

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

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In re:

BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,<sup>1</sup>

Debtors.  
-----X

Chapter 11

Case No. 09-12074-KJC

Jointly Administered

**MOTION OF THE OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS FOR ENTRY OF AN ORDER,  
NUNC PRO TUNC TO THE DATE OF THE APPOINTMENT OF  
THE COMMITTEE, PURSUANT TO 11 U.S.C. §§ 105(A), 1102(B)(3)(A)  
AND 1103(C), CLARIFYING THE REQUIREMENT TO PROVIDE  
ACCESS TO INFORMATION AND SETTING AND FIXING  
CREDITOR INFORMATION SHARING PROCEDURES AND PROTOCOLS**

The Official Committee of Unsecured Creditors (the “Committee”) of Building Materials Holding Corporation, *et al.*, the debtors and debtors-in-possession in the above-captioned cases (the “Debtors”), by and through its proposed counsel hereby moves this Court for entry of an order *nunc pro tunc* to the date of the appointment of the Committee, pursuant to sections 105(a), 1102(b)(3)(A) and 1103(c) of title 11 of the United States Code (as amended, the “Bankruptcy Code”), clarifying the requirement to provide access to information for constituent creditors and setting and fixing creditor information sharing procedures and protocols. In support of this motion (the “Procedures Motion”), the Committee respectfully represents as follows:

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<sup>1</sup> The Debtors, along with the last four digits of each Debtor’s tax identification number, are as follows: Building Materials Holding Corporation (4269); BMC West Corporation (0454); SelectBuild Construction, Inc. (1340); SelectBuild Northern California, Inc. (7579); Illinois Framing, Inc. (4451); C Construction, Inc. (8206); TWF Construction, Inc. (3334); H.N.R. Framing Systems, Inc. (4329); SelectBuild Southern California, Inc. (9378); SelectBuild Nevada, Inc. (8912); SelectBuild Arizona, LLC (0036); and SelectBuild Illinois, LLC (0792).

## **JURISDICTION**

1. This Court has jurisdiction to consider the Procedures Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). The statutory predicates for the relief requested herein are sections 105(a), 1102 and 1103 of the Bankruptcy Code.

## **PRELIMINARY STATEMENT**

2. The Bankruptcy Abuse Prevention and Consumer Protection Act (the “Act”) revised section 1102 to include paragraph (b)(3), which requires official committees of unsecured creditors to provide access to information for and solicit and receive comments from creditors who hold claims of the kind represented by a particular committee and who are not appointed to the committee. As many bankruptcy courts have recognized, the lack of specificity in section 1102(b)(3)(A) and (B) could potentially create significant issues for debtors and committees since it does not set out any procedures, protocols or guidelines and fails to define various terms contained within the amendment. Additionally, section 1102(b)(3) fails to provide any guidance with regard to the type of information committees are required to share with other creditors. Section 1102(b)(3) also does not provide any guidance with regard to sharing material that is protected by attorney-client work product, testimonial or other substantive privileges, that is designated confidential, and that may not be disclosed to certain persons pursuant to contract, agreement or applicable law. Indeed, the requirements of section 1102(b)(3) may conflict with or cause the Committee to derogate from, *inter alia*, its fiduciary and statutory duties set forth under section 1103 of the Bankruptcy Code.

3. Having recognized the need to address these discrepancies and ambiguities of section 1102(b)(3), several bankruptcy courts have been asked by either the debtor or the

committee to consider motions almost identical to the present one.<sup>2</sup> Indeed, in *Refco Inc.*, when presented with an order similar to the one presented by this Procedures Motion, that Court explained that with such protective orders “the balance has been achieved by not requiring in the first instance – that is without further court order – the Committee’s disclosure of information (a) that could reasonably be determined to be confidential and non-public or proprietary, (b) the disclosure of which could reasonably be determined to result in general waiver of the attorney-client or other applicable privilege, or (c) whose disclosure could reasonably be determined to violate an agreement, order of law, including applicable securities laws.”<sup>3</sup> From the time the Court rendered its decision in *Refco*, other bankruptcy courts presented with these types of motions have also entered orders that address the issues and concerns of the debtor and committee, create uniform procedures and balance and reconcile the inconsistency between the requirement of section 1102(b)(3) on the one hand, and the fiduciary duties of committees to keep confidential protected information, on the other hand.

