Hearing Date: January 28, 2004, at 2:30 p.m. New York Time
Objections Due: January 23, 2004, at 4:00 p.m. New York Time

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
GENUITY INC., et al.,[1]	:	Case No. 02-43558-PCB
Debtors.	:	(Jointly Administered)

MOTION OF JPMORGAN CHASE BANK SEEKING THE ENTRY OF AN ORDER, PURSUANT TO 11 U.S.C. §§ 503(b)(3) AND (4), ALLOWING REIMBURSEMENT OF REASONABLE ATTORNEYS' FEES AND ACTUAL AND NECESSARY EXPENSES

TO THE HONORABLE PRUDENCE C. BEATTY
UNITED STATES BANKRUPTCY JUDGE:

Name of Applicant:	Shearman & Sterling LLP
Period for which compensation and reimbursement is sought:	April 3, 2003 - The Effective Date
Amount of Compensation sought as actual, reasonable and necessary:	$508,904.00
Amount of Expense Reimbursement sought as actual, reasonable and necessary:	$13,501.61

[1] In addition to Genuity Inc., the other debtors herein are Genuity Solutions Inc., BBN Advanced Computers Inc., BBN Certificate Services Inc., BBN Instruments Corporation, BBN Telecom Inc., Bolt Beranek and Newman Corporation, Genuity Business Trust, Genuity Employee Holdings LLC, Genuity International Inc., Genuity International Networks LLC, Genuity International Networks Inc., Genuity Telecom Inc., LightStream Corporation, and NAP.NET, L.L.C.

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TO THE HONORABLE PRUDENCE C. BEATTY
UNITED STATES BANKRUPTCY JUDGE:

JPMorgan Chase Bank ("JPMorgan Chase"), Administrative Agent under the Amended and Restated Credit Agreement, dated as of September 24, 2001 (as amended, the "Credit Agreement"), among Genuity Inc. ("Genuity"), JPMorgan Chase, as Administrative Agent, and the lenders (the "Bank Lenders") and agents party thereto, by and through its undersigned

[1] In addition to Genuity Inc., the other debtors herein are Genuity Solutions Inc., BBN Advanced Computers Inc., BBN Certificate Services Inc., BBN Instruments Corporation, BBN Telecom Inc., Bolt Beranek and Newman Corporation, Genuity Business Trust, Genuity Employee Holdings LLC, Genuity International Inc., Genuity International Networks LLC, Genuity International Networks Inc., Genuity Telecom Inc., LightStream Corporation, and NAP.NET, L.L.C.

counsel, hereby submits this motion (the "Motion") seeking the entry of an order, pursuant to sections 503(b)(3) and (4) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"), allowing and authorizing the reimbursement of JPMorgan Chase for professional services rendered and actual and necessary out-of-pocket expenses incurred by its counsel, Shearman & Sterling LLP ("Shearman & Sterling"), in connection with the chapter 11 bankruptcy cases of Genuity and its subsidiaries (collectively, the "Debtors"). In support of the Motion, JPMorgan Chase respectfully represents and states as follows:

PRELIMINARY STATEMENT

1. JPMorgan Chase, as Administrative Agent, with the assistance of Shearman & Sterling, has played a major role in the Debtors' bankruptcy cases. In its capacity as Administrative Agent for the Bank Lenders as well as Chair of the Official Committee of Unsecured Creditors (the "Creditors' Committee") appointed in the Debtors' chapter 11 cases, the efforts of JPMorgan Chase were a key factor in, among other things, the swift resolution of numerous claims and the negotiation of a settlement agreement (the "Settlement Agreement") that formed the basis of the Debtors' Joint Consolidated Plan of Liquidation, as Modified, dated as of November 14, 2003 (the "Plan"), which provides unsecured creditors other than the Bank Lenders (the "General Unsecured Creditors") a greater recovery than without such settlement. For these reasons and as more fully explained below, JPMorgan Chase respectfully requests the allowance and reimbursement of the fees for services rendered and expenses incurred by Shearman & Sterling.

JURISDICTION

2. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue for these cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B),

and (O). The statutory predicates for the relief requested herein are sections 503(b)(3) and (4) of the Bankruptcy Code.

RELIEF REQUESTED

3. By this application, JPMorgan Chase seeks the reimbursement from the GLT Liquidating Trust (the "Liquidating Trust"), as successor in interest to the Debtors, for (a) certain professional services (the "503(b) Compensable Services") rendered by Shearman & Sterling to JPMorgan Chase from April 3, 2003 (the date of commencement of negotiations on the Plan) through the effective date (the "Effective Date") of the Plan (the "Application Period") in the amount of $508,904.00 (the "S&S Fees") and (b) actual and necessary out-of-pocket expenses incurred by Shearman & Sterling in connection with the 503(b) Compensable Services to JPMorgan Chase during the Application Period in the amount of $13,501.00 (the "S&S Expenses" and, together with the S&S Fees, the "S&S Fees and Expenses").[2]

4. As set forth in the Second Amended Disclosure Statement for Debtors' Joint Consolidated Plan of Liquidation, as Modified (the "Disclosure Statement"), JPMorgan Chase previously informed the Debtors and the Creditors' Committee of its intention to file the Motion in an amount of approximately $500,000 through August 31, 2003 plus amounts incurred thereafter. *See* Disclosure Statement at 36. Kramer Levin Naftalis & Frankel LLP, as counsel to the Liquidating Trust and former counsel to the Creditors' Committee prior to the Effective Date, as well as Nortel Networks, Inc. ("Nortel"), the non-Bank Lender member of the oversight committee (the "Oversight Committee") established pursuant to the terms of the Liquidating

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[2] By the Motion, and in accordance with case law on section 503(b) of the Bankruptcy Code, JPMorgan Chase does not seek reimbursement of the fees and out-of-pocket expenses of Shearman & Sterling for work performed and expenses incurred in connection with issues concerning solely the Bank Lenders, such as the preparation and filing of proofs of claim, intercreditor disputes among the Bank Lenders, preparation of the Motion, and certain Bank Lenders' conference calls in which only such issues were discussed.

