

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

HERITAGE FUNDING GROUP, INC.,
Debtor.

Case No.: 3:07-bk-00492-JAF
Chapter 11

**MOTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF HERITAGE FUNDING GROUP, INC. FOR ORDER CLARIFYING THE
OBLIGATIONS OF THE COMMITTEE UNDER 11 U.S.C. § 1102(B)(3)**

The Official Committee of Unsecured Creditors (the "Committee") of Heritage Funding Group, Inc. ("HFG" or the "Debtor") moves the Court for entry of an Order clarifying the Committee's obligations under 11 U.S.C. § 1102(b)(3) to provide unsecured creditors who are not members of the Committee with access to information, and in support thereof the Committee respectfully states:

I. BACKGROUND

1. On February 8, 2007 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business and manage its properties as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. On February 23, 2007, the United States Trustee appointed the Committee and designated the following seven members to serve: (i) Walt Jevremov; (ii) Charles Mangum; (iii) George H. Taylor; (iv) Timothy D. Reed; (v) William C. Sample; (vi) Thomas James Grove; and (vii) James L. Scanlon. At its organizational meeting, the Committee selected

Akerman Senterfitt, P.A. ("Akerman") as counsel to represent it during the pendency of the Debtor's Chapter 11 case.

3. On March 13, 2007, the Committee filed its Application to Retain Akerman as Counsel Nunc Pro Tunc to February 28, 2007 (the "Application").

4. On March 15, 2007, the Court entered its Order Authorizing Retention and Employment of Akerman as Counsel to the Committee.

5. As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-08, 119 Stat. 23 (2005) ("BAPCPA"), Section 1102(b)(3) states

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(b)(3) (2006).

6. BAPCPA does not define the "information" which Section 1102(b)(3)(A) and (B) requires an official creditors' committee to make available to its constituency or state how it is to be delivered.

7. By this Motion, the Committee seeks entry of an order clarifying the Committee's obligations under Section 1102(b)(3)(A) and (B) of the Bankruptcy Code, and establishing protocols by which reasonable compliance with the Bankruptcy Code may be accomplished regarding the dissemination and solicitation of information to the unsecured creditor body.

II. DISCUSSION

1. The Court has jurisdiction to grant the relief requested pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b).

2. Venue of this Chapter 11 case is proper under 28 U.S.C. §§ 1408 and 1409(a).

3. The legislative history of Section 1102(b)(3) does not provide any guidance as to the method, type or extent of information to be provided and merely reiterates the language of the Code section. *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.").

4. Determining the proper scope of Section 1102(b)(3)(A) and the mechanisms under which a creditors' committee should be required to make information available to its constituents should be analyzed in light of the diverse duties and functions of a creditors' committee and the relative size of the Chapter 11 case.

5. An official committee of creditors plays a pivotal role aiding, assisting, and monitoring the debtor to ensure that the unsecured creditors' views are heard and their interests are protected. *Pan Am Corp. v. Delta Airlines, Inc.*, 175 B.R. 438, 514 (S.D.N.Y. 1994).

6. Committees are the primary negotiating bodies for a Chapter 11 plan; they provide supervision of the debtor and execute an oversight function; they investigate the debtor's assets and affairs; and they may also perform other services as are in the interest of the unsecured creditor body. *Johns-Manville Sales Corp. v. Doan (In re Johns-Manville Corp.)*, 26 B.R. 919, 925 (Bankr. S.D.N.Y. 1983).

7. In fulfilling these roles the members of a committee owe fiduciary duties of loyalty and care to their constituents, which are all of the debtor's unsecured creditors. *The Bohack Corp. v. Gulf & Western Indus., Inc. (In re Bohack Corp.)*, 607 F.2d 258, 262 n. 4 (2d Cir. 1979). Additionally, under certain circumstances, the bankruptcy court may give a creditors' committee the authority to act not only on behalf of the unsecured creditor body but also as a fiduciary on behalf of the debtor's estate. *See Official Committee of Unsecured Creditors of Cybergenics Corp. v. Cybergenics Corp.*, 330 F.3d 548 (3rd Cir. 2003) (granting derivative standing to the creditors' committee to pursue fraudulent transfer avoidance litigation for the benefit of the Chapter 11 estate).