4. By this Procedures Motion, the Committee respectfully requests that this Court approve the proposed creditor information sharing procedures and protocols order substantially in the form attached hereto as **Exhibit A** *nunc pro tunc* to the date of the Committee’s appointment. The proposed order clarifies the requirement under section

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<sup>2</sup> The motions filed in these cases can be located on the electronic case filing system of the respective bankruptcy courts as follows: *FLYiInc.*, Bankruptcy Court, District of Delaware, Case No. 05-20011 (MFW) (Docket No. 145); *Nobex Corporation*, Bankruptcy Court, District of Delaware, Case No. 05-20050 (MFW) (Docket No. 116); *Musicland Holdings Corp.*, Bankruptcy Court, Southern District of New York, Case No. 06-10064 (SMB) (Docket No. 367); *Calpine Corporation, et al.*, Bankruptcy Court, Southern District of New York, Case No. 05-60200 (BRL) (Docket No. 494); *Airway Industries, Inc.*, Bankruptcy Court, Western District of Pennsylvania, Case No. 06-20224 (JKF) (Docket No. 100); *Luminent Mortgage Capital, Inc.*, Bankruptcy Court, District of Maryland, Case No 08-21389 (Docket No. 127); *Worldspace, Inc.*, Bankruptcy Court, District of Delaware, Case No. 08-12412 (PJW) (Docket No. 210); *Everything But Water, LLC*, Bankruptcy Court, District of Delaware, Case No. 09-10649 (MFW) (Docket No. 145).

<sup>3</sup> *Refco, Inc., et al.*, Bankruptcy Court, Southern District of New York, Case No. 05-60006 (RDD) (the Court rendering Memorandum Decision on Official Committee’s Motion for an Order Regarding Access to Information under 11 U.S.C. § 1102(b)(3)(A) and granting proposed Order (Docket No. 1025) p. 16.

1102(b)(3) to provide access to information and solicit and receive comments and fix procedures and protocols with respect thereto and institutes uniform procedures under section 1102(b)(3). The relief sought by the Committee is not only for its benefit, but also benefits the Debtors by providing the Debtors with the assurance that their confidential information will remain confidential.

### **BACKGROUND**

5. On June 16, 2009 (the “Petition Date”), each of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Court”).

6. No trustee or examiner has been appointed in these cases. The Debtors continue to manage their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

7. On June 26, 2009, the office of the United States Trustee for the District of Delaware (the “US Trustee”) appointed three members to the Committee pursuant to sections 1102(a) and 1102(b) of the Bankruptcy Code. The Committee represents the interests of all of the unsecured creditors of the Debtors. The Committee elected to engage Arent Fox LLP as its counsel.

### **RELIEF REQUESTED**

8. Section 1103(c) sets forth the powers and duties of creditor committees. Specifically, section 1103(c) authorizes the Committee to, *inter alia*, consult with the Debtors, investigate the Debtors, participate in the formulation of a plan and perform such other services as are in the interest of those represented. *See* 11 U.S.C. § 1103.

9. Additionally, as part of the Committee's responsibilities, the newly-amended section 1102(b)(3)(A) requires the Committee to provide access to information to all unsecured creditors of the Debtors. *See* 11 U.S.C. § 1102.

10. By this Procedures Motion, the Committee seeks entry of an order, *nunc pro tunc* to June 26, 2009, clarifying the requirements of section 1102(b)(3)(A) and (B) of the Bankruptcy Code and instituting uniform procedures under section 1102(b). The relief requested herein will help ensure that confidential, privileged, proprietary and/or material non-public information will not be disseminated to the detriment of the Debtors' estates, will aid the Committee in performing its statutory function and create a cost effective and efficient process by which the Committee can comply with its obligations under section 1102(b)(3)A.