Trust Agreement, dated as of December 2, 2003, and a former member of the Creditors' Committee prior to the Effective Date, (a) have reviewed the Motion, (b) believe that JPMorgan Chase, with the assistance of Shearman & Sterling, provided a substantial contribution to these cases and services that were actual and necessary in the performance of JPMorgan Chase's obligations as Creditors' Committee Chair and (c) are willing to attest to such contributions before the Court. Furthermore, based on information regarding, among other things, cash available, established reserves and projected cash distributions (the "Projected Distributions") provided to the Oversight Committee by AlixPartners LLC, as advisors to the Liquidating Trust, on December 15, 2003, there are sufficient funds in the administrative expense reserve to reimburse JPMorgan Chase for the S&S Fees and Expenses.

BACKGROUND

5. On November 27, 2002 (the "Petition Date"), the Debtors filed their petitions for relief under chapter 11 of the Bankruptcy Code. On December 5, 2002, the United States Trustee for the Southern District of New York appointed the Creditors' Committee in the Debtors' chapter 11 cases, consisting of JPMorgan Chase, BNP Paribas, Mizuho Corporate Bank, Ltd., Nortel, and Allegiance Telecom. No trustee or examiner has been appointed in the Debtors' chapter 11 cases.

A. The Plan

6. On November 21, 2003, this Court approved the Plan and, thereafter, on December 2, 2003, the Effective Date occurred. Among other things, the Plan allocates the assets of the Debtors' estates among creditor constituencies, principally the Bank Lenders, Verizon Communications, Inc. and its affiliates ("Verizon"), and the General Unsecured Creditors. Members of the Creditors' Committee, particularly JPMorgan Chase, with the

assistance of Shearman & Sterling, negotiated extensively to achieve a plan of liquidation that resolves consensually the numerous and complex intercreditor and debtor-creditor issues in the chapter 11 cases among the Debtors, the Bank Lenders, Verizon, and the General Unsecured Creditors, while maximizing the value of the estates for the benefit of all creditors.

7. As more fully described at pages 36-46 of the Disclosure Statement, the Creditors' Committee members, including JPMorgan Chase, commenced discussions regarding intercreditor issues in April 2003. After analyzing these issues and conducting due diligence related thereto, in late May 2003, the Creditors' Committee members, led by JPMorgan Chase, on behalf of the Bank Lenders, and Nortel, on behalf of the General Unsecured Creditors, commenced negotiation of the terms of the Settlement Agreement. An agreement was reached and approved by the Creditors' Committee in early July 2003. Thereafter, the Creditors' Committee, its members, and the Debtors, and their respective counsel, expended numerous hours in meetings and on conference calls negotiating the Settlement Agreement, providing and reviewing documents in connection therewith, documenting the terms thereof in the Plan, and resolving objections to the Disclosure Statement and the Plan to ensure a swift confirmation process. As set forth in the Disclosure Statement, the Debtors and the Creditors' Committee believed that the Settlement Agreement was in the best interests of the unsecured creditors of the Debtors' estates. *See* Disclosure Statement at 37.

8. Pursuant to the terms of the Settlement Agreement, intercreditor issues and certain debtor-creditor issues were compromised and settled. Specifically, the potential causes of action (the "Causes of Action") resolved pursuant to the Settlement Agreement included (a) fraudulent conveyance actions by Genuity against Genuity Solutions Inc. ("Genuity Solutions") and other subsidiaries in connection with the downstreaming of funds to those subsidiaries at times that the

Bank Lenders believe Genuity and Genuity Solutions were insolvent, (b) fraud claims against the officers and directors of Genuity in connection with making the draw request under the Credit Agreement on July 22, 2002, (c) whether the intercompany debt held by Genuity against Genuity Solutions could be recharacterized, in whole or in part, as equity infusions from Genuity to Genuity Solutions, (d) an objection to the allowed amount of the claims (the "Guarantee Claims") of the Bank Lenders against Genuity Solutions and Genuity Telecom Inc., as guarantors of Genuity's obligations under the Credit Agreement, (e) preference actions by Genuity Solutions against Genuity in the amount of $208 million and by Genuity against the Bank Lenders in the amount of $58 million for receipt of certain payments during the applicable preference periods, (f) the equitable subordination of Verizon claims to all other claims, (g) cross-claims and counterclaims of the directors and officers against Verizon and other parties, and (h) substantive consolidation of the Debtors' estates.