8. A powerful tool of the committee is its ability to obtain confidential, sensitive financial and strategic information of a debtor, and to use such information to best advantage in its negotiations or litigation with the debtor and other interested parties. However, requiring unfettered access to such information for the benefit of every interested person may impair the committee's negotiation and litigation opportunities. Additionally, competitors of the debtor may obtain and use such information to that competitor's advantage and to the disadvantage of the debtor. Consequently, a debtor may be reluctant to provide such valuable information to the committee, which, in turn, could inhibit the committee's pursuit of an investigation of potential assets to recover on behalf of the debtor's estate.

9. In light of the foregoing, maintaining the parties' reasonable expectations of confidentiality of information and of the committee's deliberative process is critical to the proper exercise of the committee's fiduciary duties as well as the performance of its oversight and negotiation functions.

10. Therefore, a committee must selectively disclose certain information that it has developed on its own through investigation and negotiation with the debtor, balancing the need to preserve access to sensitive information and to protect the attorney-client privilege with the committee's fiduciary duties to the unsecured creditors and the right of the unsecured creditors to be informed of material developments in the case.

11. Since the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, creditors' committees, in many cases, have sought similar relief to the relief sought herein. *See In re Refco, Inc.*, 2005 WL 3543953 (Bankr. S.D.N.Y. 2005); *In re Falcon Air Express, Inc. and Majel Aircraft Leasing Corp.*, (Case No.: 06-11877-BkC-AJC) (Bankr. S.D. Fla. 2006); *ITG Vegas, Inc., et al.*, (Case No.: 06-16350-BKC-PCH) (Bankr. S.D. Fla. 2006).

12. In each of these cases the protocol for access and dissemination of information proposed to comply with Section 1102(b)(3) included the creation and maintenance of an internet-accessed website for the benefit of creditors who had claims of the kind represented by the creditors' committees. The Committee has determined that an appropriate website may be established and maintained with only an extremely moderate expense, and that the utilization of the website will result in corresponding savings of the time and expense which would otherwise be incurred in responding to individual creditor inquiries.

13. In complying with the requirements of Section 1102(b)(3), courts should consider the relative size of the debtor's business, the value of assets of the estate, the potential distribution to unsecured creditors, and the number of unsecured creditors holding claims of the kind represented by the committee to ensure that the burden on the estate and the creditors'

committee does not outweigh the benefit of forming a creditors' committee and providing the unsecured creditor body with information during the pendency of the case.

14. Attached hereto as Exhibit "A" is a proposed order setting forth detailed procedures and protocols which the Committee believes will fulfill its obligation to provide access to information for general unsecured creditors, but which will not unduly burden the Committee in the exercise of its duties or impair its ability to utilize confidential, sensitive, or tactically critical information to the best advantage of the interests of the Committee's constituency.

15. The methods as set forth on Exhibit "A" by which the Committee in good faith proposes to comply with Section 1102(b)(3) are reasonable and commensurate with the relative size of the Debtor's business, the value of assets of the estate, the potential distribution to unsecured creditors, and the number of creditors holding claims of the kind represented by the Committee.

III. CONCLUSION

WHEREFORE, the Official Committee of Unsecured Creditors of Heritage Funding Group, Inc., respectfully requests that the Court enter an Order, substantially in the form annexed hereto as Exhibit "A", clarifying the Committee's obligations under 11 U.S.C. § 1102(b)(3) and establishing protocols by which reasonable compliance with the Bankruptcy Code may be accomplished regarding the dissemination and solicitation of information to the unsecured creditor body.

Dated: April 6, 2007.