#### **BASIS FOR RELIEF REQUESTED**

##### **Statute Does Not Define "Access to Information"**

11. Section 1102 of the Bankruptcy Code governs the appointment of statutory creditors' and equity security holders' committees. *See* 11 U.S.C. § 1102(a). Specifically, section 1102(b)(3) provides as follows:

A committee appointed under subsection (a) shall --

- (A) provide access to information for creditors who --
  - (i) hold claims of the kind represented by that committee; and
  - (ii) are not appointed to the committee;
- (B) solicit and receive comments from the creditors described in subparagraph (A); and
- (C) be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A).

11 U.S.C. § 1102.

12. When a statute is clear and unambiguous, “the sole function of the courts is to enforce it according to its terms.” *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)(quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). However, in “rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters . . . the intention of the drafters, rather than the strict language, controls.” *Id.* at 242-43 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (internal quotations omitted)).

13. The Committee respectfully submits that section 1102(b)(3)(A) is vague, unclear and ambiguous. The statute simply requires a committee “to provide access to information,” yet sets forth no guidelines as to the type, kind and extent of the information to be provided. In its extreme, section 1102(b)(3)(A) could be read as requiring a committee to provide access to all information provided to it by a debtor, or developed through exercise of its investigative function, regardless of whether the information is confidential, privileged, proprietary or material non-public information, and regardless of whether disseminating such information implicates securities laws disclosure requirements. *See* 17 C.F.R. §§ 243.100 to 243.103 (2005). Although the Committee does not believe that such an interpretation of section 1102(b)(3)(A) can be supported, there is a need to clarify the scope of this new section.

14. The legislative history does not provide any further guidance on this point and merely reiterates the language of section 1102(b)(3). *See* H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 87 (2005) (“Section 405(b) requires the committee to give creditors having claims of the kind represented by the committee access to information. In addition, the committee must solicit and receive comments for these creditors and, pursuant to court order, make additional reports and disclosures available to them”).

15. Given the ability to share information through the Internet or other electronic means, the drafters of section 1102(b)(3) likely intended this provision to mean that a committee's constituency should have easier access to relevant public information about a debtor without the burden of retaining counsel to monitor the numerous proceedings within a bankruptcy case. Congress could not have intended for a committee to be required to provide unfettered access to every type and kind of information that a committee receives from a debtor. If this had been the intention, section 1102(b)(3) would then frustrate numerous provisions of the Bankruptcy Code, including the plenary authority to obtain information and act in a fiduciary capacity pursuant to section 1103(c) of the Bankruptcy Code.

16. Absent clarification, a statutory committee's efforts may be frustrated because debtors will be reluctant to share confidential, sensitive financial and strategic information with a committee -- the exact information a committee needs and typically receives to assist it in the discharge of its fiduciary obligations. Moreover, committees will be reluctant to pursue an investigation of potential targets of litigation on behalf of a debtor's estate, and to develop their own analyses of estate assets. Absent relief of the kind sought herein, the Debtors will undoubtedly be concerned that information shared with the statutory fiduciary may be shared with the public, including competitors and interested acquirors. Similarly, committees will be concerned that the fruits of their own investigation may be disseminated to inappropriate parties. In turn, these concerns will impede a statutory committee's own efforts to obtain information, which will undermine the committee's ability to maximize creditor recoveries. Certainly, the drafters could not have intended section 1102(b)(3) to hinder the Committee's authority under section 1103(c) of the Bankruptcy Code. These statutes must be harmonized consistently with the overall purposes of chapter 11.

## **Expense**

17. If the Committee is unable to establish uniform procedures, it is faced with the prospect of simultaneously dealing with multiple creditor constituents on a creditor by creditor basis. Absent the requested order in the Procedures Motion, the Committee could be required to expend substantial time and resources complying with the amendments. The procedures are designed to reduce time and expense and avoid interferences with the reorganization efforts.

