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11 Debtor and Debtor-in-Possession

12 **UNITED STATES BANKRUPTCY COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 In re

15 **SERACARE LIFE SCIENCES, INC.**,
16 a California Corporation (d/b/a Therasource
17 International; f/k/a The Western States
18 Group, Inc.; d/b/a Biomedical Resources, a
19 division of SeraCare Life Sciences, Inc.;
20 d/b/a Genomics Collaborative, a division of
21 SeraCare Life Sciences, Inc.; f/k/a Southwest
22 Biological Services Western States Plasma
23 Co., Inc.; d/b/a Boston Biomedica, Inc.; d/b/a
24 SeraCare Bioservices; and d/b/a SeraCare
25 Diagnostics),

26 Debtor and Debtor-in-
27 Possession.

Case No. SD 06-00510 LA

Chapter 11 Proceeding

**DEBTOR'S OPPOSITION TO MOTION OF
AD HOC COMMITTEE OF
EQUITYHOLDERS FOR APPOINTMENT OF
AN OFFICIAL COMMITTEE OF
EQUITYHOLDERS; DECLARATIONS IN
SUPPORT THEREOF**

DATE: May 24, 2006

TIME: 2:00 p.m.

PLACE: Ctrm 2

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1 SeraCare Life Sciences, Inc., the Debtor and Debtor in Possession herein, hereby
2 submits this “Opposition” to the Motion of the Purported Ad Hoc Committee of Equityholders
3 for Appointment of An Official Committee of Equityholders (“Motion”).

4 **I.**

5 **INTRODUCTION**

6 It is well established that the appointment of an equity committee is an “*extraordinary*
7 *remedy*” and a “*rare exception*,” resulting in a high burden of proof upon the movant. Here,
8 the Ah Hoc Committee (“Movant”) has failed to submit evidence on the numerous factors
9 relevant to the appointment of an equity committee. Most importantly, the Movant has failed
10 to submit any evidence whatsoever on the essential factor, i.e., whether the equity-holders “are
11 unable to represent their interests in the bankruptcy case without an official committee.”

12 The applicable case law and the evidence before the Court convincingly establish that
13 the motion should be denied *inter alia* for the following reasons:

14 (a) The Movant holds a substantial equity stake in the Debtor (apparently now in
15 excess of 40%). Applicable case law concludes that a movant holding such a substantial equity
16 stake is capable of representing its own interest, without the need to appoint an *official*
17 committee at the expense of the estate. See Kalvar Microfilm, *infra*.

18 (b) The Movant can act as an *unofficial* committee, and still retain the right to seek
19 reimbursement if and to the extent it makes a “substantial contribution” pursuant to Section
20 503(b)(3)(D). The Movant has apparently been successful in “recruiting other equity holders
21 to be part of an unofficial committee, thereby spreading the upfront costs.” See Northwestern,
22 *infra*.

23 (c) The management of the Debtor currently holds a significant equity stake, such
24 that the interests of equity security holders are presently “adequately represented” without the
25 need of additional exclusive representation via a separate committee. See Edison Bros &
26 Westgate, *infra*. As this Court has previously noted, the statutory focus of section 1102(a)(2) is
27

1 not whether the shareholders are “exclusively” represented, but merely whether they are
2 “adequately” represented. Leap Wireless, infra.

3 (d) The Debtor anticipates that equity interests will not be impaired in this Chapter 11
4 proceeding. The Debtor and its counsel have been informally cooperating with the Ad Hoc
5 Committee and its counsel. Accordingly, the appointment of an *official* equity committee will
6 simply result in an unnecessary burden to the estate, with little or no corresponding benefit.

7 (e) Relative to other publicly traded companies, this Chapter 11 case is neither
8 sufficiently large, nor sufficiently complex, in order to justify an official equity committee.
9 The number of employees, and the annual revenues, are *miniscule* in comparison to reported
10 decisions evaluating the appointment of an equity committee. Similarly, the Debtor’s capital
11 structure is exceedingly simple, as there is only one class of equity – common stock. Edison
12 Bros., infra.

13 Accordingly, the Debtor submits that the interests of equity security holders are
14 presently represented in this Chapter 11 case, such that the appointment of an official
15 committee is not “*necessary* to assure adequate representation of...equity security holders.”

16 II.

17 **THE MOTION IS NOT SUPPORTED BY ANY RELEVANT EVIDENCE**

18 On a threshold level, it is clear that the Motion is not supported by relevant or admissible
19 evidence. Local Bankruptcy Rules 9013-2 and 9014-2 require that all motions be supported by
20 admissible evidence. Similarly, Federal Rule of Evidence 603 requires any and all factual
21 testimony to be under oath.

