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6 Attorneys for Secured Creditor,  
7 Bank of America, N.A.

8 UNITED STATES BANKRUPTCY COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

12 In re: )  
13 ) Case No. 08-32514  
14 HELLER EHRMAN LLP, )  
15 ) Chapter 11  
16 ) Debtor. ) **LIMITED OBJECTION TO THE**  
17 ) **MOTION FOR ORDER**  
18 ) **AUTHORIZING CREDITORS'**  
19 ) **COMMITTEE TO PURSUE**  
20 ) **CERTAIN ESTATE CAUSES OF**  
21 ) **ACTION**  
22 )  
23 ) DATE: March 27, 2009  
24 ) TIME: 2:30 p.m.  
25 ) PLACE: U.S. Bankruptcy Court  
26 ) 235 Pine Street, 22<sup>nd</sup> Floor,  
27 ) San Francisco, CA  
28 ) JUDGE: The Honorable Dennis Montali

23 **I. Introduction.**

24 Secured Creditor, Bank of America N.A. (the "Bank") hereby files this limited  
25 objection to the Motion for Order Authorizing Creditors' Committee to Pursue Certain  
26 Estate Causes of Action (the "Motion") filed March 6, 2009 by The Official Committee of  
27 Unsecured Creditors (the "Committee") in the above referenced case of Heller Ehrman LLP  
28 (the "Debtor"). The Committee has not shown sufficient cause to grant the relief requested

1 in the Motion. Based on the Motion and its supporting papers, the Bank has the following  
2 principal objections:<sup>1</sup>

3 1. Any order granting the Motion should make clear that, in bringing actions on  
4 behalf of the Debtor's estate or actions that would otherwise be brought by a trustee or  
5 debtor in possession (collectively, the "Estate Representative Actions"), the Committee is  
6 bringing those action in the name of the Debtor and as representative of the Debtor's  
7 bankruptcy estate. This means that the order must be clear that the Debtor and all other  
8 entities who may assert rights or claims on behalf of, or through, the Debtor, including the  
9 Committee (collectively, the "Other Entities"), will be bound by any judgment in such  
10 actions as if the Debtor itself were prosecuting these actions as the plaintiff.

11 2. The Committee and Debtor should not be allowed to split claims based on the  
12 facts and assertions underlying the Estate Representative Actions. Instead, consistent with  
13 governing Ninth Circuit authority, all claims of the Debtor arising out of the same nucleus  
14 of purported facts and allegations asserted against the Bank should be brought at the same  
15 time, by either the Debtor or Committee, on behalf of the Debtor's estate. Except as  
16 described above, the Bank takes no position as to whether it is the Committee or Debtor  
17 that brings such an action so long as the Bank is only required to mount a single defense.

18 **II. The Bank does not object to the Committee acting as the plaintiff in the Estate**  
19 **Representative Actions so long as the Committee prosecutes such actions as if it**  
20 **were the Debtor and the Debtor and all Other Entities are bound by the**  
21 **proceedings.**

22 The Bank has no objection to the Committee acting as the plaintiff in the Estate  
23 Representative Actions provided that certain fundamental judicial principles are employed  
24 by the Court. Specifically, that Committee will prosecute these actions as if it were the

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25 <sup>1</sup> For the avoidance of any doubt, the Bank disputes the validity of any claims asserted  
26 against it, whether by the Debtor, Committee, or anyone else, in connection with the  
27 Estate Representative Actions. Rather than address the purported merits of such  
28 allegations, the Bank hereby reserves all of its rights and defenses with respect to such  
asserted claims, and addresses in this limited opposition only the identity of the party that  
may bring such an action against it.

1 Debtor, and the Committee, Debtor and all Other Entities will be bound by these  
2 proceedings as if the Debtor itself were prosecuting the actions, both as a matter of issue  
3 and claim preclusion, and as a practical matter for handling discovery and other functions  
4 as the plaintiff.