18. In addition to the foregoing, consideration must be given to establishing a process that is supported by the size and type of the case and the number and type of constituent creditors, including the financial capabilities and liquidity of the debtor. Here, given the alleged limited assets and cash flow, the Debtors and the estates simply cannot support the kind of disclosures that might be warranted in a typical large case. The costs and expense of compliance are issues in this proceeding. It is cost prohibitive to deal with these issues on a creditor-by-creditor basis. In an effort to maximize the value of the estates and to reduce administrative costs associated with compliance, a process needs to be created. Efficiency and expense supports the protocols proposed by the Committee. The proposed protocols will enable the Committee to avoid incurring unnecessary administrative expenses.<sup>4</sup>

19. The proposed protocols will effectively and efficiently streamline compliance and create uniformity for the benefit of all constituent creditors.

## **Creditors' Committees Rights and Powers**

20. Section 1103 of the Bankruptcy Code sets forth the rights and powers of a committee. *See* 11 U.S.C. § 1103. Those rights and powers include “consult[ing] with the . . . debtor in possession concerning the administration of the cases” (11 U.S.C. § 1103(c)(1)) and

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<sup>4</sup> Any expenses incurred by the Committee should be considered and need to be addressed in the DIP Budget.

“investigat[ing] 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 a plan...” (11 U.S.C. § 1103(c)(2)).

21. In order to assist a statutory committee with faithfully performing its function – which includes evaluating a debtor’s reorganization strategy – debtors will provide committees with confidential, material non-public information, including in draft form. *See* 7 COLLIER ON BANKRUPTCY ¶ 1103.05[2][a], at 1103-29 & 30 (15<sup>th</sup> ed. rev. 2005). In that regard, debtors are often unwilling to disseminate this kind of information unless it will be kept confidential by each committee member and, in certain instances, committee professionals.

22. Section 1102(b)(3)(A), however, provides no guidance on the extent to which a committee is obligated to provide confidential, proprietary or material non-public information to its constituency.

23. One example of the many issues implicated by a literal reading of section 1102(b)(3) of the Bankruptcy Code relates to sharing a debtor’s material contracts with a committee. As is typical with companies in competitive industries, many of the debtor’s contracts (including key executive employee agreements) contain confidentiality provisions. Thus, the Debtors may be contractually precluded from sharing such information with the Committee if they are required to give unfettered access to such information to creditors at large, some of who may be competitors of the counterparty to the contract and may be seeking such information for their own parochial interests. Congress’ broad brushstroke has produced a frightening landscape for debtors such as this one that is trying to stabilize its business and enhance the related value available to creditors.

24. Another concern arises because the Committee's provision of unfettered access to information to its constituents could impact the attorney-client and work product privileges between the Committee and its counsel or other agents. *See Generally In re Baldwin-United Corp., D.H.*, 38 B.R. 802, 805 (Bankr. S.D. Ohio 1984) (creditors' committee entitled to protection of attorney-client privilege). This is particularly relevant given the Committee's crucial investigative powers and the likelihood that the Committee will be gathering information relevant to potential causes of action of the estate.

### **Court's Inherent Power**

25. Under section 105(a) of the Bankruptcy Code, the Court may "issue any order. . . that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a). The Committee believes the relief requested herein is necessary for the Committee to fulfill its statutory function as contemplated by section 1103(c) of the Bankruptcy Code.

26. The Committee submits that the relief requested herein is appropriate and well within the authority of this Court. As section 1102(b)(3)(A) of the Bankruptcy Code might otherwise have a substantial "chilling effect" on information the Debtors may be willing to share with the Committee, or on the Committee's development of independent analyses, it cannot be seriously questioned that the relief requested herein is "necessary and appropriate to carry out the provisions of [the Bankruptcy Code]" pursuant to section 105(a) of the Bankruptcy Code.