22 The Motion purports to attach, by way of appendices, three declarations previously
23 submitted in connection with the contested cash collateral motion. The declarations are neither
24 authenticated, nor is there any request to take judicial notice. Even assuming *arguendo* that the
25 Movant had requested judicial notice of these prior declarations, since these were contested
26 declarations between the Debtor and Union Bank with respect to a disputed cash collateral
27

1 hearing, the declarations are not appropriate for judicial notice. As held by the Third Circuit,
2 disputed or contested declarations are not appropriate for judicial notice:

3 We reject the FBI's suggestion that we may take judicial notice of the affidavits
4 pursuant to Fed.R.Evid. 201. That Rule covers only adjudicative facts “not subject
5 to reasonable dispute,” that are either “generally known within the territorial
6 jurisdiction of the trial court ... or capable of accurate and ready determination by
7 resort to sources whose accuracy cannot reasonably be questioned.” Hinton
8 vigorously disputes the FBI's predictions, contained in the affidavits, ... This is
9 simply not the type of fact subject to judicial notice.

10 Hinton v. Department of Justice, 844 F.2d 126, 130 (3rd Cir. 1988). See also Montgomery v.
11 Beneficial Consumer Discount Co., 2005 WL 497776, *4 (E.D.Pa.,2005) (“We exclude, however,
12 the Redell and Jinkins declarations because they are not documents subject to judicial notice”);
13 Sony Computer Entertainment America Inc. v. American Home Assur. Co., 2005 WL 3260483,
14 *2 (N.D.Cal. 2005) (denying “request to take judicial notice as the prior [declarations] in this case
15 are not an appropriate subject to be judicially noticed”); Nesbitt v. Wakabayshi, 2005 WL
16 1983908, *9 (E.D.Cal. 2005)contested declarations “are not readily capable of judicial notice
17 pursuant to the Federal Rules of Evidence.”)

18 Even assuming that these prior declarations are admissible for the truth of the matters
19 asserted therein, they are clearly insufficient to establish a prima facie case for the appointment of
20 an equity committee, as they do not address in any way the adequacy of representation of equity
21 holders.

22 Over a week after submitting the Motion, the movant submitted a declaration of counsel
23 (Mark Bane). This declaration of counsel purports to attach a list of the Ad Hoc Committee
24 members. This declaration clearly contains no evidence relevant to “cause” for the appointment
25 of an equity committee.

26 There is no evidence from the equity holders themselves establishing that their interests are
27 not adequately represented. “[S]eparate committees impose additional administrative expenses on
28 the debtor's estate which adversely affect the debtor's ability to reorganize and [] separate teams of
professionals rarely contribute to the spirit of compromise that is intended as the guiding star of
chapter 11.” In re Sharon Steel Corp., 100 B.R. 767, 778 (Bankr.W.D.Pa. 1989). “[C]ourts

1 should be cautious because overly lenient standards may potentially over-burden the
2 reorganization process by allowing numerous parties to interject themselves into the case on every
3 issue, thereby thwarting the goal of a speedy and efficient reorganization.” In re E.S. Bankest,
4 L.C., 321 B.R. 590, 595 (Bankr.S.D.Fla. 2005); In re Ionosphere Clubs, Inc., 101 B.R. 844
5 (Bankr. S.D.N.Y. 1989).

6 It is well recognized that “the appointment of additional committees is closely followed by
7 applications to retain attorneys and accountants.” In re Wang Laboratories, Inc., 149 B.R. 1,
8 4 (Bankr.D.Mass. 1992).¹ Clearly, the movant has failed to prove that the alleged benefits of an
9 equity committee will outweigh the costs thereof.

10 III.

11 **THE APPOINTMENT OF AN EQUITY COMMITTEE IS A “RARE EXCEPTION”** 12 **THAT IS NOT WARRANTED IN THIS CASE**

13 The Debtor submits that the appointment of an equity committee is a “rare exception”
14 which is not warranted in this case. The applicable statute is Section 1102(a)(2), which provides:

15 (2) On request of a party in interest, the court may order the appointment of
16 additional committees of creditors or of equity security holders *if necessary* to
17 assure adequate representation of creditors or of equity security holders. The
18 United States trustee shall appoint any such committee.

19 11 U.S.C. § 1102(a)(2).

