

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

*In re* : Chapter 11  
: SEMCRUDE, L.P., et al., :  
: :  
: : Case Number 08-11525 (BLS)  
: : (Jointly Administered)  
Debtors. :

Hearing Date: September 10, 2008 at 10:00 a.m.  
Objection Deadline: September 4, 2008 at 4:00 p.m.

**MOTION OF THE UNITED STATES TRUSTEE FOR AN ORDER  
DIRECTING THE APPOINTMENT OF AN EXAMINER**

In support of her motion for an order directing the appointment of an examiner, Roberta A. DeAngelis, Acting United States Trustee for Region 3 ("U.S. Trustee"), by and through her counsel and based upon information and belief, avers:

**PRELIMINARY STATEMENT**

On July 22, 2008 (the "Petition Date"), SemCrude, L.P. and certain of its affiliates (the "Debtors") announced that their bankruptcy filings were caused, in large part, by a severe liquidity crisis occasioned by massive margin calls related to large New York Mercantile Exchange ("NYMEX") and Over the Counter ("OTC") futures and options positions held by the Debtors prior to the Petition Date (the "Trading Strategy"). Because the Debtors no longer had sufficient liquidity to cover \$2 billion plus in cash necessary to cover their margin calls, the Debtors sold their NYMEX trading account to Barclays approximately one week prior to the Petition Date. The Debtors' liquidity crisis resulted from the use of virtually all of the Debtors' available cash generated from its allegedly profitable business operations and from various Insider Transactions (defined below) to cover the losses associated with the Trading Strategy.

Creditors and other parties in interest have raised questions as to whether the use of such funds was proper, particularly \$290 million used to fund the losses incurred by a non-debtor trading firm allegedly owned by the Debtors' former CEO, Thomas Kovisto.

The dearth of information available regarding the Trading Strategy and its impact upon the value of the Debtors' businesses has caused significant unrest and concern among the Debtors' customers, suppliers, lenders and investors. Under Section 1104(c)(1), appointment of an examiner is in the interests of creditors, any equity security holders, and other interests of the estate.

The Debtors' fixed, liquidated, unsecured debts, other than debts for goods and services or taxes, or owing to an insider, exceed \$5 million. In November 2005, two of the Debtors, SemGroup and SemGroup Finance Corp. (together, the "Issuers") issued approximately \$600 million of unsecured notes that mature in 2015 (the "Unsecured Notes"). Accordingly, as set forth below, the appointment of an examiner under section 1104(c)(2) of the Bankruptcy Code to investigate the affairs of the Debtors is mandatory. Appointment of an examiner serves the best interests of creditors, equity security holders and other interests of the estate and will provide the most expeditious and cost-effective means of performing the investigation that is required by the facts and circumstances of the cases as discussed fully below.

## INTRODUCTION

1. Under (i) 28 U.S.C. § 1334, (ii) an applicable order of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and determine this motion.

2. Under 28 U.S.C. § 586, the U.S. Trustee is charged with monitoring the federal bankruptcy system. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the United States trustee has “public interest standing” under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the United States trustee as a “watchdog”).

## BACKGROUND

### A. The Debtors' Cases

3. On the Petition Date, the Debtors filed the petitions which initiated the above-captioned cases. By order dated July 23, 2008, this Court directed the joint administration of these cases under case number 08-11525.

4. On or about August 2, 2008, the U.S. Trustee appointed an official committee of unsecured creditors (the “Committee”).

5. A trustee has not been appointed in these cases.

### B. Statement of Facts

6. Founded in February 2000, the Debtors are engaged in diversified services for the North American crude oil and refined products industry. Together, the Debtors and certain of their non-debtor affiliates (the “Companies”), located both domestically and abroad, provide

gathering, transportation, storage, distribution, marketing, and other midstream services primarily to independent producers and refiners of petroleum products located along the North American energy corridor from the Gulf Coast region to central Canada and the West Coast of the United Kingdom. For oil and gas producers, the Companies serve as a first purchaser of petroleum products; for refiners, the Companies serve as both a supplier of petroleum products and a purchaser of non-petrochemical refined products such as gasoline, distillates, natural gas liquids ("NGLs"), and liquid asphalt cement. The Companies have a significant asset base consisting primarily of pipelines, gathering systems, processing plants, storage facilities, terminals, and other distribution facilities located between North American production and supply areas, including the Gulf Coast, Mid-Continent and Alberta, Canada, and areas of high demand such as the Midwest region of the United States. The Companies also have storage, terminal, and marine facilities at Milford Haven in the United Kingdom with pipeline connectivity to nearby refiners that enables them to supply product to the East Coast of the United States.