### **NOTICE**

27. The Committee provided notice of this Procedures Motion to: (a) the Debtors, (b) the Office of the United States Trustee and (c) all parties that have filed notices of appearance and request for service of documents in this case (collectively, the "Notice Parties"). The Committee submits that, under the circumstances, no other or further notice is required.

**NO PRIOR REQUEST**

No previous request for the relief sought herein has been made to this or any other court.

**CONCLUSION**

WHEREFORE, the Committee respectfully requests that the Court grant the relief requested by this Procedures Motion and enter an order granting the Procedures Motion *nunc pro tunc* to June 26, 2009, and awarding such other and further relief as may be just and proper.

Dated: Wilmington, DE  
July 10, 2009

Benesch Friedlander Coplan & Aronoff, LLP

/s/ Bradford J. Sandler

Bradford J. Sandler, Esquire (No. 4142)

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*Proposed Counsel for the Official Committee  
of Unsecured Creditors*

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

----- X  
In re:

BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 09-12074-KJC

Jointly Administered

Hearing Date: 8/27/09 at 3:30 p.m.

Objection Deadline: 8/20/09 at 4:00 p.m.  
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**NOTICE OF MOTION**

To: Office of the United States Trustee and all parties requesting notice pursuant to  
Bankruptcy Rule 2002

The Official Committee of Unsecured Creditors of Building Materials Holding Corporation *et al.*, by and through it's undersigned counsel, has filed an Motion for Entry of an Order, *Nunc Pro Tunc* to the Date of the Appointment of the Committee, Pursuant to 11 U.S.C. §§ 105(A), 1102(B)(3)(A) and 1103(C), Clarifying the Requirement to Provide Access to Information and Setting and Fixing Creditor Information Sharing Procedures and Protocols (the "Motion").

You are required to file a response, if any, to the attached Motion on or before **August 20, 2009 at 4:00 pm. (ET)**.

At the same time, you must serve a copy of the response upon movant's attorneys:

Bradford J. Sandler, Esq.  
Benesch, Friedlander, Coplan & Aronoff LLP  
222 Delaware Ave., Suite 801  
Wilmington, DE 19801

Christopher J. Giaimo, Jr., Esq.  
Arent Fox LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036

<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269); BMC West Corporation (0454); SelectBuild Construction, Inc. (1340); SelectBuild Northern California, Inc. (7579); Illinois Framing, Inc. (4451); C Construction, Inc. (8206); TWF Construction, Inc. (3334); H.N.R. Framing Systems, Inc. (4329); SelectBuild Southern California, Inc. (9378); SelectBuild Nevada, Inc. (8912); SelectBuild Arizona, LLC (0036); and SelectBuild Illinois, LLC (0792).

A HEARING ON THIS MATTER WILL BE HELD ON **AUGUST 27, 2009 AT 3:30 P.M. (ET)** BEFORE THE HONORABLE CHIEF JUDGE KEVIN J. CAREY AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, WILMINGTON, DELAWARE, COURT ROOM NO. 5.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED WITHOUT FURTHER NOTICE OR HEARING.

July 10, 2009

BENESCH, FRIEDLANDER, COPLAN &  
ARONOFF LLP

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*Proposed Counsel for the Official  
Committee of Unsecured Creditors*

**EXHIBIT A**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

----- X  
In re:

BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,<sup>1</sup>  
Debtors.

Chapter 11

Case No. 09-12074-KJC

Jointly Administered  
----- X

**ORDER REGARDING CREDITOR ACCESS TO INFORMATION AND  
SETTING AND FIXING CREDITOR INFORMATION SHARING PROCEDURES  
AND PROTOCOLS PURSUANT TO 11 U.S.C. §§ 105(A), 1102(B)(3) AND 1103(C)**

