

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW JERSEY**

IN RE:

LE GOURMET CHEF, INC.,  
f/k/a Houseware Stores, Inc.,

DEBTOR.

CASE No.: 06-17364 (DHS)

CHAPTER 11

**MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS FOR AN ORDER ESTABLISHING PROCEDURES  
FOR COMPLIANCE WITH 11 U.S.C. § 1102(b)(3)**

The Official Committee of Unsecured Creditors (the “Committee”) of Le Gourmet Chef, Inc., (the “Debtor”), by its counsel, Lowenstein Sandler PC (“Lowenstein”), hereby files this Motion (the “Motion”) for an Order Establishing Procedures for Compliance with section 1102(b)(3) of the Bankruptcy Code. In support of the Motion, the Committee represents as follows:

**I. Jurisdiction**

1. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §157(b). The Motion is based on sections 105, 107, 1102 and 1103 of the Bankruptcy Code.

**II. Background**

2. On August 8, 2006 (the “Petition Date”), the Debtor filed its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”). The Debtor continues in the management and operation of its businesses and property as a debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed.

3. On August 16, 2006, the Office of the United States Trustee for the District of New Jersey appointed the Committee pursuant to section 1102(a)(1) of the Bankruptcy Code. The Committee selected Simon Property Group, represented by Ronald Tucker, Esq., as its chairperson (the “Chairperson”).

4. Following an auction on August 22, 2006, the Court approved the sale of substantially all of the assets of the Debtor to the Kitchen Collection, Inc. (the “KCI”). The sale to KCI closed on August 28, 2006.

5. Since the Committee’s appointment, the Committee’s professionals have worked closely with the Debtor and its professional to, among other things, obtain information regarding the Debtor’s business and financial affairs, and maximize the value of the Debtor’s assets.

6. As part of the Debtor’s and Committee’s cooperative efforts in this case, the Debtor may have already or may in the future provide to the Committee certain confidential, proprietary and/or non-public information (the “Confidential Information”). The Committee members receive such Confidential Information as a result of their service on the Committee and in the fulfillment of their fiduciary duty (the “Fiduciary Duty”).

7. The Committee and the Debtor have already engaged in discussions regarding the status of the Debtor’s case and the Debtor’s plan to liquidate its assets. The Committee believes that sufficient funds may exist for a distribution to be made to unsecured creditors. However, the funds are limited and the Committee has sought to limit the administrative expenses and secured claims incurred by the Debtor’s estate. The Committee

expects to work closely with the Debtor in the formulation of a plan of orderly liquidation and has received and likely will continue to receive Confidential Information from the Debtor in the process.

### **III. Relief Requested**

8. The Committee, its individual members and their respective representatives, advisors and counsel, seek an Order, effective as of the Committee Formation Date, clarifying that section 1102(b)(3)(A) of the Bankruptcy Code does not require the Committee to disseminate proprietary, privileged, non-public Confidential Information concerning the Debtor and deeming the Committee and its advisors to be in compliance with section 1102(b)(3) of the Bankruptcy Code as a result of the implementation of the certain procedures set forth below (the “Procedures”).

9. Lowenstein intends to establish an e-mail address to allow unsecured creditors to send questions and comments in connection with this case (the “E-Mail Correspondence”). The e-mail address will be [LGC@lowenstein.com](mailto:LGC@lowenstein.com).

### **IV. Basis for the Relief Requested**

10. Section 1102(b)(3) imposes requirements for the Committee to “provide access to information” to, and to “solicit and receive comments” from, similarly situated creditors that are not members of the Committee. 11 U.S.C. § 1102(b)(3).

11. Section 1103(c) provides for the primary duties of the Committee, which include, among other things, investigating the acts of the debtor and participating in the formulation of a plan. In order to properly perform these duties, the Committee must have access to the Debtor’s proprietary documents and information. To aid the communication

between the Debtor and the Committee, the Committee may agree to be bound by certain confidentiality requirements.

12. Section 1102(b)(3)(A) is unclear and ambiguous. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) does not define what “information” the Committee must make available to its constituency. *See, In re Refco Inc.*, 336 B.R. 187 (Bankr. S.D.N.Y. 2006). More specifically, “section 1102(b)(3)(A) might be interpreted to impose an obligation contrary to other applicable laws and the Committee’s fiduciary duties and hamper the Committee’s performance under section 1103 of the Bankruptcy Code.” *Refco*, 336 B.R. at 190.

13. The legislative history behind section 1102(b)(3) is scarce. The House Report merely states that:

“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 from these creditors, and pursuant to court order, make additional reports or disclosure available to them.” *Id.* FN 1, *quoting* H.R.Rep. No. 109-31, 109 Cong., 1<sup>st</sup> Sess. 87 (2005).

14. Section 1102(b)(3) may require, although the Committee does not believe so, the disclosure of all information requested by its constituency, irrespective of confidentiality agreements or securities law disclosure requirements. *See*, 11 C.F.R. §§ 234.100 to 243.103 (2005).