7. The Companies operate through eight primary business segments: SemCrude, SemFuel, SemCanada, SemMaterials, SemStream, SemGas, SemEuro, and SemGroup Holdings (via their publicly traded master limited partnership, SemGroup Energy Partners, L.P. ("Energy Partners")). These business segments provide the following services:

- (a) **SemCrude** gathers, transports, stores, blends, markets, and distributes crude oil in the United States. SemCrude's sale of crude oil is primarily to refiners and other resellers in various types of sale and exchange transactions.
- (b) **SemFuel** purchases, ships, stores, markets, and distributes refined products in the United States. SemFuel has a significant shipping history on the major common carrier pipelines linking the PADD I, PADD II, and PADD III regions and, due to the volume of product that SemFuel moves along these major pipelines, it has been granted "preferred shipper status."

- (c) **SemCanada** is a leading independent natural gas marketing and energy-asset management business in Canada and consists of the SemGroup Companies' natural gas processing, gathering, and marketing operations and crude oil marketing and blending operations.
- (d) **SemMaterials** purchases, produces, stores, and distributes liquid asphalt cement products and residual fuel throughout most of the United States and Mexico.
- (e) **SemStream** purchases, transports, terminals, stores, markets, and distributes propane and other NGLs, with a principal focus on propane, in the United States.
- (f) **SemGas** was established in November 2004 to provide high-deliverability, multi-cycle natural gas storage to meet the growing need for peak-day natural gas deliverability and "swing" gas capability for large gas users, such as gas-fired electric power producers. The activities of SemGas consist primarily of acquiring and developing storage assets and acquiring and constructing natural gas gathering pipeline systems and natural gas processing assets.
- (g) **SemEuro's** operations include SemLogistics Milford Haven and SemEuro Supply. SemEuro was established in 2006 as a result of SemGroup's purchase of the largest storage facility in the United Kingdom. With plans for future growth, the SemGroup Companies expanded their operations in Western Europe by founding SemEuro Supply Limited in July 2006 to engage in marketing and supply activities in North Western Europe.
- (h) **SemGroup Holdings** was formed in July 2007 to hold SemGroup's investment in future entities, initially Energy Partners. SemGroup Holdings controls Energy Partners through ownership of its general partner, which holds a 2% general partner interest and all of the incentive distribution rights in Energy Partners.

8. SemGroup, L.P. ("SemGroup") is the direct or indirect parent company of the other Debtors and certain non-debtor affiliates, including Energy Partners, which is not a debtor in these chapter 11 cases. Energy Partners is a publicly-traded master limited partnership and its common units are traded on the NASDAQ Global Market under the symbol "SGLP." Energy Partners provides crude oil and liquid asphalt cement terminalling and storage services and crude oil gathering and transportation services. Certain of the operations and assets of the Debtors are

maintained and operated through SemGroup's indirect equity ownership in Energy Partners. Energy Partners' financial statements are consolidated in SemGroup's financial statements.

9. Historically, to manage exposure to market changes in commodity prices, to protect gross margins on purchased petroleum products, and to manage liquidity risk associated with margin deposit requirements on overall derivative positions, the Debtors and their non-debtor affiliates utilized futures and options contracts.

Liquidity Crisis/Trading Strategy

10. The Debtors admit that their past trading strategies and increased margin requirements created a significant negative impact on the Debtors' liquidity position, which worsened significantly in the weeks leading up to the filing. As a result, on July 16, 2008, the Debtors transferred their NYMEX trading account to Barclays, thereby converting loss contingencies into recognized losses totaling in excess of \$2.4 billion (the "Sale"). Prior to the Sale, it became clear that the Companies would not have sufficient liquidity to cover future margin calls.