5 The Bank objects, however, to the Committee acting as plaintiff to the extent that  
6 any additional burdens would be placed on the Bank's ability to defend itself from attack.  
7 For example, to ensure fairness in the contemplated litigation, any discovery requests made  
8 by the Bank for information or documents in the possession or control of either or both of  
9 Debtor and Committee should be made and served only on the party prosecuting these  
10 actions. If the Committee prosecutes these actions, the Bank's discovery requests should be  
11 made only to the Committee. The Committee, in turn, would then produce and respond to  
12 such discovery requests on behalf of itself and the Debtor. This necessarily entails that all  
13 of Debtor's business records will be preserved and fully accessible to both the Bank,  
14 through discovery, and the party prosecuting the Estate Representative Actions. The Bank  
15 objects to the Committee acting as plaintiff in the contemplated Estate Representative  
16 Actions to the extent that the Committee does not have full and complete access to all of the  
17 Debtor's business records, including all potentially privileged communications involving  
18 the Debtor relating to the Estate Representative Actions. The Bank is concerned that,  
19 absent full and complete access by the Committee, discoverable information may be  
20 withheld from production by the Committee to the Bank, to the detriment and prejudice of  
21 the Bank.

22 So long as the Committee acts on behalf of itself and the Debtor in connection with  
23 the proposed litigation, the Committee should be permitted to bring the Estate  
24 Representative Actions on behalf of the Debtor. If, however, the ability of the Bank or  
25 defendants in other actions will be impaired because it is the Committee and not the Debtor  
26 that is prosecuting the actions, or if any judgment in such actions will not be binding to the  
27 same extent as any action prosecuted by the Debtor, then the Committee should not be  
28 authorized to prosecute the Estate Representative Actions. Certainly, each of the

1 Committee, Debtor and Other Entities should be precluded from later bringing another  
2 cause of action against the Bank based on the transactional nucleus of facts underlying the  
3 Estate Representative Actions.

4 **III. The Motion fails to demonstrate why the Committee should be given a blanket**  
5 **reservation to split its claims in the face of the principles of claim preclusion.**

6 The Bank further objects to the Committee’s request for a blanket exemption from  
7 ordinary rules of claim preclusion so that it can split causes of action that might otherwise  
8 be required to be brought in a single action. If the Debtor and Committee reach an  
9 agreement for the Committee to bring the Estate Representative Actions against the Bank,  
10 the Committee must bring all actions of the Debtor, Committee, or Other Entities arising  
11 out of the operative nucleus of facts relating to the Estate Administrative Actions, and it  
12 must do so at the same time. These parties cannot carve out separate causes of action  
13 against the Bank arising out of the same general set of purported facts, and then choose  
14 when, and by whom, such causes of action will be brought.

15 The Motion fails to show why this case should be exempted from established  
16 principles of claim preclusion. In the Ninth Circuit, splitting claims is disfavored and only  
17 permitted in very limited circumstances, none of which are applicable here. “The doctrine  
18 against splitting a single cause of action refers to the compulsion to pursue in one action all  
19 the theories and remedies which might be appropriate to a grievance.” *Haphey v. Linn*  
20 *County*, 924 F.2d 1512, 1517 (9th Cir. 1991); *see In re Associated Vintage Group, Inc.*, 283  
21 B.R. 549, 556 (BAP 9<sup>th</sup> Cir. 2002). The purpose of preclusion is to “relieve parties of the  
22 cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing  
23 inconsistent decisions, encourage reliance on adjudication.” *Parklane Hosiery Co., Inc. v.*  
24 *Shore*, 439 U.S. 322 (1979) (citations omitted). Public “policy dictates that there be an end  
25 of litigation; that those who have contested an issue shall be bound by the result of the  
26 contest, and that matters once tried shall be considered forever settled as between the  
27 parties.” *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (U.S. 1981). Accordingly,  
28

1 courts have adopted a relatively narrow set of exceptions to claim preclusion, none of  
2 which apply here.

3 The Committee notes that “[t]ypically, avoidance actions are filed late in the  
4 Chapter 11 process and/or even after confirmation of a plan of reorganization” but asserts  
5 that claims should be split here because it would “facilitate the development and  
6 implementation of a plan by providing the creditors with greater certainty as to the assets  
7 that may be available for distribution” Motion, at 6-7. In essence, the Committee requests  
8 that, as a matter of convenience, it be permitted to bring, on behalf of the Debtor’s estate, a  
9 single set of claims against the Bank now at the onset of the case and to split and reserve  
10 any other claims the Committee, Debtor or any of the Other Entities may have against the  
11 Bank until some later date in the future. Splitting claims as a matter of purported  
12 convenience is not recognized by the courts of this Circuit as an exception to the general  
13 prohibition against splitting claims.