15. The Committee shares the concerns expressed by the official committees of unsecured creditors and by the debtors in cases such as: *Refco*, *Calpine*, *FLYi*, *Nobex*, *Pliant*

and *Nellson Nutraceutical*. In *Refco* and *Calpine*, by filing similar motions, the committees wrote:

Absent clarification, a statutory committee's efforts may be frustrated because Debtors will be reluctant to share confidential information, sensitive financial and strategic information with the committee - the exact information a committee needs and typically receives to assist it in the discharge of its fiduciary obligations. In addition, committees will be reluctant to pursue an investigation of potential targets of litigation on behalf of the debtors' estate, and to develop their own analyses of estate assets. Absent relief of kinds sought herein, 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.

*Refco*, Case No. 05-60006 (RDD), Docket # 133, ¶ 14 (Bankr. S.D.N.Y. 2005); *Calpine*, Case No. 05-60200 (BRL), Docket # 494, ¶ 14.(Bankr. S.D.N.Y. 2005); *In re FLYi, Inc., et al.*, 05-20011, Docket # 23, ¶ 8 (Bankr. D.Del. 2005)(MFW)(Debtors stated that they “would be highly discouraged from giving Confidential Information to the Creditors Committee”); *In re Nobex Corp.*, 05-20050, Docket # 116, ¶ 13 (Bankr. D.Del. 2005)(MFW)(same); *In re Nellson Nutraceutical, Inc.*, 06-10072, Docket # 17, ¶ 19 (Bankr. D. Del. 2006)(PJW)(same).

16. The statutory provision requiring the Committee to provide access to information to other general unsecured creditors could impact the attorney-client privilege and work product privileges between the Committee and their counsel or other agents. *Cf. In re Baldwin-United Corp.*, 38 B.R. 802, 805 (Bankr. S.D. Ohio 1984)(creditors' committee entitled to protection of attorney-client privilege). In *Refco*, the court stated that “[m]aintaining

confidentiality against unsecured creditors generally may be necessary to preserve the committee's attorney-client privilege." *Refco*, 336 B.R. at 197 citing *In re Subpoena Duces Tecum*, 978 F.2d 1159, 1161 (9<sup>th</sup> Cir. 1992). The court further noted that "one should proceed cautiously concerning the disclosure of information that could reasonably have the effect of waiving the attorney-client or other privilege...notwithstanding Bankruptcy Code section 1102(b)(3)." *Id.*

17. Various statutory provisions empower this Court to grant the relief requested herein. Section 105(a) of the Bankruptcy Code states that the Court may "issue any order...that is necessary or appropriate to carry out the provisions of this title." The Committee believes that the relief requested herein is necessary for the Committee to fulfill its statutory mandates under sections 1102(b)(3) and 1103(c). Because section 1102(b)(3)(A) of the Bankruptcy Code might have a substantial "chilling effect" on information the Debtor may be willing to share with the Committee, or on the Committee's development of independent analysis, the Committee's request is "necessary and appropriate to carry out the provisions of the Bankruptcy Code." *See also Refco*, Docket #: 133, ¶ 27; *Calpine*, Docket # 494, ¶ 27. Section 107(b)(1) of the Bankruptcy Code provides that "on request of a party in interest, the bankruptcy court shall... protect an entity with respect to a trade secret or confidential search, development, or commercial information." Section 107(b)(1) and Bankruptcy Rule 9018 empower this Court to protect the Debtor's Confidential Information from disclosure to general creditors.

18. In addition, the relief requested herein is substantially similar to that approved by other courts. *See Refco*, Docket # 888 and Docket # 1025; *Calpine*, Docket # 811,

*In re Pliant Corp.*, Case No. 06-10001 (Bankr. D. Del 2006), Docket #344; and *In re FLYi, Inc.*, Case No. 05-20011 (Bankr. D. Del 2005), Docket #145.

19. The requirements of sections 1102(b)(3) and 1103(c) must be properly balanced. The Procedures will provide a means for general unsecured creditors to contact the Committee or its counsel and will provide those creditors access to information as required by section 1102(b)(3). However, the Procedures also recognize and take into account the interests of the Debtor in protecting the Confidential Information from being disseminated to the general public and the limited resources available in this case.

#### **V. Notice**

20. Notice of this Motion was served by facsimile, email, or hand delivery on (a) the United States Trustee for the District of New Jersey; (b) counsel to the Debtor; (c) those parties who have requested service of notices pursuant to Bankruptcy Rule 2002; and (d) counsel for the Debtor's secured lenders. The Committee asserts that such notice is proper and no other or further notice is necessary.

#### **VI. Waiver of Oral Argument**

21. Unless an objection to this Motion is filed and not resolved, the Committee requests entry of the annexed Order without oral argument.

#### **VII. No Prior Request**

22. The Committee has not previously sought the relief requested herein from this or any other Court.

WHEREFORE, the Committee requests the entry of an Order effective as of August 16, 2006 (a) deeming the Committee and its advisors to be in compliance with section 1102(b)(3) of the Bankruptcy Code as a result of the implementation of the Procedures; (b) finding that the Committee is not required to share the Debtor's Confidential Information with its constituents and (c) granting such other related relief as the Court deems appropriate.