20 **A. The Movant Has Failed to Meet its Burden of Proof.** It is the burden of the
21 party seeking the appointment of an additional committee to prove inadequate representation. See
22 In re Agway, Inc., 297 B.R. 371, 374 (Bankr.N.D.N.Y. 2003). *See also* In re Winn-Dixie Stores,
23 Inc., 326 B.R. 853, 857 (Bankr.M.D.Fla. 2005); In re Dow Corning Corp., 194 B.R. 121, 144
24 (Bankr.E.D.Mich.1996) *rev'd on other grounds,* 212 B.R. 258 (E.D.Mich.1997); In re Enron
25 Corp., 279 B.R. 671, 685 (Bankr.S.D.N.Y. 2002)

26 ¹ *See also* In re Williams Communications Group, Inc., 281 B.R. 216, 220 (Bankr.S.D.N.Y. 2002)
27 (same); In re Dow Corning Corp., 194 B.R. 121, 143 (Bankr.E.D.Mich. 1996) *rev'd other grounds*
28 212 B.R. 258 (E.D.Mich. 1997) (same); Matter of Interco Inc., 141 B.R. 422, 424 (Bankr.E.D.Mo.
1992) (same); In re Beker Industries Corp., 55 B.R. 945, 949 (Bankr.S.D.N.Y. 1985) (same); In re
Saxon Indus., Inc., 39 B.R. 945, 947 (Bankr.S.D.N.Y.1984) (same).

1 Here, the declaration in support of the Motion is devoid of any evidence regarding
2 “inadequate representation”. The declaration of counsel, submitted after the motion itself, does
3 nothing more than purport to identify the Ad Hoc Committee members. As noted above, the
4 Motion attached three prior declarations submitted by the Debtor, Brown Brothers Harriman &
5 Co., and Union Bank, respectively in connection with the Debtor’s Motion for Emergency Use of
6 Cash Collateral. These declarations merely provide factual background and financial information
7 with respect to the Debtor.

8 With respect to “inadequate representation”, the Motion consists of nothing more than
9 conclusory legal argument. It is well established that argument of counsel is not evidence. *See*
10 U.S. v. Rose, 104 F.3d 1408, 1416 (1st Cir. 1997) (“argument by counsel is not evidence”).

11 **B. The Appointment of an Additional Committee under Section 1102(a)(2) is an**
12 **“Extraordinary Remedy”.**

13 “The appointment of an additional committee is an *extraordinary remedy*.” In re Winn-
14 Dixie Stores, Inc., 326 B.R. 853, 857 (Bankr.M.D.Fla. 2005); In re Enron Corp., 279 B.R. 671,
15 685 (Bankr.S.D.N.Y.2002) (“extraordinary remedy”).

16 “The appointment of official equity committees should be the *rare exception*.” In re
17 Williams Communications Group, Inc., 281 B.R. 216, 223 (Bankr.S.D.N.Y. 2002); Exide
18 Technologies v. State of Wisconsin Invest. Bd., 2002 WL 32332000, *1 (D.Del. 2002) (“the
19 appointment of an official equity committee should be the rare exception”); In re Northwestern
20 Corp., 2004 WL 1077913, *2 (Bankr.D.Del. 2004) (“appointing an official equity committee
21 should be the rare exception”); Collier on Bankruptcy-15th Edition Rev. ¶ 1102.03[2] (2006)
22 (“Appointment of committees of equity security holders is the exception rather than the rule in
23 chapter 11 cases.”).

24 Here, the evidence in support of the Motion is obviously inadequate to establish this high
25 burden of proof to justify the extraordinary remedy.

1 IV.

2 **THE AD HOC COMMITTEE CAN REPRESENT THEIR INTERESTS WITHOUT**
3 **APPOINTMENT OF AN OFFICIAL COMMITTEE**

4 In In re Williams Communications Group, Inc., 281 B.R. 216 (Bankr.S.D.N.Y. 2002),
5 cited in Leap Wireless, the Court adopted the following test specifically for the appointment of an
6 equity committee:

7 The appointment of official equity committees should be the *rare exception*. Such
8 committees should not be appointed unless **equity holders establish** that (i) there is a
9 substantial likelihood that they will receive a meaningful distribution in the case under
10 a strict application of the absolute priority rule, and (ii) **they are unable to represent**
11 **their interests in the bankruptcy case without an official committee. The second**
12 **factor is critical because, in most cases, even those equity holders who do expect a**
13 **distribution in the case can adequately represent their interest without an official**
14 **committee and can seek compensation if they make a substantial contribution in**
15 **the case.**

16 In this regard, the Movants are by no means left without any recourse since "the right
17 to be heard is, at this point, as important a right as any ascribed to an official
18 committee." Section 1109(b) of the Code allows an equity security holder to raise and
19 be heard on any issue in the case. The Movants have already demonstrated their ability
20 to organize and participate in this case with skill and zeal through the prosecution of
21 this motion and the opposition to the Restructuring Agreements. Should the
22 Shareholders' efforts result in a substantial contribution to the estate, they may be
23 reimbursed pursuant to section 503(b)(3)(D) of the Code. Thus, **the Movants may still**
24 **be heard in this case, but not at the estate's expense without a showing of**
25 **substantial contribution in the case.**

