Bankr. LEXIS 1352, at *10 (Bankr. S.D.N.Y. Apr. 24, 2009) (entities who "engaged in a joint strategy to file and prosecute this chapter 11 case" shared a common interest for purposes of establishing privilege.);[8] *In re Mortgage & Realty Trust*, 212 B.R. 649, 651 (Bankr. C.D. Cal. 1997) (holding that a three-way conversation between debtor's vice president, debtor's counsel, and counsel for creditors' committee was protected under the common-interest doctrine).

(b) Sharing a Common-interest Privilege with MLB is Consistent with TRBP's Fiduciary Duties.

The Ad Hoc Group next contends, citing no authority whatsoever, that sharing a common-interest privilege with some creditors but not others is contrary to the Debtor's fiduciary duties. (Id. at ¶ 18.) There is a reason there is no such authority: bankruptcy cases routinely involve situations where some creditors support the debtor's plans, while other creditors oppose the plan. The fact that the Debtor here is aligned with MLB by no means entails that the Debtor has abdicated its fiduciary duties. Indeed, choosing to cooperate with some creditor constituencies may actually be *essential* to complying with fiduciary duties, especially in cases, like the present one, where the approval of one creditor (MLB) is absolutely necessary for the future success of the operation.

[8] That case, relegated to a footnote by the Ad Hoc Group, supports the commonsense proposition that the entities who join the common cause of plan confirmation share a common-interest privilege. None of the Ad Hoc Group's attempts to distinguish *Quigley* are persuasive. In *Quigley*, a third party plan proponent played a key role in the prosecution of the debtor's plan, including by helping to strategize on the plan's implementation. The Ad Hoc Group tries to point out several immaterial distinctions, relying principally on formalities like the fact in this case "the Debtor is the sole proponent of the Plan" and "there is no pre-existing joint defense agreement between the Debtor and Baseball." (Mot. 18 n.4.) These are distinctions without differences. A careful reading of *Quigley* shows that the existence of a joint-defense agreement or being a joint proponent were not the *sine qua non* of the common-interest privilege in that case. Instead, the court emphasized that the entities at issue actually "engaged in a joint strategy" and, like the present case, engaged in an "organized effort predated the bankruptcy filing." *Id.* at *15. In short, the bankruptcy court looked to the actual conduct of the entities with respect to their support of the plan, not any particular checklist of formalities.

(c) MLB and TRBP Share a Common Legal Interest.

Next, the Ad Hoc Group once again asserts, without citing specific authority, that MLB and TRBP lack a common legal interest. This belies common sense. If similarly aligned parties supporting the filing and confirmation of a plan do not share a common legal interest, it is difficult to assert that such an interest could ever exist in the bankruptcy context.

(d) MLB and TRBP Agreed to Maintain Confidentiality.

Finally, contrary to the Ad Hoc Group's assertion that TRBP and MLB have not agreed to their communications confidential (*Id.* ¶ 20), TRBP and MLB did in fact intend to keep their communication confidential, as is evidenced by the use of "COMMON-INTEREST PRIVILEGED AND CONFIDENTIAL" legend on communications in late April.

III. CONCLUSION AND REQUESTED RELIEF

For these reasons, Debtor respectfully requests the following rulings: (a) that the Ad Hoc Group's First Requests for Production are not relevant, (b) that certain pre-petition communications between MLB and TRBP are protected from discovery by the common-interest privilege, and (c) that the Ad Hoc Group's Motion to Compel Production of Documents in Response to the Ad Hoc Group's First Requests for Production be denied in its entirety. Debtor also requests any further relief to which it may be justly entitled.

Dated: June 27, 2010

/s/ Martin A. Sosland_____
Martin A. Sosland (18855645)
Vance L. Beagles (00787052)
Yolanda C. Garcia (24012457)
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201
Telephone: (214) 746-7700
Facsimile: (214) 746-7777

Ronit J. Berkovich (*pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Debtor and Debtor in possession