Dated: September 25, 2006

Respectfully submitted:

/s/ John K. Sherwood  
LOWENSTEIN SANDLER, PC  
John K. Sherwood, Esq.  
Thomas A. Pitta, Esq.  
65 Livingston Avenue  
Roseland, New Jersey 07068  
Telephone: (973) 597-2500  
Fax: (973) 597-2400

*Counsel to the Official Committee of  
Unsecured Creditors of LeGourmet Chef,  
Inc., et al*

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY

Caption in Compliance with D.N.J. LBR 9004-2(c)

Kenneth A. Rosen (KR 4963)  
John K. Sherwood (JS 2453)  
Thomas A. Pitta, Esq. (TP 3018)  
**LOWENSTEIN SANDLER, PC**  
65 Livingston Avenue  
Roseland, New Jersey 07068  
973.597.2500

*Counsel to the Official Committee Of  
Unsecured Creditors*

IN RE:

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CASE No.: 06-17364 (DHS)

CHAPTER 11

**ORDER ESTABLISHING PROCEDURES FOR COMPLIANCE BY THE  
OFFICIAL COMMITTEE OF UNSECURED CREDITORS WITH 11 U.S.C. §§  
1102(b)(3) AND 1103(c) EFFECTIVE AS OF JANUARY 13, 2006**

The relief set forth on the following pages numbered two (2) through four

(4) is hereby **ORDERED**:

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Debtor: Le Gourmet Chef, Inc., f/k/a Houseware Stores, Inc.  
Case No: 06-17364 (DHS)  
Caption: **Order Establishing Procedures for Compliance By The Official Committee of Unsecured Creditors With 11 U.S.C. §§ 1102(b)(3) and 1103(c) Effective as of January 13, 2006**

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Upon the motion (the “Motion”) of the Official Committee of Unsecured Creditors (the “Committee”), in the case of the above-captioned Debtor, for an entry of an order (the “Order”) establishing procedures for compliance by the Committee with 11 U.S.C. § 1102(b)(3); and due and proper notice of the Motion has been given; and it appearing that no other or further notice is required; and it appearing that the Court has jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that good and sufficient notice has been given; and after due deliberation and sufficient cause appearing therefore;

**IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:**

1. That the Motion<sup>1</sup> is granted;
2. That the relief granted herein shall be effective as if this Order had been entered on August 16, 2006;
3. That the Committee and its individual members and their respective representatives, advisors and counsel shall be deemed to be in compliance with Sections 1102(b)(3) and 1103(c) of the Bankruptcy Code by (a) establishing an email address ([lge@lowenstein.com](mailto:lge@lowenstein.com) (the “Email Address”)) to allow unsecured creditors to

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<sup>1</sup> Capitalized terms not otherwise defined herein shall retain the meanings ascribed thereto in the Motion.

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Debtor: Le Gourmet Chef, Inc., f/k/a Houseware Stores, Inc.  
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send questions and comments in connection with this case and (b) authorizing the Committee and its counsel to review and, in their reasonable discretion, to respond to the E-Mail Correspondence;

4. That notwithstanding any construction of Section 1102(b)(3)(A) of the Bankruptcy Code to the contrary, the Committee and its individual members and their respective representatives, advisors and counsel shall not be authorized or required, without an order of this Court or consent of the Debtor, which consent shall not be unreasonably withheld, to disseminate any (a) confidential, proprietary, privileged, or non-public information (including information provided under the Confidentiality Agreement) concerning the Debtor, including (without limitation) with respect to 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, or any other matter relevant to this case or to the formulation of a chapter 11 plan, whether provided by or on behalf of the Debtor or by any third party, or (b) any other information if, in the reasonable opinion of the Committee's counsel, the effect of such disclosure would constitute a general waiver of the attorney-client, work-product, or other privilege, to anyone other than its members, counsel, advisors, consultants and all of their agents and employees;

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5. That the Debtor shall assist the Committee in identifying any confidential, proprietary, or non-public information concerning the Debtor that is provided to the Committee, its agent, and professionals by the Debtor or its agents or professionals;

6. That none of the Committee members or its counsel, any of their respective agents or advisors (“Exculpated Parties”), shall have or incur any liability to any entity (including the Debtor) for any act taken or omitted to be taken in accordance with the procedures described herein provided, however, that the foregoing shall not affect the liability of any Exculpated Party protected herein that otherwise would result from any such act or omission to the extent that such act or omission results from an intentional breach of fiduciary duty, gross negligence or willful misconduct;

7. That without limiting the foregoing, the exculpation provided herein shall be coextensive with any Exculpated Party’s, and any of their respective agents, advisors counsel, qualified immunity under applicable law;

8. That 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, that it holds claims of the kind described in Section 1102(b)(3) of the Bankruptcy Code;

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9. That within five (5) days of the entry of this Order, the Committee's counsel shall serve this Order on all of the Debtor's known creditors and all parties requesting notice pursuant to Fed. R. Bankr. P. 2002 and 9010(b); and

10. That this Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.