AKERMAN SENTERFITT

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COUNSEL FOR THE OFFICIAL COMMITTEE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished either by electronic notification or U.S. Mail, postage prepaid and properly addressed, this 6th day of April, 2007, to:

Heritage Funding Group, Inc.
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/s/ John B. Macdonald

Attorney

Exhibit "A"

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

HERITAGE FUNDING GROUP, INC.,

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Chapter 11

ORDER GRANTING THE MOTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF HERITAGE FUNDING GROUP, INC. FOR ORDER CLARIFYING THE OBLIGATIONS OF THE COMMITTEE UNDER 11 U.S.C. § 1102(B)(3)

This case is before the Court upon the Motion of the Official Committee of Unsecured Creditors (the "Committee") of Heritage Funding Group, Inc. ("HFG" or the "Debtor") for entry of an Order clarifying the Committee's obligations under 11 U.S.C. § 1102(b)(3) to provide unsecured creditors who are not members of the Committee with access to information. The Court having reviewed the Motion and otherwise being fully advised in the premises, it is:

ORDERED:

1. The Motion is granted.
2. In satisfaction of the Committee's obligations to provide access to information for unsecured creditors in accordance with Section 1102(b)(3)(A) and (B) of the Bankruptcy Code, the Committee shall, until the earliest to occur of dissolution of the Committee, dismissal, or conversion of this Chapter 11 case of HFG (the "Case"), or further order of the Court:

(a) Provide access to information for the Committee's constituents through web based technology (the "Committee Website"), which may include, but shall not be limited to, the following information:

(1) General information concerning the Case, including the composition of the Committee, access to certain docket filings, and information summarizing recent proceedings, events, and public financial information;

(2) A calendar with upcoming significant events in the case;

(3) A general overview of the Chapter 11 process;

(4) Press releases (if any) issued by the Committee and the Debtor;

(5) Answers to frequently asked questions, discussing, among other things, the role of the Committee, the responsibility of the Committee members, and the filing of a proof of claim; and

(6) A section providing creditors the ability to e-mail the Committee questions and receive a response, provided that the Committee may privately provide such responses to the inquiring creditor in the exercise of its reasonable discretion, in light of the nature of the information requested and the creditor's agreement to adhere to any appropriate confidentiality constraints; and

(7) Any other information to be posted at the direction of the Court, the Committee or its counsel;

(b) Provide notice to the unsecured creditors of the existence of the Committee Website by mailing one letter to all unsecured creditors listed on the Debtor's Schedule F; and

(c) Provide such other services as required by the Court, the Committee and its counsel to assist the Committee in complying with the requirements of the Section 1102(b)(3) of the Bankruptcy Code.

3. The Committee and its individual members and their respective representatives, advisors, and counsel shall provide access to information to creditors holding claims of the kind

represented by the Committee, unless the Committee in its discretion determines that disclosure of such information is not in the best interest of the Committee and/or the Debtor's estate and that such disclosure would likely (1) impair the Committee's negotiations or litigation with certain interested parties, (2) inhibit the Committee's pursuit of an investigation of potential assets to recover on behalf of the debtor's estate, or (3) violate the attorney-client and/or work-product privilege.

4. None of the Committee members or its counsel, nor any of their respective agents or advisors (the "Committee Parties"), shall have or incur any liability to any entity (including the Debtor and its affiliates) for any act taken or omitted in good faith in compliance with paragraphs 2 and 3, or any other provision of this Order; provided, however, that the foregoing shall not preclude or abridge the right of any creditor to move the Court for an order requiring the production of other or further information, to the extent available.

5. Except as otherwise set forth herein, nothing herein shall expand or diminish the qualified immunity under applicable law of any Committee Party, or any of their respective agents, advisors or counsel.

6. The Committee is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

7. This Order shall be effective as of the date hereof; however, the terms of this Order shall apply to all information governed by such Order, including information in the Committee's possession on or prior to February 23, 2007.

8. This Order shall be binding in all respects upon the Debtor, Heritage Funding Group, Inc., and any successor thereto.

9. This Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

DATED this ____ day of April, 2007, in Jacksonville, Florida.

Jerry A. Funk
United States Bankruptcy Judge

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