18 In re Williams Communications Group, Inc., 281 B.R. 216, 223-224 (Bankr.S.D.N.Y. 2002)
19 (emphasis added) (citations omitted). *See also* In re Northwestern Corporation, 2004 WL
20 1077913, *2 (Bankr.D.Del. 2004) ("an equity committee 'should not be appointed unless equity
21 holders establish that (i) there is a substantial likelihood that they will receive a meaningful
22 distribution in the case under a strict application of the absolute priority rule, and (ii) they are
23 unable to represent their interests in the bankruptcy case without an official committee.'"); Exide
24 Technologies v. State of Wisconsin Invest. Bd., 2002 WL 32332000 (D.Del. 2002) (same).

25 The second factor (whether equityholders are unable to represent their interests in the
26 bankruptcy case without an official committee) is dispositive here.

1 **A. Movant holds a Substantial Stake, and Can Therefore Represent their own**
2 **interests.** In Matter of Kalvar Microfilm, Inc. 195 B.R. 599 (Bankr.D.Del. 1996) (cited in Leap
3 Wireless), the Court denied the appointment of an equity committee, noting that the movant held a
4 large enough equity stake such that it was capable of representing its own interests, without the
5 burden of the appointment of an official committee. Kalvar Microfilm, 195 B.R. at 601 (“On the
6 adequate representation issue, [Movant] holds over 30% of the preferred stock. It thus has a
7 substantial stake and can continue to represent its own interests in future matters in this case.”).

8 The declaration of counsel, in support of the Motion, states that the Ad Hoc Committee
9 membership “constitutes approximately 27.5% of the total outstanding shares of the Debtor.”
10 Bane Declaration, ¶3. The Debtor is informed that the Movant has additional members, and that
11 certain of its members have substantially increased their equity stake, such that the current
12 percentage of shares held by Movant is now even higher, and in excess of 40%. If correct, this
13 ownership figure greatly exceeds the equity stake in Kalvar, i.e., 30%, and thus the Movant “has a
14 substantial stake and can continue to represent its own interests in future matters in this case.” Id.

15 To the extent the Ad Hoc Committee has been able to organize and retain counsel, it is
16 clear that it is capable of representing its own interests without burdening the estate. Thus,
17 movant fails the second test in Williams: “they are unable to represent their interests in the
18 bankruptcy case without an official committee...” Clearly, they are able to represent their
19 interests without an official committee. For the same reasons as Kalvar, the Ad Hoc Committee
20 holds a sufficiently large stake such that they can represent their own interests, without burdening
21 the limited resources of the estate.

22 **B. Management Holds a Significant Equity Stake and therefore the Interests of**
23 **Equityholders are Adequately Represented.** In determining adequacy of representation, both
24 the bankruptcy court and district court in In re Edison Bros. Stores, Inc., 1996 WL 534853 (D.Del.
25 1996), relied upon management’s equity stake, in determining that the interests of equity holders
26 were already adequately represented in the case. Id. at *5 (“The bankruptcy court determined that
27 an equity committee was not needed because management held a 35 percent equity interest, the
28

1 debtor's capital structure was not complex, and there were no facts to suggest management was not
2 aligned with non-insider shareholders.”). *See also In re Westgate General Partnership*, 55 B.R.
3 560, 562 (Bankr.E.D.Pa. 1985) (denying appointment of equity committee *inter alia* where equity
4 interests are adequately represented by debtor’s management).

5 As set forth in the attached declaration of Kai Loedel, the Debtor’s officers and directors
6 (excluding Jerry Burdick), directly or indirectly, hold approximately sixteen (16%) percent of
7 Debtor’s common stock, inclusive of stock options.

8 The Debtor submits that, consistent with *Edison Bros* and *Westgate*, equity interests are
9 adequately represented by Debtor’s management. This Court, in *Leap Wireless*, noted “that the
10 statutory focus of section 1102(a)(2) is not whether the shareholders are ‘exclusively’ represented,
11 but whether they are ‘adequately’ represented.” *Leap Wireless*, 295 B.R. at 140. Accordingly,
12 *exclusive* representation, via an official committee, is simply not required.