14 The Committee fails to cite any authority supporting this request to split claims that  
15 may be asserted against the Bank other than Section 26(1)(b) of the Restatement (Second)  
16 of Judgments. This is because, in practice, the exception in Section 26(1)(b) of the  
17 Restatement is narrowly applied. For example, the exception is used when a court reserves  
18 the right of a party to relitigate an action arising out of the same nucleus of facts when it  
19 dismisses an action “without prejudice.” *See e.g., Alary Corp. v. Sims (In re Associated*  
20 *Vintage Group, Inc.)*, 283 B.R. 549, 564 (B.A.P. 9th Cir. 2002). In another example, the  
21 exception is used when a state court with exclusive jurisdiction over certain state claims  
22 refuses to adjudicate federal claims arising under the same nucleus of facts because such  
23 federal claims are pending before a federal court. *See e.g., Dodd v. Hood River County*, 59  
24 F.3d 852, 862 (9th Cir. 1995). In short, the exception applies where justice would not be  
25 served by precluding a plaintiff from proceeding with a separate cause of action. Applying  
26 the Section 26(1)(b) exception to this case would be an unprecedented application of this  
27 narrow exception; the Bank is not aware of any case where a court has reserved a right to  
28 later bring claims because it would be more convenient to the requesting party.



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Debtor. ) PROOF OF SERVICE BY U.S. MAIL  
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19 ) San Francisco, CA  
20 ) JUDGE: The Honorable Dennis Montali  
21 )  
22 \_\_\_\_\_ )

23 I. Michael P. Ellis, the undersigned, hereby declare as follows:

24 I am employed in the City of San Francisco, State of California, in the office  
25 of a member of the bar of this Court, at whose direction the service was made. I am  
26 over the age of eighteen years, and not a party to the within action. My business  
27 address is Pillsbury Winthrop Shaw Pittman LLP, 50 Fremont Street, San Francisco,  
28 CA 94105-2228. My mailing address is 50 Fremont Street, P. O. Box 7880, San

1 Francisco, CA 94120-7880. On March 20, 2009, I served the following document  
2 titled

3  
4 ○ **LIMITED OBJECTION TO THE MOTION FOR ORDER  
AUTHORIZING CREDITORS' COMMITTEE TO PURSUE  
5 CERTAIN ESTATE CAUSES OF ACTION**

6 on the parties in this action as follows:

7 **[See Attached Service List]**

- 8  
9  **(BY MAIL)** I caused each envelope, with postage thereon fully prepaid, to be placed in  
10 the United States mail at San Francisco, CA. I am readily familiar with the practice of  
11 Pillsbury Winthrop Shaw Pittman LLP for collection and processing of correspondence  
12 for mailing, said practice being that in the ordinary course of business, mail is deposited  
13 in the United States Postal Service the same day as it is placed for collection.
- 14  **(BY FACSIMILE)** The above-referenced document was transmitted by facsimile  
15 transmission and the transmission was reported as complete and without error to the  
16 numbers listed above.
- 17  **(BY EMAIL TRANSMISSION)** The above-referenced document was transmitted via  
18 electronic transmission to the persons at the electronic-email addresses indicated on the  
19 attached service list.
- 20  **(BY PERSONAL SERVICE)** I delivered to an authorized courier or driver authorized  
21 by \_\_\_\_\_ to receive documents to be delivered on the same date. A proof of service  
22 signed by the authorized courier will be filed forthwith.
- 23  **(BY OVERNIGHT COURIER)** I am readily familiar with the practice of Pillsbury  
24 Winthrop Shaw Pittman LLP for collection and processing of correspondence for  
25 overnight delivery and know that the document(s) described herein will be deposited in  
26 a box or other facility regularly maintained by Federal Express for overnight next  
27 business day delivery.

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

Executed this 20<sup>th</sup> day of March, 2009, at San Francisco, California.

\_\_\_\_\_  
/s/ Michael P. Ellis (Cal. Bar. No. 209434)  
Michael P. Ellis

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