9. The Bank Lenders strongly believe that the litigation outcome of the Causes of Action would have resulted in a higher recovery to the Bank Lenders than the recovery set forth in the Settlement Agreement and, in turn, the Plan. For example, the Bank Lenders and Verizon account for substantially all of the claims against Genuity; the claims of the General Unsecured Creditors (along with the Guarantee Claims of the Bank Lenders against Genuity Solutions) predominantly are at the Genuity Solutions level. Accordingly, the probable recoveries by Genuity from Solutions and other Debtors under the Causes of Action would serve to increase the distributions to the creditors of Genuity (including the Bank Lenders) and decrease the distributions to the General Unsecured Creditors. Furthermore, without the consolidation of the estates, the Bank Lenders would have had Guarantee Claims against, among others, Genuity

Solutions.[3] The amount of the Bank Lenders' claims at the Genuity Solutions level (including against any Genuity Solutions recoveries under the Causes of Action) would have been substantially higher than the claims of the General Unsecured Creditors and, therefore, the Bank Lenders would have received a substantial portion of Genuity Solutions' distributions.

10. Despite the Bank Lenders' position on the Causes of Action, JPMorgan Chase, with the assistance of Shearman & Sterling, negotiated a settlement that, as set forth in the Disclosure Statement, provides the General Unsecured Creditors with a projected recovery of 10% to 35% (which recovery, as a result of, among other things, anticipated claims reconciliation subsequent to the filing of the Disclosure Statement, currently is in the range of 28% to 42% according to the Projected Distributions) without the expense of protracted litigation on the issues that would have diminished the amount available for distribution and extensive delay of receipt of distributions, potentially more than a year. Indeed, as set forth in the Disclosure Statement, if a sufficient number of Bank Lenders did not agree to the terms of the Settlement Agreement and, in turn, the Plan, and instead pursued certain Causes of Action, the recovery of the General Unsecured Creditors could have been as little as 3% to 6%, less the expense of such litigation.[4]

11. Not only did the efforts of JPMorgan Chase, with the assistance of Shearman & Sterling, provide a direct monetary benefit to the General Unsecured Creditors, but JPMorgan Chase, with the assistance of counsel, also ensured that a sufficient number of Bank Lenders agreed to the terms of the Settlement Agreement, thereby facilitating a consensual confirmation

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[3] Although a challenge to the amount of the Guarantee Claims may have been pursued, the Bank Lenders believe they would have prevailed in any such litigation.

[4] General Unsecured Creditors might have raised issues that, if all were decided against the Bank Lenders, could have led to a recovery for General Unsecured Creditors of between 59% and 100% of their allowed claims. However, as set forth on pages 36-46 of the Disclosure Statement, it is unlikely that all of the issues raised would have been decided against the Bank Lenders.

process. The Bank Lenders represented a substantial proportion of the creditors of the Debtors' estates and were classified in a separate class under the Plan. Had the Bank Lenders pursued certain Causes of Action and not approved of the terms of the Settlement Agreement (and, in turn, rejected the Plan), cramdown of the Plan would have been necessary, and confirmation would have been uncertain. JPMorgan Chase, as well as Shearman & Sterling, expended time discussing the Settlement Agreement and Plan with the Bank Lenders to avoid such a result. Accordingly, the efforts described herein of JPMorgan Chase and Shearman & Sterling were extensive, essential to the Plan process, and beneficial to the Debtors' estates.

B. Claims & Administration

12. The commencement of Plan negotiations coincided with the Creditors' Committee's efforts to resolve substantial claims against the Debtors, efforts that, among other things, afforded the Creditors' Committee a better understanding of the Debtors' claims base and potential recoveries. The knowledge JPMorgan Chase and Shearman & Sterling acquired in respect of the Debtors' business and claims against Genuity and Genuity Solutions during the prepetition negotiations with Level 3 Communications, LLC ("Level 3"), in connection with the Asset Purchase Agreement, dated November 27, 2002, proved to be beneficial to the Creditors' Committee in the claims resolution process as well as at other times. As a result of this knowledge, as well as JPMorgan Chase's position as Chair of the Creditors' Committee, it became necessary for JPMorgan Chase and Shearman & Sterling not only to assist in claims negotiations, but also to review proposed settlements and pleadings. This assistance facilitated the negotiation of the Settlement Agreement and the Plan, which was beneficial to all creditors and to the confirmation process. Furthermore, given the structure of the Plan, which provides separate distributions to the Bank Lenders and the General Unsecured Creditors, the negotiations

regarding general unsecured claims benefited ***only*** the General Unsecured Creditors and not the Bank Lenders.

13. In particular, in June 2003, JPMorgan Chase, on behalf of the Creditors' Committee members (other than Nortel), with the assistance of Shearman & Sterling, took the lead on and expended a number of hours both negotiating and documenting a settlement with Nortel regarding its claims. Nortel's claims consisted of, among other things, approximately $126.6 million in general unsecured claims and over $26 million in cure claims. After due diligence and presentations from Nortel and the Debtors on the merits of Nortel's claims, negotiations commenced. As a result of these efforts, the Creditors' Committee, led by JPMorgan Chase, reached a settlement with Nortel, which ultimately was approved by the Debtors and, in turn, this Court. Pursuant to that settlement, Nortel received approximately $25 million in general unsecured claims and approximately $2 million in cure claims. This settlement added significantly to the value of the estate for the benefit of all creditors. Furthermore, as more generally set forth above, pursuant to the terms of the Plan the negotiation of the reduction of Nortel's general unsecured claim from approximately $126.6 million to approximately $25 million benefited ***only*** the General Unsecured Creditors and not the Bank Lenders.

14. To further define the Debtors' asset base and otherwise assist in the negotiation of the Settlement Agreement and confirmation of the Plan, JPMorgan Chase, with the assistance of Shearman & Sterling, also participated in the negotiation of the international wind-down process, professional and estate fees, and the management incentive plan; telephone calls with various constituencies (particularly the Bank Lenders and Verizon) to ensure a smooth confirmation

process; and discussions among the Oversight Committee regarding claims and post-confirmation issues.