13 **C. The Debtor anticipates that Common Stock will be Unimpaired, and Thus An**
14 **Equity Committee is Not Necessary Protect the Rights of Stock Holders.**

15 As set forth below, there is only one class of equity, i.e., common stock. At the present
16 juncture, the Debtor does *not* anticipate that common stock will be impaired in this Chapter 11
17 proceeding. To the extent equity is *unimpaired*, there is little or no purpose in the formation of an
18 official equity committee.

19 The Debtor and its counsel have been in regular contact with the Ad Hoc Committee and
20 its counsel. The Debtor is willing to voluntarily provide documents to the Ad Hoc Committee,
21 subject to the execution of a confidentiality agreement. In light of the dialogue and
22 communication with the Movant, and the anticipation that the rights of equity security holders will
23 not be impaired under a Chapter Plan, there is simply no material benefit to either the Estate or
24 equityholders, to be conferred from the appointment of an official committee.

25 **D. The Ad Hoc Committee Can Act as an Unofficial Committee, and seek**
26 **Reimbursement under §503(b)(3)(D).** Section 1109(b) of the Code allows individual equity
27 security holders to raise and be heard on any issue in the case, as a party in interest. Accordingly,
28

1 the appointment of an *official* committee is not necessary, as individual equity holders or an
2 *unofficial* committee can be heard in the case, and seek reimbursement *if* they make a substantial
3 contribution.

4 Section 503(b)(3)(D) states that a bankruptcy court may allow as an administrative
5 expense the actual, necessary expenses of "an equity security holder, or a **committee**
6 **representing** creditors or **equity security holders** *other than a committee appointed under*
7 *Section 1102 of this title, in making a substantial contribution in a case under Chapter 9 or 11*
8 *of this title...."* (emphasis added). Thus, an *unofficial* committee may seek reimbursement under
9 Section 503(b)(3)(D) for a substantial contribution in a Chapter 11 case.

10 In denying motions to appoint official equity committees, courts have noted that
11 shareholders should not be compensated from the estate until and unless that establish a
12 "substantial contribution" to the estate. Accordingly, the shareholders may form an unofficial
13 committee and be heard in the case, and retain the right to seek reimbursement under Section
14 503(b)(3)(D):

15 [T]he Movants are by no means left without any recourse since "the right to be
16 heard is, at this point, as important a right as any ascribed to an official
17 committee." *Albero v. Johns-Manville*, 68 B.R. at 164. Section 1109(b) of the
18 Code allows an equity security holder to raise and be heard on any issue in the
19 case. The Movants have already demonstrated their ability to organize and
20 participate in this case with skill and zeal through the prosecution of this motion
21 and the opposition to the Restructuring Agreements. Should the Shareholders'
22 efforts result in a substantial contribution to the estate, they may be reimbursed
23 pursuant to section 503(b)(3)(D) of the Code. Thus, the Movants may still be heard
24 in this case, but not at the estate's expense without a showing of substantial
25 contribution in the case.

26 In re Williams Communications Group, Inc., 281 B.R. 216, 223-224 (Bankr.S.D.N.Y. 2002). See
27 also In re Northwestern Corporation, 2004 WL 1077913, *3 (Bankr.D.Del. 2004) ("Movants have
28 every right to raise their arguments in the context of plan confirmation but that the estate should
bear the upfront cost ... Further, if they are successful, the Movants may assert a claim for
reimbursement of their fees and costs under Section 503(b)(3)(D) of the Bankruptcy Code. They
can decrease the risk by recruiting other equity holders to be part of an unofficial committee,

1 thereby spreading the upfront costs. In any event, if they are correct, they are protected by Section
2 503(b)(3)(D) of the Bankruptcy Code.”); In re Leap Wireless Intern., Inc., 295 B.R. 135, 140
3 (Bankr.S.D.Cal. 2003) (“Section 1109(b) gives them the right to raise and be heard on any issue in
4 this case. They may object to valuation at the confirmation hearing on the debtors' Plan. Section
5 503(b)(3)(D) permits them to be reimbursed for their efforts should they result in substantial
6 contribution to the estate.”).

7 Here, the estate should not bear the expense of additional committees, unless they can
8 establish a substantial contribution in the case. As noted in Northwestern Corporation, supra, the
9 Ad Hoc Committee can recruit additional members to further spread the up front costs. The
10 Debtor is informed that the current members of the Ad Hoc Committee collectively hold in excess
11 of forty percent (40%) of the outstanding common stock. As a result, the members are able to
12 spread the cost among numerous members, and therefore do not require representation at the
13 expense of the bankruptcy estate.