11. In the Declaration of Terrence Ronan (the Debtors' current Chief Executive Officer) in support of the Debtors' Chapter 11 Petitions and Request for First Day Relief (the "Ronan Affidavit"), Ronan stated that the filing was primarily caused by a severe liquidity crisis occasioned by the Debtors' trading activity, which resulted in massive margin calls related to large NYMEX and OTC futures and options positions:

Increased margin requirements have had a severe negative impact on the SemGroup Companies' liquidity position, which worsened significantly in recent weeks. On July 16, 2008, the SemGroup Companies transferred their NYMEX trading account to Barclays, thereby converting loss contingencies into recognized losses

totaling in excess of \$2.4 billion. It became clear that the SemGroup Companies would not have sufficient liquidity to cover margin calls. Of the approximate \$2.4 billion in aggregate NYMEX trading losses, approximately \$290 million is owed to SemGroup by a trading company wholly owned by Thomas L. Kivisto, SemGroup's co-founder and then President and Chief Executive Officer.

Ronan Aff. ¶ 23. A copy of the Ronan Affidavit is attached as **Exhibit A**.

Creditor Distrust/Potentially Improper Use of Funds

12. Due to the severe liquidity crisis occasioned by the Trading Strategy, the Debtors' creditors and customers are concerned about the ability of Debtors' management to operate these businesses on a going-forward basis.

13. In its Objection (the "RZB Objection") to the Debtors' Emergency Motion (A) for Authorization to (i) Obtain Post-Petition Financing Pursuant to 11 U.S.C. § 364; (ii) Utilize Cash Collateral Pursuant to 11 U.S.C. § 363; (iii) Grant Priming Liens, Security Interests, and Superpriority Claims to Post-Petition Lender Pursuant to 11 U.S.C. § 364(c); and (iv) Provide Adequate Protection to Pre-Petition Secured Lenders Pursuant to 11 U.S.C. § 361, 362, 363 and 364, and (B) Schedule a Final Hearing Pursuant to Bankruptcy Rule 4001(c) (the "DIP Financing Motion"), RZB Finance LLC ("RZB") alleged that "massive losses recently suffered as a result of the Debtors' improper trading activity, lack of financial disclosure, investigations and litigation cast significant doubt on the ability of the Debtors' business segments to continue as going concerns." RZB Obj. ¶ 17. A true and correct copy of the RZB Objection is attached as **Exhibit B**.

14. RZB further stated that the Trading Strategy resulted from improper "speculat[ion] with the Lenders' Collateral [and] employ[ment of] unauthorized option trading

strategies in violation of the Debtors' own risk management policies and [] numerous covenants under the Credit Agreement . . . ." RZB Obj. ¶ 19.

15. Finally, RZB concluded that "[t]hese circumstances, combined with the magnitude of the losses suffered by the Debtors and the Debtors' unwillingness to "come clean," are likely to have an adverse impact on the Debtors' relations with customers, suppliers, employees and other constituencies, and therefore create uncertainty regarding the ability of the Debtors' various business segments to continue as going concerns." RZB Obj. ¶ 17.

16. Pursuant to a credit agreement between General Electric Capital Corporation ("GECC") and one of the Debtors, SemCrude Pipeline, GECC provided \$120 million of financing for the purpose of funding the construction of a 580-mile crude oil pipeline by a non-debtor affiliate, White Cliffs Pipeline, LLC. In its limited objection to the DIP Financing Motion ("GECC Objection"), GECC alleged that, "in the midst of the liquidity crisis that led to the commencement of the Debtors' chapter 11 cases, SemCrude Pipeline, LLC borrowed approximately \$54 million on the GECC Loan and, on information and belief, promptly upstreamed \$50 million of this money to its parent rather than using the cash to continue construction of the Pipeline." GECC Obj. ¶ 5. A true and correct copy of the GECC Objection is attached as **Exhibit C**.

17. At the hearing held on July 31, 2008 in connection with the Debtors' continuing request for continued use of cash collateral and for interim approval of the DIP Financing Motion, Stephen Zellin of Blackstone Advisory Services, L.P., the Debtors' financial advisor, acknowledged that the \$50 million drawn from the GECC facility had been improperly diverted to SemCrude Pipelines' parent and used to fund a deposit associated with the transfer of the

Debtors' NYMEX book to Barclays as a result of the Trading Strategy. Tr. 7/31/08 pp. 107-08.