15. Throughout these proceedings, JPMorgan Chase and Shearman & Sterling were mindful of the tasks performed by the Creditors' Committee and the Debtors, and their respective professionals. To avoid duplication, JPMorgan Chase and Shearman & Sterling deferred to such parties where appropriate, such as in the case of certain claims negotiations and hearings.

BASIS FOR RELIEF

16. Sections 503(b)(3)(D) and (F) of the Bankruptcy Code provide for the allowance of certain administrative claims for the necessary expenses of, respectively, (i) an individual creditor who makes a substantial contribution to a case, and (ii) a member of a creditors' committee in the performance of its duties. Specifically, sections 503(b)(3)(D) and (F) of the Bankruptcy Code provide, in pertinent part:

> (b) After notice and a hearing, there shall be allowed administrative expenses . . . including –
>
> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by –
>
> (D) a creditor . . . in making a substantial contribution in a case under chapter 9 or 11 of this title . . .
>
> (F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee.

11 U.S.C. §§ 503(b)(3)(D) and (F).

17. Additionally, creditors qualifying for reimbursement pursuant to sections 503(b)(3)(D) and (F) of the Bankruptcy Code may *also* recover attorneys' fees and expenses

pursuant to section 503(b)(4) of the Bankruptcy Code. Section 503(b)(4) of the Bankruptcy Code provides, in pertinent part:

> (b) After notice and a hearing, there shall be allowed administrative expenses . . . including –
>
> (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

11 U.S.C. § 503(b)(4). Sections 503(b)(3) and (4) of the Bankruptcy Code work in conjunction to permit an entity that qualifies for reimbursement under section 503(b)(3)(D) or (F) of the Bankruptcy Code to be compensated for attorneys' and accountants' fees as well. *See* Lawrence P. King, ed., COLLIER ON BANKRUPTCY ¶ 503.11[2], 69 (15th ed. rev. 2003); *see also In re DP Partners Ltd. P'ship*, 106 F.3d 667, 671 (5th Cir. 1997).

A. <u>"Substantial Contribution" Under Section 503(b)(3)(D) of the Bankruptcy Code</u>

18. Although the term "substantial contribution" is not defined in the Bankruptcy Code, the Bankruptcy Court for the Southern District of New York has found a "substantial contribution" warranting reimbursement as an administrative expense where the efforts of the entity seeking such reimbursement resulted in "an 'actual and demonstrable benefit to the debtor's estate, the creditors, and to the extent relevant, the stockholders.'" *In re Granite Partners, L.P.*, 213 B.R. 440, 445 (Bankr. S.D.N.Y. 1997) (*citation omitted*); *see also In re U.S. Lines, Inc.*, 103 B.R. 427, 429 (Bankr. S.D.N.Y. 1989), *aff'd*, 1991 WL 67464 (S.D.N.Y. April 22, 1991). "Compensable services foster and enhance--rather than retard and interrupt--the

progress of reorganization."[5] *Granite Partners*, 213 B.R. at 446; *see also U.S. Lines*, 103 B.R. at 429.

19. Services are not compensable if they:

(a) "do not actually increase the size of the estate . . . or deplete the assets of the estate without providing any corresponding greater benefit";

(b) "duplicate those [services] rendered by the debtor or other court appointed officers, absent proof they are unwilling or unable to act";

(c) "increased the administrative costs to the estate"; or

(d) are "calculated primarily to benefit the client . . . even if they also confer an indirect benefit on the estate".

Granite Partners, 213 B.R. at 446; *see also U.S. Lines*, 103 B.R. at 429-430.

20. The purpose behind reimbursing an entity that has provided a substantial contribution "is to promote meaningful creditor participation." *In re Richton Int'l Corp.*, 15 B.R. 854, 855-6 (Bankr. S.D.N.Y. 1981); *see also In re Sedona Inst.*, 22 B.R. 74, 81 (B.A.P. 9th Cir. 1997) ("A primary objective of § 503(b)(3)(D) is to encourage creditor participation: 'often a creditor will possess both knowledge and resources which, if applied properly, could benefit the estate'") (*citation omitted*). Accordingly, courts traditionally award reimbursement of fees and expenses where "the creditor took an active role in facilitating the negotiation and successful confirmation of the plan" or "opposed an earlier plan and as a result, the court ultimately confirmed a more favorable plan." *Granite Partners*, 213 B.R. at 446, 451 (court awarded fees where firm's efforts in settlement "paved the way for confirmation and established the postconfirmation administration of the estates" and worked jointly with a trustee on the

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[5] Although case law often enunciates the standard for compensable services as services that foster and enhance the "progress of reorganization," reimbursement of such expenses is awarded in liquidating cases as well. *See, e.g., Granite Partners*, 213 B.R. at 446 (in awarding reimbursement of fees in liquidation, court refers to standard for compensable services as services fostering and enhancing the "progress of reorganization"); *In re Jelinek*, 153 B.R. 279 (Bankr. D. N.D. 1993) (awarding fees and expenses in chapter

disclosure statement approved by the Court); *see, e.g., Richton*, 15 B.R. at 856 (fees and expenses awarded where creditors' lawyer "facilitated the progress of these cases and . . . substantially aided the formulation and adoption of the Plan of Reorganization"); *In re 9085 E. Mineral Office Bldg. Ltd.*, 119 B.R. 246, 248, 253 (Bankr. D. Colo. 1990) (fees and expenses awarded where secured creditor proposed and confirmed plan that paid unsecured creditors 100% while compromising own claim). Some courts additionally grant reimbursement "without regard to the plan process, where the creditor's activities have led to a concrete, measurable monetary benefit." *Granite Partners*, 213 B.R. at 447; *see, e.g., In re McLean Indus., Inc.*, 88 B.R. 36, 39 (Bankr. S.D.N.Y. 1988) (awarding reimbursement of fees and expenses where applicant objected to a proposed sale that prompted other objections and a higher bid).