Upon the motion, dated July 10, 2009 (the "Motion"), filed by the Official Committee of Unsecured Creditors of Building Materials Holding Corporation, *et al.*, the debtors and debtors-in-possession in the above-captioned cases (the "Debtors"), seeking an order pursuant to sections 105(a), 1102(b)(3) and 1103(c) of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (as amended, the "Bankruptcy Code"), fixing and clarifying the Committee's requirement to provide access to information and solicit and receive comments and setting and fixing creditor information sharing procedures and protocols *nunc pro tunc* to June 26, 2009, the date the Committee was appointed; and the Court having considered the Committee's proposed creditor information sharing procedures and protocols, and having received no objection to the relief sought therein, and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY FOUND AND DETERMINED THAT:

A. Jurisdiction and Venue; Core Proceeding. The Court has jurisdiction to grant the relief provided for herein pursuant to 28 U.S.C. §§ 157 and 1334. This matter constitutes a core proceeding within the meaning of 28 U.S.C. § 157(b).

<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269); BMC West Corporation (0454); SelectBuild Construction, Inc. (1340); SelectBuild Northern California, Inc. (7579); Illinois Framing, Inc. (4451); C Construction, Inc. (8206); TWF Construction, Inc. (3334); H.N.R. Framing Systems, Inc. (4329); SelectBuild Southern California, Inc. (9378); SelectBuild Nevada, Inc. (8912); SelectBuild Arizona, LLC (0036); and SelectBuild Illinois, LLC (0792).  
GENBUS/684182.1

B. Statutory Predicates. The statutory predicates for the relief sought in the Motion are sections 105(a), 1102(b)(3) and 1103 of the Bankruptcy Code.

C. Adequacy of Notice. Notice of the Motion was timely, adequate, proper and sufficient and constituted the best notice practicable under the particular circumstances, and no other or further notice of the Motion is required.

D. Opportunity to be Heard. A reasonable opportunity to object or be heard with respect to the Motion and the relief requested therein and granted in this Order has been afforded.

NOW THEREFOR, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED  
THAT:

1. Objections. All objections to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, including all reservations of rights included therein, which are not otherwise resolved in this Order, are overruled on the merits.

2. Motion. The Motion is granted to the extent provided herein.

3. Access To Creditor Information. In satisfaction of the Committee's obligations to provide access to information for creditors and solicit and receive comments in accordance with section 1102(b)(3)(A) and (B) of the Bankruptcy Code, and to otherwise clarify and fix the requirements to provide access to information for creditors ("Creditor Information Protocol"), the Committee may, in its reasonable discretion, but has no obligation to do so, until the earliest to occur of dissolution of the Committee, dismissal of these chapter 11 cases, or conversion of these chapter 11 cases, or upon further order of the Court:

(a) Establish and maintain an electronic mail address for creditors to submit questions and comments to the Committee.

(b) Establish and maintain a password protected Internet-accessed website (the "Committee Website") for the benefit of constituent unsecured creditors who have registered for access with the Committee that may provide, without limitation:

- (1) general information concerning the chapter 11 cases of the Debtors including, case dockets and docket filings, or access or links or the internet address to the case dockets and docket filings, and general information concerning significant parties in the cases;
- (2) quarterly Committee written reports summarizing recent proceedings, events and public financial information;
- (3) highlights of significant and material events in the cases;
- (4) a calendar with upcoming significant and material events or hearings in the cases;
- (5) the internet address, access or links to the claims docket as and when established by the Debtors or any claim agent retained in the case;
- (6) a general overview of the chapter 11 process, press releases (if any) issued by each of the Committee and the Debtors;
- (7) responses to creditor questions, comments and requests for access to information; provided, that the Committee may privately provide such responses in the exercise of its reasonable discretion, including in the light of the nature of the information request and the creditor's agreements to appropriate confidentiality and trading of claims or interests constraints;
- (8) answers to frequently asked questions;
- (9) access or links or the internet address to other relevant websites;
- (10) No access or link will bypass the login and password requirements of the PACER or ECF websites; and
- (11) To obtain a PACER account and password, contact the PACER Service Center at (800) 676-6856 or visit its website via the Internet at [www.pacer.psc.uscourts.gov](http://www.pacer.psc.uscourts.gov)