14 **V.**

15 **THE CASE IS NOT COMPLEX AND**
16 **THE COST OF THE ADDITIONAL COMMITTEE OUTWEIGHS**
17 **ANY CONCERN FOR ADEQUATE REPRESENTATION**

18 The movant cites In re Leap Wireless International, Inc., 295 B.R. 135 (Bankr.S.D.Cal.
19 2003), and suggests that the only two relevant factors for the appointment of an equity committee
20 are whether: (i) there is a substantial likelihood that the equity holders will receive a meaningful
21 distribution, and (ii) the existing committee(s) do not adequately represent their interests.

22 The Movant misreads the Leap Wireless decision, as this excerpt from the decision merely
23 recited the dispositive factors under the facts of that particular case. Specifically, the above
24 factors were the primary grounds upon which the Leap Wireless court *denied* the appointment of
25 an equity committee, i.e., (i) the Leap Wireless estate was “hopelessly insolvent” and (ii) the
26 interests of equity holders was “adequately represented” by the existing creditors committee
27 without the need of a separate equity committee.

1 The Leap Wireless decision noted several relevant factors that are relevant to the
2 appointment of an equity committee:

3 The Bankruptcy Code permits the court to order appointment of an equity security
4 holders committee "if necessary to assure adequate representation." 11 U.S.C. §
5 1102(a)(2). There is no statutory definition of "adequacy of representation"; it is
6 generally determined on a case by case basis. *In re Beker Industries Corp.*, 55 B.R.
7 945, 948 (Bankr.S.D.N.Y.1985). The most frequently cited factors considered by
8 courts in making this determination are: **number of shareholders; complexity of
9 the case, and whether the cost of the additional committee significantly
10 outweighs the concern for adequate representation.** See *In re Williams
11 Communications Group, Inc.*, 281 B.R. 216, 220 (Bankr.S.D.N.Y.2002); *In re
12 Wang Laboratories, Inc.*, 149 B.R. 1, 2 (Bankr.D.Mass.1992). Other factors which
13 may influence this decision include the delay associated with the appointment of a
14 committee, the timing of the motion relative to the status of the chapter 11 case and
15 whether the debtor is likely "hopelessly insolvent." *In re Kalvar Microfilm, Inc.*
16 195 B.R. 599, 600 (Bankr.D.Del.1996); *Williams* 281 B.R. at 220-21.

17 Id. at 137 (emphasis added).

18 The Kalvar decision (cited in Leap Wireless) noted: "No one factor is dispositive, and the
19 amount of weight that the court should place on each factor may depend on the circumstances of
20 the particular Chapter 11 case." Matter of Kalvar Microfilm, Inc., 195 B.R. 599, 601
21 (Bankr.D.Del. 1996). See also In re Edison Bros. Stores, Inc., 1996 WL 534853, *3 (D.Del. 1996)
22 ("these factors are simply guidelines for the court to consider and 'every case must be judged on
23 its own facts.'").

24 **A. The Case is Neither Large nor Complex.**

25 The Motion fails to address one of the primary factors – the size and complexity of the
26 case. Clearly, relative to other publicly trade companies, this chapter 11 case is not "large and
27 complex" on the level that might justify an equity committee.

28 For example, the Williams Communications Group, *supra*, had 3,200 employees
worldwide, and \$1.19 billion is annual revenue, but still denied the appointment of an equity
committee. Williams, 281 B.R. at 218. In contrast, the Debtor here has approximately 250
employees – less than one-twelfth (1/12) the employees of the Williams case; and only \$55

1 million in annual revenues - less than one-twentieth (1/20) the annual revenue of the Williams
2 case.²

3 In support of the Motion, the Ad Hoc Committee notes that there are “223 holders of
4 shares of SeraCare.” Motion, 5:23. However, this number is paltry relative to the numbers
5 required to justify an equity committee. For example, the Court in In re Wang Laboratories, Inc.,
6 149 B.R. 1, 2 (Bankr.D.Mass. 1992), concluded that the case was large and complex after noting
7 multiple classes of stock and over 50,000 equity-security holders. See Wang Laboratories, 149
8 B.R. at 2 (“approximately **49,000 holders** of Class B shares and 2,000 holders of Class C” and the
9 “number of beneficial owners of equity interests is probably nearer to 70,000 in the aggregate”).
10 See also In re Baldwin-United Corp., 45 B.R. 375 (Bankr.S.D.Ohio 1983) (“**20 and 50 different**
11 **classes of equity security holders**” and “**15,000-plus holders of Baldwin-United common**
12 **stock**”); In re Beker Industries Corp., 55 B.R. 945, 947 (Bankr.S.D.N.Y. 1985) (at least 2 classes
13 of stock and almost 2,500 holders- “Outstanding are roughly 12,000,000 shares of common held
14 by 2,148 stockholders, at least as of March of this year, and 1,150,000 shares of preferred held by
15 339 entities.”)