21. In determining whether to award fees pursuant to section 503(b)(3)(D) of the Bankruptcy Code, the Bankruptcy Court in this district does not require the creditor to have acted *solely* for the benefit of other creditors. *See, e.g., Richton*, 15 B.R. at 856 (noting that compensation for a substantial contribution may be granted "even if the services rendered by counsel are for its client"). While actions "calculated to primarily benefit the client" are not compensable even though there may be an indirect benefit to a debtor's estate, *Granite Partners*, 213 B.R. at 446, actions that benefit a creditor's self-interest as well as the interests of a debtor do not bar compensation. *See Richton*, 15 B.R. at 856 (noting that law firm's interest in serving its client and the debtors does not bar compensation, "[o]therwise, creditor participation in reorganization might be discouraged"); *see also U.S. Lines*, 103 B.R. at 430 ("services that confer a significant and demonstrable benefit upon the reorganization process which have not been rendered solely on behalf of a creditor's own interest should be compensated"); *9085 E.*

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11 liquidating case for substantial contribution made by attorney for creditor who formulated plan while noting economic situation of liquidating cases).

Mineral Office Bldg., 119 B.R. at 252 n.14 ("[w]ork performed over and above what was necessary to represent applicant's own client's interest which resulted in a 'substantial benefit' to the reorganization is compensable"). Moreover, an applicant must demonstrate only a "credible connection" between its efforts and progress in the bankruptcy process. *Granite Partners*, 213 B.R. at 447.

22. Finally, courts also give weight to the fact that third parties do not oppose -- indeed, even support -- the application for reimbursement of fees and expenses. *See U.S. Lines*, 103 B.R. at 430, 432 (court notes that "[c]orroborating testimony by a disinterested party attesting to a claimant's instrumental acts has proven to be a decisive factor," and awards fees "in light of" debtor's support of creditor's substantial contribution motion and determination that creditor's services benefited other creditors and the debtor's estate); *Richton*, 15 B.R. at 856 (court notes the lack of objection to motion seeking reimbursement under section 503(b)(3)(4) of the Bankruptcy Code).

B. JPMorgan Chase Is Entitled to Reimbursement Because It Has Made A Substantial Contribution to the Debtors' Estates

23. In applying the foregoing standards to the facts here, it is manifest that JPMorgan Chase and its counsel, Shearman & Sterling, have made a substantial contribution to the Debtors' estates under section 503(b)(3)(D) of the Bankruptcy Code, and JPMorgan Chase is therefore entitled to reimbursement of the fees and expenses incurred by Shearman & Sterling in connection therewith, pursuant to sections 503(b)(3)(D) and (4) of the Bankruptcy Code. For example, through their instrumental role in negotiating the settlement of the Causes of Action under the Settlement Agreement, JPMorgan Chase and Shearman & Sterling negotiated a recovery for the General Unsecured Creditors of 10% to 35% (currently projected to be 28% to

42%), a recovery that may not have been possible if costly and protracted litigation had proceeded, thus providing an actual and demonstrable benefit to the estate.

24. JPMorgan Chase and Shearman & Sterling further provided extensive assistance to the Creditors' Committee and Debtors not only in negotiating the terms of the Settlement Agreement and Plan, but also in (a) ensuring that a sufficient number of the Bank Lenders, which were placed in a separate class under the Plan, agreed to the terms of the Settlement Agreement, (b) using their knowledge acquired during the Level 3 negotiations to assist the parties with claims reconciliation, and (c) performing other functions set forth herein in furtherance of confirmation. Thus, the assistance of both JPMorgan Chase and Shearman & Sterling "[led] to an actual and demonstrable benefit to the estate" and "fostered and enhanced" the plan process. These contributions made by JPMorgan Chase and Shearman & Sterling fall squarely within the circumstances in which courts reimburse fees and expenses as an administrative expense under section 503(b)(3) of the Bankruptcy Code: (i) where "the creditor took an active role in facilitating the negotiation and successful confirmation of the plan" and (ii) "where the creditor's activities have led to a concrete, measurable monetary benefit." *See id.* at 446-47.

25. The services provided by JPMorgan Chase and Shearman & Sterling discussed herein were not "calculated to primarily benefit the client" but clearly were meant to benefit, and have benefited, all of the creditors of the Debtors' estates. Specifically, by agreeing to the Settlement Agreement, and, in turn, the Plan, JPMorgan Chase surrendered a likely higher return on its claims. *See, e.g., 9085 E. Mineral Office Bldg.*, 119 B.R. at 252 (fees awarded where creditor accepted reduction of its claim to facilitate plan process). Furthermore, JPMorgan Chase and Shearman & Sterling often assisted in reducing the claim base of the General Unsecured Creditors, with little or no benefit to the Bank Lenders. Finally, the reimbursement of

fees and expenses of Shearman & Sterling in connection with issues specific to the Bank Lenders is excluded in this Motion.

