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VIA E-MAIL AND OVERNIGHT MAIL

Senator Charles E. Schumer
D-New York
757 Third Avenue, Suite 17-02
New York, NY 10017

Re: Bankruptcy Venue Bill
Fairness in Bankruptcy Litigation Act of 2005

Dear Senator Schumer,

We write on behalf of the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York to register our opposition to legislation recently introduced in the U.S. Senate by Senator John Cornyn of Texas and co-sponsored by Senator Diane Feinstein which seeks to modify Section 1408 of Title 28, which governs the venue of bankruptcy proceedings (the "Venue Bill").

This legislation would require that all corporate bankruptcy cases be filed in the jurisdiction where a company (or the parent company of a corporate family) is physically headquartered or has its principal assets. This proposal would require the courts to ignore likely more important considerations examined under current law, such as (a) location of principal operating subsidiaries and whether the parent company itself is a mere holding company with no operations of its own, (b) the interests of justice or the convenience of the parties who actually need to and will appear during the proceedings to protect their interests, and (c) the state of incorporation.

By way of background, our Committee represents the interests of lawyers who practice regularly in the two federal judicial districts that include the City of New York, the United States Bankruptcy Courts for the Southern and Eastern Districts of New York. Our members represent the interests of both debtors and creditors, in business bankruptcy cases of public and private companies and other entities. In particular, our Committee includes many leading members of the business bankruptcy bar. Collectively, we have experience in nearly every major business bankruptcy filed in recent years in diverse jurisdictions located throughout the United States, and involving the restructuring of billions of dollars in assets and liabilities. (In recent years, I per-

sonally have filed business bankruptcy cases in the District of Delaware, the Eastern District of Virginia, the Southern District of New York and the District of Maryland). Our work on behalf of our clients directly touches the lives and economic well-being of thousands of employees, shareholders, investors, and others in the New York City area and around the country who are affected when a company files for bankruptcy protection.

The Venue Bill is misguided and would visit both material harm and substantial expense on creditors and debtors in many cases. We also believe that the allegations made in support of the Venue Bill are factually incorrect and shortsighted. The following five summary points are laid out in somewhat more detail below:

(a) The statute already provides for the transfer of cases to other courts in "the interests of justice or for the convenience of the parties". The Venue Bill is simply not necessary because abuses are routinely counteracted under the current statutory scheme. Conversely, the Venue Bill itself would impose inconvenience and hardship.

(b) There is no reason to believe that, in the modern global economy, the jurisdiction where a company's "principal assets" (which could be bank accounts, pledged subsidiary share certificates in a lender's vault or a single facility) or corporate headquarters are located is a uniquely appropriate or convenient forum for the disposition of large chapter 11 cases.

(c) The suggestion that corporate entities are somehow forced into jurisdictions by professionals seeking to charge higher fees is without foundation. It also misunderstands the role of management, boards of directors and professionals in bankruptcy cases.

(d) The allegation that by choosing venue, companies can choose their judges is incorrect as a factual matter in most major judicial districts (which have multiple judges).

(e) The accusation that federal judges issue improper rulings to entice or placate debtors and their professionals defames our judiciary. Moreover, as addressed below, each of the three examples noted by Senator Cornyn – Polaroid, Kmart and WorldCom – prove the converse of what he alleges.

Each of these five primary flaws in the Venue Bill and its purported justifications is set forth in somewhat greater detail below:

1. The existing statute already provides for a transfer of bankruptcy cases to "another district in the interests of justice or for the convenience of the parties" 28 U.S.C. 1412. Indeed, many cases or proceedings are transferred when courts determine that the venue was initially chosen in an improper fashion, or that the initial forum is unduly inconvenient for the relevant parties. Thus, this legislation is unnecessary.[1] There are already adequate statutory provisions to address precisely the abuses he believes exist. Indeed, while Senator Cornyn refers to his Enron experience as having spurred his initiatives in this area, he fails to note that the Judge presiding over the Enron case held a multi-day evidentiary hearing on wide notice to consider the

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[1] Unlike the Venue Bill, the existing statute also comports with the spirit of the venue rules that apply to Federal civil actions generally, which offer multiple grounds for establishing appropriate venue. See 28 U.S.C. § 1391.

appropriate venue for the case, and then issued a lengthy written opinion. The Court held that venue should remain in New York notwithstanding the Court's sympathy for former employees and thoughtful consideration of their articulated concerns, [2] precisely because, among other things, it was substantially more convenient for the vast majority of creditors that would need actually to be heard in the case. (It is important to note that Enron's Official Committee of Unsecured Creditors, a statutory fiduciary charged with protecting the interests of all unsecured creditors, supported the result.)