16 In In re Edison Bros. Stores, Inc., 1996 WL 534853 (D.Del. 1996), the Court focused
17 particularly on the fact that the *capital structure* was not complex, and that there was only a single
18 class of equity securities.

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21 ² In Matter of Kalvar Microfilm, Inc., 195 B.R. 599 (Bankr.D.Del. 1996), the Court denied the
22 appointment of an equity committee, noting that while the case was large, it was not complex *inter*
23 *alia* where the debtors are not attempting to change the nature of its operations through the
24 bankruptcy process, and relatively few operational issues have been brought before the court.

25 The movants and the objectors dispute whether the case is large and complex.
26 Undoubtedly, the dollar size of the debtors is large. However, this is not a complex
27 case from a bankruptcy perspective. This is a pre-planned bankruptcy. The debtors
28 are not attempting to change the nature of its operations through the bankruptcy
process, and relatively few operational issues have been brought before the court.
Indeed, there are only about 220 docket entries in the first three months of this
case.

Matter of Kalvar Microfilm, Inc., 195 B.R. 599, 601 (Bankr.D.Del. 1996).

1 [T]he parties did not question the bankruptcy court's finding that the debtor's capital
2 structure is not complex. ... The bankruptcy court also noted that, for the purposes of
3 determining whether shareholders are adequately represented, the complexity of
4 capital structure is more relevant than the complexity of the debtor's business affairs.
5 The bankruptcy court reasoned that there was less need to appoint an equity
6 committee in this case because there were not any different levels of debt or different
7 classes of equity. Based on the bankruptcy court's application of the facts to the law,
8 the court concludes that the bankruptcy court did not abuse its discretion in finding
9 that an equity committee was not necessary to assure adequate representation of
10 shareholder interests.”

11 In re Edison Bros. Stores, Inc., 1996 WL 534853, *3 & *5 (D.Del. 1996)

12 Based upon the foregoing, the Debtor submits that the “number of shareholders” and
13 “complexity of the case” weigh strongly against the appointment of an equity committee. Here,
14 the Motion effectively concedes this case is neither large nor complex, by its acknowledgement of
15 only a *single class of equity* and only 235 record holders of shares. Clearly, relative to the case
16 law contemplating the appointment of an equity committee, this case is small, and the capital
17 structure is simple. Thus, the size and simplicity of the case do not justify the appointment of an
18 official equity committee at the expense of the estate.

19 **B. Cost/Benefit Analysis of An Equity Committee.**

20 The other frequently cited factor in Leap Wireless concerns the cost of the additional
21 committee outweighing the concern for adequate representation.

22 The appointment of an equity committee raises *cost* concerns since such appointments are
23 "closely followed by applications to retain attorneys and accountants." In re Williams
24 Communications Group, Inc., 281 B.R. 216, 220 (Bankr.S.D.N.Y. 2002) citing In re Saxon Indus.,
25 Inc., 39 B.R. 945, 947 (Bankr.S.D.N.Y.1984). Essentially, the courts employ a balancing test to
26 weigh the cost of an equity committee versus the "concern for adequate representation." Id citing
27 Wang, 149 B.R. at 3. *See also* Matter of Kalvar Microfilm, Inc. 195 B.R. 599, 601 (Bankr.D.Del.
28 1996) (“As to the third factor, undoubtedly additional cost would result if the court grants the
29 motion. The equity committee will seek to retain law firms to represent it, Hellmold Associates
30 to act as its financial advisor at a hefty monthly fee, and possibly other experts.”). See also In re
31 Trans World Airlines, Inc., 1992 WL 168152, *3 (Bankr.D.Del. 1992) (“The creation of additional

1 committees pursuant to Section 1102(a)(2)...would needlessly burden the Debtor's estate with
2 substantial additional administrative expenses.”).

3 Here, Movant has submitted no evidence with respect to the cost/benefit analysis of an
4 equity committee. As noted above, the Debtor does *not* anticipate that common stock will be
5 impaired in this Chapter 11 proceeding. In light of the existing dialogue and communication with
6 the Movant, and the anticipation that the rights of equity security holders will not be impaired
7 under a Chapter Plan, there is simply no material benefit as a result of the appointment of an
8 official committee.

9 In contrast, on the cost side, given that this is a relatively small company for the
10 appointment of an equity committee, the financial burden upon the estate is clearly high.
11 Moreover, it is noteworthy that the Ad Hoc Committee is represented by prominent firms in *New*
12 *York, Boston and Los Angeles*. While their respective legal rates are not disclosed, it is beyond
13 dispute that geographically, these three cities have some of the highest hourly rates in the country.