4. Privileged and Confidential Information. The Committee shall not be required or obligated to disseminate to any entity (all references to "entity" herein shall be as defined in section 101(15) of the Bankruptcy Code, "Entity"): (i) without further order of the Court, confidential, proprietary, or other non-public information concerning the Debtors including (without limitation) with respect to the acts, conduct, assets, liabilities and financial condition of the Debtors, the operation of the Debtors' business the desirability of the continuance of such business and sale of the Debtors' business or assets or other strategic on financial transactions, or any other matter relevant to these cases or to the formulation of one or more chapter 11 plans (including any and all confidential, proprietary, or other

nonpublic materials of the Committee) whether provided (voluntarily or involuntarily) by or on behalf of the Debtors or by any third party or prepared by or for the Committee or (ii) any other information if the effect of such disclosure would constitute a breach or violation under any agreement or contract to which the Debtors are parties (collectively, the “Confidential Information”), or (iii) any other information if the effect of such disclosure would constitute a general waiver of the attorney-client, work-product, or other applicable privilege possessed by the Committee.

5. Information Subject to Discovery. Any information received (formally or informally) by the Committee from any entity in connection with an examination pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure or in connection with any formal or informal discovery in any contested matter, adversary proceeding or other litigation in these chapter 11 cases or related to the Debtors shall not be governed by the terms of this Order but, rather, by any order governing such discovery or adversary proceeding, contested matter or other litigation.

6. Identification. The Debtors shall assist the Committee in identifying any Confidential Information concerning the Debtors that is provided by the Debtors or their agents or professionals, or by any third party, to the Committee, its agents and professionals.

7. Creditor Information Requests. If a creditor (the “Requesting Creditor”) submits a written request (including via electronic mail) (the “Information Request”) for the Committee to disclose or provide information, the Committee shall as soon as practicable, but no more than twenty (20) days after receipt of the Information Request, provide a response to the Information Request (including on the Committee Website) (the “Response”), including providing access to the information requested or the reasons the Information Request cannot be complied with. If the Response is to deny the Request because the Committee believes the Information Request implicates Confidential Information that need not be disclosed pursuant to the terms of this Order or otherwise under 11 U.S.C. §1102(b)(3)(A), or that the Information Request is unduly burdensome, the Requesting Creditor may, after a good faith effort to meet and confer with an authorized representative of the Committee regarding the Information Request and the Response, seek to compel such disclosure for cause pursuant to a motion. Such motion shall be served

and the hearing on such motion shall be filed with the Bankruptcy Court and noticed to all required interested parties and scheduled pursuant to the rules of the court. The Committee shall not object to any Requesting Creditor's request to participate in any such hearing by telephone conference. Nothing herein shall be deemed to preclude the Requesting Creditor from requesting (or the Committee objecting to such request) that the Committee provide the Requesting Creditor a log or other index of any information specifically responsive to the Requesting Creditor's request that the Committee deems to be Confidential Information or protected by the attorney/client, work product, or any other privilege. Furthermore, nothing herein shall be deemed to preclude the Requesting Creditor from requesting that the Court conduct an in camera review of any information specifically responsive to the Requesting Creditor's request that the Committee claims is Confidential Information or subject to the attorney/client, work product, or other privilege.

8. Committee Response. In its Response to an Information Request for access to Confidential Information, the Committee shall consider whether

(a) the Requesting Creditor is willing to agree in writing to reasonable confidentiality and trading restrictions with respect to such Confidential Information and represents that such trading restrictions and any information-screening process complies with applicable securities laws, Bankruptcy Rules or contract; and

i. Claims Traders: If the Requesting Creditor is involved in claims trading, the Requesting Creditor must file a document with the Court, and serve upon counsel to the Committee, the Debtors and the United States Trustee confirming that it has established an information screening barrier ("Screening Wall") that will be enforced, that no Confidential Information will be revealed to claims traders, trading desk or any persons or entities involved in trading and listing the name of the person that has been designated as monitor to ensure compliance with the provisions hereof; and

ii. Market Competitors: If the Requesting Creditor is a competitor of the Debtors (or is a prospective competitor) and the information requested may impair the Debtors, no information will be disclosed unless the Court orders such disclosure after notice and a hearing; and

(b) under the particular facts, such agreement and any information-screening process that it implements will reasonably protect the confidentiality of such information; provided,

however, that if the Committee elects to provide access to Confidential Information on the basis of such confidentiality and trading restrictions, the Committee shall have no responsibility for the Requesting Creditor's compliance with, or liability for violation of, applicable or contract laws.