2. There is no reason to believe that the jurisdiction where a debtor is headquartered or has its principal assets is more appropriate or convenient to creditors than the other alternatives provided in the existing venue statute. Many large corporations -- the type of filer really at issue here -- are headquartered in one jurisdiction but have the vast majority of their assets and employees elsewhere. Most large corporations are national or international in scale and have creditors and shareholders around the country and often, around the globe. Indeed, as courts have found, while a headquarters' building may be in one jurisdiction (which often has more historical than current relevance), more often than not the locus of the case and the majority of the creditors, especially those who are most likely to need to appear in court to protect their interests, are actually located elsewhere. Put differently, that a corporate enterprise with far-flung operations conducted through domestic and foreign subsidiaries that are financed through the capital markets located in New York City should be prohibited from filing in the Southern District of New York (the "SDNY") because the ultimate parent entity is headquartered in a small community with limited resources and accessibility, is an indefensible proposition.

Adelphia Communications Corporation provides an example. It is headquartered in Coudersport, Pennsylvania, three hours from the nearest airport in Buffalo, New York. Of its more than $20 billion in creditors, very few are located in the vicinity of Coudersport, and a filing in Western Pennsylvania would have materially increased the cost and burden of the case to virtually every single party affected by it, while helping none.

Moreover, even where the majority of employees are in fact located in the headquarters' jurisdiction, that is often scant reason for requiring the cases to be filed there. In many large cases (particularly in the more experienced jurisdictions), employees' rights are unaffected because of so-called "first day" relief designed to permit the uninterrupted payment of employee claims. In such cases, employees have no need to appear in the proceedings. Where employees or retirees are affected, official representation – often through labor unions or official court-appointed committees – is often provided, using law firms to represent them that may have little nexus to the venue of the case. The Airline Pilots Association, for example, has used the same New York law firm to represent its interests in cases filed in Chicago (United Airlines), Virginia (USAirways) or Honolulu (Hawaiian Airlines).

In cases involving allegations of financial fraud (Enron or WorldCom, for example) Federal regulators and law enforcers (*e.g.*, the Securities and Exchange Commission and the Department of Justice ("DOJ")) would have been hampered in their investigations and prosecutions if vital cooperation was delayed or limited due to venue requirements that placed corporate vic-

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[2] In re Enron Corp., No. 01-16034, at 33 (Bankr. S.D.N.Y. Jan. 11, 2002) (Gonzalez, J.) (denying motion to transfer venue).

tims in a judicial district different from the one selected by Governmental agencies in which to conduct civil enforcement and criminal trials.

3. The allegation that corporate entities choose their venue based upon the likelihood of getting their professionals' fees approved is unwarranted. Boards of directors of debtors and their general counsels have the ultimate say on what venue is chosen and seek what is in the best interest of the enterprise following consideration of numerous relevant factors. Indeed, they often focus intensively on the legal and factual issues surrounding choice of venue, consistent with their fiduciary duties and often the expressed preferences of the largest stakeholders, particularly in the case of prenegotiated or "prepackaged" chapter 11 cases. The Office of the United States Trustee, an arm of the DOJ, supervises the payment of professional fees and has established guidelines that generally are national in scope and uniform in application. Moreover, in several recent large cases, including Enron and WorldCom, courts have appointed fee examiners whose sole role is to review and, where appropriate, question the fees of professionals retained in the cases.