A true and correct copy of the relevant portions of the official transcript of the July 31, 2008 hearing before this Court is attached as **Exhibit D**.

18. Moreover, despite the fact that the Debtors were seeking specific authorization from the Court to loan and/or invest the \$50 million draw on the GECC Loan to White Cliffs to fund construction of the pipeline, such funds were not included in the cash budget submitted in support of the Debtors' DIP Financing Motion.

19. Since July 20, 2008, it has been widely reported that several class action law suits have been or will soon be filed against Energy Partners. The class action plaintiffs in their complaint (the "Complaint"), among other things, charged certain of Energy Partners' officers and directors (who upon information and belief were also officers of certain Debtors) with violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. *Carson v. SemGroup Energy Partners, L.P.*, No. 08-CV-00425 (N.D. Okla., filed July 22, 2008), Compl. ¶¶ 39-45. The class action plaintiffs further alleged that Energy Partners engaged in a series of questionable transactions with SemGroup, its parent, for the sole purpose of providing much-needed cash to cover margin calls related to the Trading Strategy. *Id.* ¶¶ 3-9, 31. A true and correct copy of the Complaint is attached as **Exhibit E**.

#### Insider Transactions

20. In July 2007, SemGroup Holdings raised \$275 million through its public offering for the sale of 12.5 million common units of Energy Partners. Prior to the public offering, SemGroup contributed its crude business to Energy Partners. The crude business consisted of crude oil terminalling and storage facilities, approximately 1,150 miles of pipelines,

and 200 tanker trucks. As part of the transaction, SemGroup Holdings was issued 12,570,504 subordinated units and 549,908 general partner units of Energy Partners and at least \$137 million in cash.<sup>1</sup> 3/5/08 Energy Partners' Form 10-K at 5, 139.

21. On or about January 14, 2008, Energy Partners entered into a purchase and sale agreement with SemMaterials, L.P., one of the Debtors, pursuant to which Energy Partners acquired certain of the Debtors' asphalt assets for a purchase price of \$378.8 million (the "February Sale"). This transaction closed on February 20, 2008. 3/5/08 Energy Partners' Form 10-K at 9.

22. On or about May 12, 2008, SemGroup Energy Partners, LLC ("Energy Partners LLC"), Energy Partners' subsidiary, entered into a purchase and sale agreement with SemCrude, L.P., wherein it agreed to purchase certain pipeline and related assets from SemCrude for \$45 million (the "May 12<sup>th</sup> Sale"). The acquired assets include a 130-mile, 8-inch pipeline that originates in Ardmore, Oklahoma and terminates in Drumright, Oklahoma, and other real and personal property related to the pipeline. The transaction closed on May 30, 2008. 5/12/08 Energy Partners' Form 8-K at 2.

23. On or about May 20, 2008, Energy Partners LLC entered into a purchase and sale agreement with SemCrude wherein it agreed to purchase from SemCrude its interest in SemGroup Crude Storage, LLC ("Crude Storage") for \$90 million. Crude Storage owns certain land, crude oil storage and terminalling facilities with an aggregate of approximately 2 million barrels of storage capacity and related assets located at the Cushing Interchange (the "May 20<sup>th</sup>

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<sup>1</sup> Energy Partners notes that such transactions were not "arm's length" transactions and may not have been effected upon terms at least as favorable as they could have been obtained from unaffiliated third parties. 3/5/08 Energy Partners' Form 10-K at 139.

Sale"). The transaction closed on May 30, 2008. 5/30/08 Energy Partners' Form 8-K at 2.

24. On July 18, 2008, Manchester Securities Corp. and Alerian Finance Partners, LP (the "Holdings' Lenders") exercised certain rights under a loan agreement dated June 25, 2008 (the "Loan Agreement") with SemGroup Holdings and SemGroup Energy Partners G.P., L.L.C. (the "GP"). Under the Loan Agreement, the Holdings' Lenders have the right to direct the vote of all of the membership interests for the GP upon an event of default under the Loan Agreement. The Holdings' Lenders exercised those rights on July 18, 2008. 7/18/08 Energy Partners' Form 8-K at 2. Upon information and belief, Holdings borrowed \$150 million under the Loan Agreement (the "Holdings' Loan;" collectively with the February Sale, the May 12<sup>th</sup> Sale, and the May 20<sup>th</sup> Sale, the "Insider Transactions").