Any disputes with respect to this paragraph shall be resolved as provided in the preceding paragraph, and, to the extent applicable, the next paragraph.

9. Release of Confidential Information of Third Parties. In addition, if the Information Request implicates Confidential Information of the Debtors (or any other Entity) and the Committee agrees that such request should be satisfied, or if the Committee on its own wishes to disclose such Confidential Information to creditors, the Committee shall demand (the "Demand") for the benefit of the Debtors' creditors: (a) if the Confidential Information is information of the Debtors, by submitting a written request, each captioned as a "Committee Information Demand," to ("Debtors' Counsel"), stating that such information will be disclosed in the manner described in the Demand unless the Debtors object to such Demand on or before fifteen (15) days after the service of such Demand; and, after the lodging of such an objection, the Requesting Creditor may file a motion on notice, pursuant to the rules of this Court and as set forth in Paragraph 7 above, seeking a ruling with respect to the Demand under 11 U.S.C. § 704(a)(7); and (b) if the Confidential Information is information of another Entity, by submitting a written request to such Entity and its counsel of record, with a copy to Debtors' Counsel, stating that such information will be disclosed in the manner described in the Demand unless such Entity objects to such Demand on or before fifteen (15) days after the service of such Demand; and, after the lodging of such an objection, the Committee, the Requesting Creditor, such Entity and the Debtors shall schedule a hearing with the Court pursuant to the rules of this Court seeking a ruling with respect to the Demand.

10. Limitations. Nothing in this Order requires the Committee to provide access to information or solicit comments from any Entity that has not demonstrated to the satisfaction of the Committee, in its sole discretion, or to the Court, that it holds claims of the kind described in section 1102(b)(3) of the Bankruptcy Code.

11. Exculpation. The Debtors and the Committee and any of their respective directors, officers, employees, members, attorneys, consultants, advisors and agents (acting in such capacity) (collectively, the "Exculpated Parties"), shall not have or incur any liability to any Entity (including the Debtors and their affiliates) for any act taken or omitted to be taken in connection with the preparation, dissemination, or implementation of the Creditor Information Protocol, the Committee Website and other information to be provided pursuant to section 1102(b)(3) of the Bankruptcy Code provided that the act of or omission is performed in compliance with the terms of this Order; provided, however, that the foregoing shall not affect the liability of any Exculpated Party protected pursuant to this paragraph 11 that otherwise would result from any such act or omission to the extent that such act or omission is determined in a final non-appealable order to have constituted a breach of fiduciary duty, gross negligence, or willful misconduct, including, without limitation, fraud and criminal misconduct, or the breach of any confidentiality agreement or Order. Without limiting the foregoing, the exculpation provided in this paragraph shall be coextensive with any Exculpated Party's qualified immunity or similar protections under applicable law.

12. Effective Date. This Order shall be effective as of June 26, 2009.

13. Binding. This Order shall be binding in all respects upon the Debtors, Committee and affected parties and any successors thereto and all creditors and parties-in-interest.

14. Nonseverable. The provisions of this Order are nonseverable and mutually dependent.

15. Jurisdiction. This Court shall retain exclusive jurisdiction to interpret and enforce the provisions of this Order in all respect and further to hear and determine all matters arising from the construction and implementation of this Order.

Dated: \_\_\_\_\_, 2009  
Wilmington, Delaware

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UNITED STATES BANKRUPTCY JUDGE