4. Senator Cornyn's assertion that bankrupt corporations can "effectively select the judges of their own cases – because picking the judge isn't far off from picking the verdict" is factually incorrect and an insult to the federal judiciary. As an initial matter, many of the large jurisdictions that Senator Cornyn has targeted have many judges to whom cases are assigned on a random basis. The SDNY, for example, has ten bankruptcy judges (eight of whom sit in Manhattan). Delaware has utilized both local District Court judges and visiting judges drawn from throughout the federal judiciary. Thus, in most cases, it is not correct that by choosing to file in a particular jurisdiction, practitioners can "effectively select the judges in their own cases." The allegation that choosing a judge means "picking the verdict" is without basis.

5. The most incredible allegation that undergirds the Venue Bill is the accusation that federal bankruptcy judges have a "disturbing incentive to compete with other bankruptcy courts for major bankruptcy cases by tilting their rulings in favor of corporate debtors and their attorneys." This accusation is baseless and a further insult to our federal judiciary.

Indeed, the three examples brought forward in Senator Cornyn's floor remarks, when accurately described, may well prove exactly the opposite of his contention. In each of these three cases, the overseeing federal courts, against the vigorous opposition of the subject debtors, imposed substantial additional third-party oversight of the debtors' affairs.

Polaroid, for example, was sold only after months of litigation and negotiation with the official committee of unsecured creditors and other parties. Ultimately, the purchaser increased the sale price and equity consideration sufficiently that a largely consensual sale was possible.

Moreover, Senator Cornyn's assertion that "the court refused to hear testimony as to the true value of the company" is not accurate. Not only was there substantial testimony on this topic at multiple hearings and at a contested sale hearing, but the court later appointed an independent examiner (bitterly opposed as unnecessary by the company and the creditors' committee) to fully and definitively analyze whether the sale was fair and appropriate. This examiner and his counsel examined thirteen individuals pursuant to Bankruptcy Rule 2004, engaged in informal meetings and discussions with seventeen individuals and reviewed approximately

300,000 pages of documentary evidence before concluding that there was "no evidence indicating that the Bankruptcy Court's decision to approve the sale was not warranted." In re Polaroid Corp., No. 01-10864 (PJW), Report of Perry M. Mandarino, CPA, Examiner, Docket No. 2934, p. 16 (Bankr. D. Del. August 22, 2003).

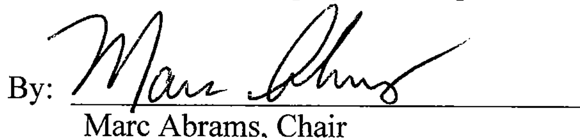
The other two cases brought as examples of jurisdictions chosen because of judges "likely to rule" in debtors' favor are equally inapposite. Kmart was handed unpleasant judicial surprises by the judges in Chicago, including a dramatic "critical vendors" district court decision (affirmed by the Seventh Circuit) reversing the bankruptcy court and directing the Company to sue hundreds of the vendors supposedly critical to Kmart's survival. It is hard to see how that is an example of a court that was inclined to be debtor friendly.

WorldCom is even more persuasive – *as evidence that the current system works well and imposes sufficient and often intense scrutiny and oversight of debtors*. The federal courts in New York overseeing the WorldCom restructuring imposed almost unprecedented restrictions on the operations of the company, and appointed Richard Breeden, a former SEC Commissioner as the "Corporate Monitor" of the company, who was involved at every step of the proceedings, and expressed strong views on many facets of the restructuring. Indeed, because of the many restrictions imposed on WorldCom by the New York courts, the emerged company has been widely hailed as the very model of corporate governance.[3]

We would be happy to discuss these matters further at your convenience.

Yours truly,

Committee on Bankruptcy and Corporate Reorganization

By: 
Marc Abrams, Chair

[3] It is particularly ironic that in citing WorldCom, Senator Cornyn points out that a "WorldCom executive used money taken from the company to build an exempt Texas homestead, and WorldCom took no action." Texas is one of the few venues that attracts individual debtors by offering extraordinary protections through an unlimited homestead exemption. As alluded to by Mr. Cornyn, this encourages individuals with substantial debts to move to Texas, purchase a house worth millions of dollars, file for bankruptcy and shelter the entire value of their new "homes" from legitimate creditors through Texas' uncapped homestead exemption.