14 In In re Winn-Dixie Stores, Inc., 326 B.R. 853 (Bankr.M.D.Fla. 2005), the Bankruptcy
15 Court noted that the “costs” of a Committee was more than merely the fees and costs associated
16 with professionals. The Court found “that appointing an additional committee would not facilitate
17 a more harmonious resolution of the cases but would instead engender discord, litigation and
18 delay. The Court finds that an additional committee would not provide a benefit to the overall
19 administration of the estate.” Winn-Dixie Stores, 326 B.R. at 857.

20 Accordingly, in evaluating the costs and benefits of an equity committee, the Court must at
21 least consider the possibility that such appointment, at the expense of the estate, would merely
22 engender discord, litigation and delay.

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VI.
CONCLUSION

Based upon the foregoing, the Debtor requests that the Motion be denied in its entirety.

DATED: May 15, 2006

WINTHROP COUCHOT
PROFESSIONAL CORPORATION

By: _____ /s/
Peter W. Lianides, Esq.
Attorneys for SeraCare Life Sciences, Inc., debtor
and debtor-in-possession

DECLARATION OF KAI LOEDEL

I, Kai Loedel, hereby declare and state as follows:

1. I am the Director of Finance of SeraCare Life Sciences, Inc., a California corporation (the "Debtor"), and am authorized to execute this declaration on behalf of the Debtor. The facts stated herein are within my personal knowledge and if called upon to testify to the same I could and would testify competently thereto.

2. As its Director of Finance, I am thoroughly familiar with the finances and capital structure of the Debtor. At the present time the Debtor has approximately 250 employees, and generates approximately \$55.0 million in annual revenues. The Debtor is a publicly held entity. Until recently, its shares were actively traded on the NASDAQ National Market. The Debtor has only a single class of equity, i.e., common stock. The Debtor's officers and directors (excluding Jerry Burdick), directly or indirectly, hold approximately sixteen (16%) percent of Debtor's common stock, inclusive of stock options.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of May 2006, in Oceanside, California.

_____/s/
Kai Loedel

DECLARATION OF PAUL COUCHOT

I, Paul Couchot, declare and state:

1. I am an attorney and shareholder with the law firm of Winthrop Couchot Professional Corporation, general insolvency counsel to SeraCare Life Sciences, Inc., a California Corporation, the debtor and debtor-in-possession in the above Chapter 11 proceeding (the “Debtor”) herein.

2. I have been in regular contact with Ross Martin, counsel for the Ad Hoc Committee. Mr. Martin has informed me that the members of the Ad Hoc Committee hold at least 40% of the Debtor’s outstanding shares of common stock. I am also aware that representatives of both the Debtor and the Ad Hoc Committee have had telephonic discussions and a face to face meeting.

3. At the present juncture, the Debtor does *not* anticipate that holders of common stock will be impaired in this Chapter 11 proceeding.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of May 2006, in Newport Beach, California.

_____/s/
Paul J. Couchot

CERTIFICATE OF SERVICE

I, Nadine Lorenzo, declare as follows:

I am employed in the County of Orange, State of California; I am over the age of eighteen years and am not a party to this action; and my business address is 660 Newport Center Drive, Fourth Floor, Newport Beach, California 92660, in said County and State. On **May 15, 2006**, I served the following document:

DEBTOR’S OPPOSITION TO MOTION OF AD HOC COMMITTEE OF EQUITYHOLDERS FOR APPOINTMENT OF AN OFFICIAL COMMITTEE OF EQUITYHOLDERS; DECLARATIONS IN SUPPORT THEREOF

on each of the interested parties (stated on the attached service list/as follows):

SEE ATTACHED SERVICE LIST

by the following means of service:

<input checked="" type="checkbox"/>	BY MAIL: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. Under that practice, it would be deposited with the U.S. Postal Service on that same date with postage thereon fully prepaid at Newport Beach, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
<input checked="" type="checkbox"/>	I am employed in the office of Winthrop Couchot Professional Corporation. Peter W. Lianides is a member of the bar of this Court.
<input type="checkbox"/>	(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
<input checked="" type="checkbox"/>	(FEDERAL) I declare under penalty of perjury that the foregoing is true and correct.

Executed on **May 15, 2006**, at Newport Beach, California.

_____/s/
Nadine Lorenzo

_____/s/
JAM

SERVICE LIST

1 2 3 4 5	United States Trustee Mary Testerman Duvoisin, Esq. 402 W. Broad Street., Suite 600 San Diego, CA 92101	<u>Debtor</u> SeraCare Life Sciences, Inc. Kai Loedel, Director of Finance 1935 Avenida del Oro, Suite F Oceanside, CA 92056
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