25. Upon information and belief, proceeds from the Insider Transactions were used to fund margin calls in connection with the Trading Strategy.

**Fixed, Liquidated, Unsecured Debts Exceed \$5 Million**

26. Pursuant to an indenture, dated as of November 18, 2005, the Issuers issued the Unsecured Notes, which bear interest at the rate of 8.75% per annum (the "Unsecured Notes"), maturing in 2015. Wells Fargo Bank, N.A. ("Wells Fargo")<sup>2</sup> is the indenture trustee under the indenture for the Unsecured Notes. Interest on the Unsecured Notes is payable bi-annually on May 15 and November 15 of each year. The Unsecured Notes are guaranteed by, or are otherwise obligations of, certain of the Issuers' subsidiaries. Ronan Aff. at ¶ 19.

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<sup>2</sup> Upon information and belief, HSBC has assumed the role as the Successor Indenture Trustee with respect to the Unsecured Notes.

## ARGUMENT

### A. The Appointment of an Examiner is Mandatory in These Cases

27. Section 1104(c) of the Bankruptcy Code provides as follows:

If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or by current or former management of the debtor, if -

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.

11 U.S.C. § 1104(c).

28. Section 1104(c) authorizes the appointment of an examiner at any time before the confirmation of a plan, on request of a party in interest or the U.S. Trustee, after notice and a hearing, "if the court does not order the appointment of a trustee". The statute expressly provides that the court cannot appoint an examiner if a trustee is appointed. However, this limitation was not intended to require denial of a motion to appoint a trustee as a precondition to the appointment of an examiner. *See Keene Corp. v. Coleman (In re Keene Corp.)*, 164 B.R. 844, 855 (Bankr. S.D.N.Y. 1994).

29. The appointment of an examiner under 11 U.S.C. § 1104(c)(2) is mandatory rather than discretionary. *See Revco*, 898 F.2d at 500-01. In *Revco*, the Sixth Circuit held that the appointment of an examiner is mandatory under that section based on the plain meaning of the statute. *Id.* Noting the difference between subsection (b)(1) (now (c)(1)), which is

discretionary, and subsection (b)(2) (now (c)(2)), which is mandatory, the court stated as follows:

Section 1104(b)(1), which governs the appointment of an examiner when the total unsecured debt is less than \$5 million, follows the language of § 1104(a) [relating to the appointment of a trustee]; in both cases the appointment is left to the bankruptcy court's discretion. The contrast with § 1104(b)(2) could not be more striking. When the total "fixed, liquidated, unsecured" debt is greater than \$5 million, the statute requires the court to appoint an examiner. [Citation omitted.] Unless § 1104(b)(2) requires the appointment of an examiner in such a case, it becomes indistinguishable from § 1104(b)(1).

*Id.* at 501.

30. In addition, the *Revco* court addressed the debtors' concerns that the mandatory construction of the statute may invite abuse, and that a party in interest could needlessly prolong a case with last-minute demands for an examiner, noting that the bankruptcy court retains broad discretion to direct the examiner's investigation, including its nature, extent, and duration. See 11 U.S.C. § 1104(c) ("the court shall order the examiner to conduct such an investigation of the debtor as is appropriate"); *Revco*, 898 F.2d at 501.

31. The majority of other courts addressing this issue have recognized the mandatory nature of examiner appointments under § 1104(c)(2). See *In re Loral Space & Communications, Ltd.*, 2004 WL 2979785, \*4 (S.D.N.Y. 2004), *rev'g* 313 B.R. 577 (Bankr. S.D.N.Y. 2004) ("As stated in *Collier on Bankruptcy*, 'Section 1104(c)(2) does not leave any room for the court to exercise discretion about whether an examiner should be appointed, as long as the \$5,000,000 threshold is met and a motion for appointment of an examiner is made by a party in interest,' 7 *Collier* 1104.03[2][b] at 1104-38."); *In re UAL Corp.*, 307 B.R. 80, 84 (Bankr. N.D. Ill. 2004)(best reading of statute is that examiner appointment is mandatory if requirements of section 1104(c)(2) are satisfied, but court retains discretion to determine nature and scope of examiner's investigation); *In re Big Rivers Electric Corp.*, 213 B.R. 962, 965-966 (Bankr. W.D.