26. The services rendered by JPMorgan Chase and Shearman & Sterling were not duplicative of services performed by others. As set forth above, JPMorgan Chase and Shearman & Sterling often deferred to the Creditors' Committee and the Debtors to avoid duplication of effort. Furthermore, third parties in this bankruptcy case, including counsel to the Liquidating Trust and Nortel, believe that JPMorgan Chase and Shearman & Sterling have made a substantial contribution in these cases.

27. The facts here resemble the facts in *Richton,* in which the Bankruptcy Court for the Southern District of New York awarded Weil, Gotshal & Manges LLP ("Weil"), counsel for bank lenders, fees and expenses pursuant to sections 503(b)(3) and 503(b)(4) of the Bankruptcy Code for Weil's substantial contribution to the case. The Court observed that, as JPMorgan Chase and Shearman & Sterling have done in the present cases, Weil actively participated in "virtually every aspect of the reorganization process." *Richton*, 15 B.R. at 855. For example, Weil, among other things, (a) "facilitated operation of the banks as an organized creditors group before the Creditors' Committee" in that case was appointed, (b) "generally oversaw the relatively smooth, cooperative, and productive progress of these cases," and (c) later in the case worked to reconcile disputes, and negotiate and consummate the plan of reorganization, which the court held were "instrumental in the promulgation of the Plan of Reorganization." *Id.* Moreover, the court noted that third parties in the case supported Weil's application and Weil excluded from its request for reimbursement those fees and expenses incurred in servicing only its client. *Id.* at 856. The 503(b) Compensable Services provided here by JPMorgan Chase, with

the assistance of Shearman & Sterling, are similar to those of Weil in *Richton*, and the fees and expenses incurred in connection therewith should be reimbursed.

C. Reimbursement Under Section 503(b)(3)(F)

28. Although there are no reported decisions in the Second Circuit on section 503(b)(F) of the Bankruptcy Code, the Third Circuit has held that, upon "a straightforward reading of the statute," this provision authorizes not only the reimbursement of fees and expenses incurred by a member of an official creditors' committee in the performance of its duties, but also reimbursement of such committee members' attorneys' fees and expenses incurred in connection therewith. *In re First Merchants Acceptance Corp.*, 198 F.3d 394, 403 (3d Cir. 1999). As the Third Circuit held in *First Merchants Acceptance*:

> [i]t seems inescapable from the statutory language that when Congress enacted the 1994 Bankruptcy Reform Act and added members of creditors committees to the list in § 503(b)(3) of those who can claim "actual" and "necessary expenses," it simultaneously expanded the list of entities who are entitled to reimbursement for professional fees under § 503(b)(4).

Id. The Third Circuit, however, has cautioned that an untempered reimbursement of fees would "unnecessarily drain estate assets." *Id.* at 400.

29. Courts have delineated two factors in determining whether attorneys' fees should be awarded under section 503(b)(3)(F) of the Bankruptcy Code: (i) whether the fees were "demonstrably incurred" and (ii) whether the duties were necessary to the committee. *First Merchants Acceptance,* 198 F.3d at 403. "Necessary" services include those enumerated in section 1103(c) of the Bankruptcy Code, which lists some of the activities that a committee may perform. *See First Merchants Acceptance,* 198 F.3d at 403. Under section 1103(c) of the Bankruptcy Code, a committee may

> (1) consult with the trustee or debtor-in-possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of the plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determination as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other services as are in the interest of those represented.

11 U.S.C. § 1103(c).

30. The services need not be performed solely by the committee member, but may be performed by any individual acting on the committee member's behalf. As the Third Circuit in *First Merchants Acceptance* held:

> [t]he nature of the services does not depend on the identity of the actor; either the service is or is not incurred in the performance of the duties of such committee. For example a phone call to a creditor to negotiate a reduction in the Debtor's liability is an expense incurred in the performance of the duties of such committee, whether the call was made by a committee member, an aide to that member, or the member's attorney.

First Merchants Acceptance, 198 F.3d at 399. However, the services provided must not be to assist the committee member on the member's own behalf, such as filing a proof of claim. *See In re Worldwide Direct, Inc.*, 259 B.R. 56, 60 (Bankr. D. Del. 2001). Nor may the duties be duplicative. *See id.* at 61 Nevertheless,

> where counsel for a member has a special expertise or has been involved in a matter pre-petition and, therefore, has specialized knowledge that would assist the committee in handling a particular discreet matter, it would be appropriate for the committee in the performance of its duties to ask the member's counsel to perform work on that particular matter.

Id.

31. JPMorgan Chase, as Chair of the Creditors' Committee, with the assistance of Shearman & Sterling, was required to perform certain tasks to fulfill its responsibilities and duties. For example, JPMorgan Chase, with the assistance of Shearman & Sterling, participated in (a) the resolution of claims (particularly negotiations with Nortel), (b) negotiating the resolution of objections to the Disclosure Statement and Plan, (c) the negotiations regarding the international wind-down process, professional and estate fees, and the management incentive plan, and (d) telephone calls with various constituencies to ensure a smooth confirmation process. These tasks not only were necessary but also were conducted for the benefit of the Debtors' estates and not for JPMorgan Chase, particularly given that the results of certain tasks often were of little or no value to JPMorgan Chase and the Bank Lenders. In performing these tasks, JPMorgan Chase and Shearman & Sterling frequently brought a special knowledge of claims and the Debtors' business that they acquired pre-petition and did not duplicate the work conducted by other parties in these cases. Accordingly, JPMorgan Chase respectfully submits that, to the extent the Court finds that Shearman & Sterling's fees and expenses are not compensable under sections 503(b)(3)(D) and (4) of the Bankruptcy Code, such fees and expenses fall within the scope of permissible reimbursements under sections 503(b)(3)(F) and (4) of the Bankruptcy Code.