Ky. 1997) (appointment of examiner required as a matter of law); *In re The Bible Speaks*, 74 B.R. 511, 514 (Bankr. D. Mass. 1987) (appointment of examiner required if trustee not appointed, but court appointed trustee); *In re Tyler*, 18 B.R. 574, 578-579 (Bankr. S.D. Fla. 1982) (appointment of examiner not mandated because moving party failed to establish that debtor's unsecured debts exceeded \$5,000,000); *In re 1243 20<sup>th</sup> Street, Inc.*, 6 B.R. 683, 685 n.3 (Bankr. D. D.C. 1980) (mandatory); *In re Lenihan*, 4 B.R. 209, 211 (Bankr. D. R.I. 1980) (mandatory).

32. A minority of courts that have examined the issue have improperly concluded that the appointment of an examiner under 1104(c)(2) is discretionary. This Court should not be influenced by the few instances where courts impermissibly ignored the plain language of the statute, commonly-accepted theories of statutory construction and the impact of paragraph (c)(2)'s debt threshold alternative. See *In re Rutenberg*, 158 B.R. 230, 233 (Bankr. M.D. Fla. 1993) (court denied motion for appointment of examiner filed by individual debtor no longer engaged in business, where plan and disclosure statement had been filed and such appointment would cause further delay in the administration of case); *In re GHR Cos.*, 43 B.R. 165, 176 (Bankr. D. Mass. 1984) (court denied motion for appointment of examiner in view of pending motions to appoint a trustee and to change venue and where debtors were not public companies); *In re Shelter Resources Corp.*, 35 B.R. 304, 305 (Bankr. N.D. Ohio 1983) (court denied motion to appoint examiner to investigate allegations made in shareholders' derivative action and to review fairness of any settlement of action, where such investigation was rendered moot by approval of

settlement).<sup>3</sup>

33. In determining that the appointment of an examiner under § 1104(b)(2)(now § 1104(c)(2)) is mandatory, the *Revco* court based its holding on the plain meaning of the statute itself. See *Revco*, 898 F.2d at 500; see also *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning”).

34. If the plain language of a statute is unambiguous, there is generally no need to look to administrative interpretations of the statute or to legislative history to determine the meaning of the statute. See *Magic Restaurants, Inc. v. Bowie Produce Co. (In re Magic Restaurants, Inc.)*, 205 F.3d 108, 114 (3d Cir. 2000); see also *Patterson v. Shumate*, 504 U.S. 753, 761 (1992); *Toibb v. Radloff*, 501 U.S. 157, 162 (1991).

35. The term “shall” is generally mandatory and leaves no room for the exercise of discretion by the trial court. See *Barbieri v. RAJ Acquisition Corp. (In re Barbieri)*, 199 F.3d 616, 619 (2d Cir. 1999) (§ 1307(b) of Bankruptcy Code is mandatory where statute provides that the court “shall” dismiss Chapter 13 case on request of the debtor at any time); see also *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S.Ct. 956, 962 (1998) (“the mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion”); *Hall Financial Group, Inc. v. DP Partners Ltd. Partnership (In re DP Partners Ltd. Partnership)*, 106 F.3d 667, 670-671 (5<sup>th</sup> Cir.), cert. denied, 522 U.S. 815 (1997) (use of “shall” in § 503(b) of Bankruptcy Code connotes mandatory intent where statute provides that “there shall be allowed

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<sup>3</sup> The bankruptcy court’s ruling in *Shelter Resources* was effectively overruled by the Sixth Circuit’s subsequent decision in *Revco*. See *Keene*, 164 B.R. at 856 n.9.

administrative expenses” if the requirements of the statute are met); *Bell Atlantic-New Jersey, Inc. v. Tate*, 962 F.Supp. 608, 616 n.6 (D.N.J. 1997) (“The word ‘shall’ when utilized in laws, directives, and the like, means ‘must’ or ‘is or are obligated to’”); *Williamsport Sanitary Auth. v. Train*, 464 F.Supp. 768, 772 n.1 (M.D. Pa. 1979) (use of word “shall” connotes a mandatory intent).