D. Reasonableness of Shearman & Sterling's Fees and Expenses

32. Annexed hereto as Exhibit A are schedules setting forth (a) the total number of hours billed to the 503(b) Compensable Services during the Application Period by Shearman & Sterling, along with the partners, associates, and paraprofessionals who provided 503(b) Compensable Services to JPMorgan Chase during the Application Period, and each such person's billing rate, total billed hours, and fees for such services rendered, and (b) the total amount of expenses (by category) incurred during the Application Period by Shearman & Sterling in connection with the 503(b) Compensable Services.

33. Exhibit B to this Application contains (a) detailed time entries identifying the person who performed the services, the date on which such services were performed, the amount of time spent by each individual performing them, and a detailed description of the services rendered, which records were made contemporaneously with the rendition of services by the persons rendering such services and (b) a detailed breakdown of actual and necessary out-of-pocket expenses incurred during the Application Period by Shearman & Sterling in connection with the 503(b) Compensable Services. Shearman & Sterling respectfully submits that the 503(b) Compensable Services rendered by it on behalf of JPMorgan Chase were necessary and appropriate and resulted in substantial value and benefit to the Debtors' estates.

1. S&S Fees

34. The S&S Fees itemized in Exhibits B, which are in the aggregate amount of $508,904.00 and were incurred in connection with the actions for which JPMorgan Chase seeks reimbursement, are reasonable and satisfy the requirements for reimbursement under section 503(b)(4) of the Bankruptcy Code. Section 503(b)(4) of the Bankruptcy Code provides for "reasonable" compensation for professional services rendered by an attorney, "based on the

time, the nature, the extent, and the value of such services." 11 U.S.C. § 503(b)(4). In considering the reasonableness of attorneys' fees and expenses pursuant to this section, the Bankruptcy Court in this district considers the twelve factors established in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which are as follows: (i) time and labor required; (ii) novelty or difficulty of the questions; (iii) skill required to perform the service properly; (iv) preclusion of other employment due to acceptance of case; (v) customary fee; (vi) whether the fee is fixed or contingent; (vii) time limits imposed by client or circumstance; (viii) amount involved and results obtained; (ix) attorneys' experience, reputation and ability; (x) undesirability of case; (xi) nature and length of professional relationship with client; and (xii) awards in similar cases. *See In re Texaco, Inc.*, 90 B.R. 622, 631-32 (Bankr. S.D.N.Y. 1988) (applying these twelve factors for determining fees in the context of section 503(b)(4) of the Bankruptcy Code). All of these factors justify the compensation sought herein.

35. The rates Shearman & Sterling charged JPMorgan Chase in these cases are the same rates that Shearman & Sterling charges for professional and paraprofessional services rendered in comparable bankruptcy and non-bankruptcy matters and are reasonable based on the customary compensation charged by skilled practitioners in non-bankruptcy cases in a competitive national legal market. *See Zolfo, Cooper & Co. v. Sunbeam-Oster Co. Inc.*, 50 F.3d 253, 259 (3d Cir. 1995) (in the context of section 330 of the Bankruptcy Code, the court notes that "[t]he baseline rule is for firms to receive their customary rates"); *see also, In re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13, 17-18, 20 & 21 (Bankr. S.D.N.Y. 1991) (in the context of section 330 of the Bankruptcy Code, court finds "professionals to be compensated at market rates").

36. Throughout these cases, Shearman & Sterling has expended a considerable effort to "self police" its fees by critically reviewing all time charges entered into its billing system. In that regard, Shearman & Sterling sought to carefully manage staffing to avoid duplication of effort and, where possible (after taking into consideration the nature and complexity of a matter or dispute), utilized lawyers with lower billing rates.

37. Shearman & Sterling assigned legal assistants to organize and maintain all of the pleadings filed and certain documents prepared during the Application Period. Shearman & Sterling typically charges non-bankruptcy clients for these services as well, and such services should be compensable in this case. *See In re Busy Beaver Building Centers, Inc.*, 19 F.3d 833, 849 (3d Cir. 1994) (in awarding expenses under section 330 of the Bankruptcy Court, court found touchstone for compensability of services provided by a paraprofessional is "whether non-bankruptcy attorneys typically charge and collect from their clients fees for that particular service when performed by a member of that profession, and the rates charged and collected therefor").

38. The Shearman & Sterling fees incurred by JPMorgan Chase in making a substantial contribution to the Debtors' estates as well as serving as Chair of the Creditors' Committee are reasonable based on the fees customarily charged in this district. Accordingly, JPMorgan Chase submits that the S&S Fees should be reimbursed pursuant to sections 503(b)(3) and (4) of the Bankruptcy Code.

2. **S&S Expenses**

39. Shearman & Sterling has incurred out-of-pocket disbursements during the Application Period in connection with providing the 503(b) Compensable Services totaling $13,501.61. The items included as disbursements are not included in Shearman & Sterling's

overhead; they are not, therefore, a component of the base hourly rates set by Shearman & Sterling. Thus, Shearman & Sterling's billing rates do not include components for photocopying, word processing, on-line computer services, and other charges that may be incurred by particular clients because of the exigencies of time and the services required. Shearman & Sterling's billing method, whereby only clients who use these services are charged for such services, is designed to allocate costs fairly among the firm's clients. The expenses for which JPMorgan Chase seeks reimbursement are of the type customarily charged to Shearman & Sterling's bankruptcy and non-bankruptcy clients (unless reduced in order to comply with the Administrative Order regarding Amended Guidelines for Fees and Disbursements For Professionals in Southern District of New York Bankruptcy Cases, dated April 19, 1995 (Lifland C.J.) (the "Fees Administrative Order"), as set forth below). Furthermore, Shearman & Sterling has made every effort to minimize these expenses.