36. In these jointly-administered cases, there is no dispute that the Unsecured Notes exceed \$5 million. Accordingly, under the plain meaning of 11 U.S.C. § 1104(c)(2) and the only appellate cases addressing this issue, the appointment of an examiner is mandatory in these cases.

**B. The Appointment of an Examiner Is in the Best Interests of Creditors, Equity Security Holders and Other Interests of the Estates**

37. Under the facts and circumstances of these cases, it is in the best interests of creditors, equity security holders and other interests of the estate to appoint an examiner pursuant to 11 U.S.C. § 1104(c)(1) to investigate the facts and circumstances surrounding the precipitous decline in the value of the Debtors’ assets and the resulting liquidity crisis caused by the Trading Strategy, including the associated use of funds from the Debtors’ operations to fund the Trading Strategy.

38. Both before and after the Petition Date, allegations of fraud and impropriety have been raised by creditors and others with respect to the Trading Strategy. The Debtors’ bankruptcy filing has had a significant effect on the energy futures market and the sale of crude oil domestically. Accordingly, significant public concern has attached to the Debtors’ bankruptcy filings, and numerous articles have been published regarding them. See Serena Ng and Ann Davis, *How Funds’ SemGroup Bet May Yet Pay*, THE WALL STREET JOURNAL ONLINE, August 1, 2008, page C1; Brian Baskin and Jessica Resnick-Ault, *SemGroup Ex-CEO Tied to*

*Trading Firm*, THE WALL STREET JOURNAL ONLINE, July 31, 2008, page C12; Christopher Hellman, *Inside the SemGroup Bust*, FORBES.COM, July 28, 2008; Brian Baskin, *Rooted In Crude Futures, SemGroup Failure Spreads to Physical Oil*, THE WALL STREET JOURNAL ONLINE, July 25, 2008; Serena Ng and Peg Brickley, *Wrong-Way Oil Bets Slam An Energy Firm*, THE WALL STREET JOURNAL, July 25, 2008, at C1 (collectively, the "Articles"). Copies of the Articles are attached hereto as **Exhibit F**. In the Articles, allegations have been raised regarding the propriety of the Debtors' trading activity and subsequent transfer of the Debtors' trading account to Barclays, the propriety of the use of a trading firm owned by the Debtors' former chief executive officer in such trades, whether the Debtors' trading activity ran afoul of their obligations to their lenders, whether the Debtors' liquidity problems were improperly hidden from their lenders and investors, and the propriety of certain financial transactions entered into by the Debtors as the Debtors' financial troubles worsened.

39. The dearth of information available regarding these activities has caused significant unrest and concern among the Debtors' customers, suppliers, lenders and investors. Indeed, in the two weeks since the Petition Date, the Debtors have not addressed these concerns.

40. Appointment of an examiner to investigate these matters will shed light on these issues and produce a report that informs the Court and the public whether culpable conduct occurred.

41. The examiner's report will also identify whether the Debtors' estates were harmed by the fallout from the Trading Strategy and identify potential claims and causes of action to remedy any harm. The presentation of the examiner's report in a timely manner will assist in alleviating public concern regarding the company and the mistrust surrounding the

Debtors' current dealings with their creditors and customers.

42. Pursuant to section 1106(b), the examiner appointed in these cases should be directed to investigate the circumstances surrounding the Trading Strategy, the Insider Transactions, and the potential improper use of funds from the Debtors' operating businesses to fund the Trading Strategy. The report filed by the examiner will enable the Court, the Committee and parties in interest to evaluate the genesis of any irregularities and to identify persons against whom the Debtors' estates might have claims or rights of action.

**RESERVATION OF RIGHTS/CONCLUSION**

43. The U.S. Trustee reserves the right to amend or to supplement this motion.

44. The U.S. Trustee reserves the right to conduct discovery in connection with this

motion.

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