40. Expenses for external services are based on invoiced cost. Shearman & Sterling negotiates volume discounts where possible and passes these savings along to clients. Expenses for internal services are based on the cost of that service to Shearman & Sterling, based on labor, materials, equipments costs, administrative costs, overhead and so forth. Accordingly, Shearman & Sterling does not make a profit on such services.

41. Some specific disbursements incurred on JPMorgan Chase's behalf include the following:

(i) Photocopying: Shearman and Sterling charges less than the $.20 per page set forth in the Fees Administrative Order, which is the same rate generally charged by Shearman & Sterling to its other clients.

(ii) Facsimiles: For facsimiles, JPMorgan Chase only seeks reimbursement for, in accordance with the Fees Administrative Order, a fixed charge of $1.25 per page for domestic transmissions (a reduction from the $1.50 per page Shearman & Sterling normally charges its clients (including JPMorgan Chase in these cases). Shearman & Sterling does not charge its clients for incoming facsimiles.

(iii) Telephone Charges: JPMorgan Chase was charged actual costs for all long distance telephone calls.

(iv) Service and Distribution of Documents: Throughout the case, Shearman & Sterling has been required to distribute documents to the Debtors, JPMorgan Chase, the Creditors' Committee, and other parties in interest, and their respective counsel. Shearman & Sterling took several steps to minimize the disbursements associated with such distributions. For example, Shearman & Sterling used e-mail or first class mail when time permitted. In certain instances, however, Shearman & Sterling was required to use hand or overnight couriers.

(v) Overtime Costs: The time constraints imposed by the circumstances of these cases required Shearman Sterling attorneys and other employees to perform a considerable amount of work at night after normal office hours, on weekends, and on holidays. These services were essential to the meeting of various deadlines imposed and the successful completion of negotiations. As a consequence, Shearman & Sterling was required to utilize some overtime secretarial help, thereby incurring a certain amount of overtime charges. Employees of Shearman & Sterling who were required to work after 8:00 p.m. were reimbursed for their reasonable meal costs and their transportation costs home. JPMorgan Chase seeks reimbursement of these costs, except that if the employee

dined before 8:00 p.m., reimbursement of such expense is sought only if the employee returned to the office to work for at least an additional hour and a half. Although Shearman & Sterling's guidelines for permissible overtime meals provides that an individual's meal may not exceed $25.00, JPMorgan Chase only seeks reimbursement herein of up to $20.00 per meal in accordance with the Fees Administrative Order.

(vi) Daytime Working Meals: JPMorgan Chase was charged the actual costs for all meals at which either the client was present and the Debtors' bankruptcy cases were discussed, or the attorneys alone worked on matters related to the Debtors' cases. Shearman & Sterling customarily charges its clients for such working meals.

42. Shearman & Sterling submits that the expenses incurred in the rendition of the 503(b) Compensable Services were necessary, reasonable, and justified under the circumstances. All of the services for which reimbursement is sought were rendered solely in the Debtors' cases.

43. Shearman & Sterling has not entered into any arrangement or agreement with any person or entity with respect to the sharing of the fees and expenses paid to it for which reimbursement is sought by JPMorgan Chase as set forth in the Motion, except as permitted by section 504(b)(1) of the Bankruptcy Code.

REQUEST FOR WAIVER OF MEMORANDUM OF LAW

44. JPMorgan Chase respectfully requests that, with respect to this Motion, the Court waive its requirement under Local Bankruptcy Rule 9013-1(b) that all motions filed with the Court be accompanied by a memorandum of law. This Motion raises no novel or complex issues of law, and JPMorgan Chase submits that a waiver of that requirement is appropriate.

NOTICE

45. A copy of this Motion has been served on (a) the Office of the United States Trustee, (b) counsel to the Liquidating Trust, and (c) counsel to Nortel. Notice of the Motion has been served on each of the other parties on the Master Service List approved by this Court's Order Pursuant to 11 U.S.C. §§ 102 and 105(a) and (d) and Bankruptcy Rules 2002(m), 9006 and 9007 Establishing Certain Notice, Case Management and Administrative Procedures and Scheduling Initial Case Conference in Accordance with Local Bankruptcy Rule 1007-2(e), dated March 21, 2003, which notice provided instructions on how to request copies of the Motion. JPMorgan Chase submits that, given the nature of the relief requested, no other or further notice need be given.

46. No previous request for the relief sought in this Motion has been made to this Court or any other court.

WHEREFORE, JPMorgan Chase respectfully requests that this Court enter an Order, substantially in the form annexed hereto as Exhibit C, (i) granting the Motion, (ii) granting JPMorgan Chase an allowed administrative expense claim in the amount of $508,904.00 for services rendered by Shearman & Sterling and $13,501.61 for out-of-pocket expenses incurred

by Shearman & Sterling in connection therewith, and (iii) granting such other relief as is just and appropriate.

Dated: New York, New York
December 31, 2003

SHEARMAN & STERLING LLP

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