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Creditors

11 **UNITED STATES BANKRUPTCY COURT**  
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 In re: ) Case No.: 06-00510-LA  
14 **SERACARE LIFE SCIENCES, INC.,** ) Chapter 11  
15 Debtor. ) **MOTION OF THE OFFICIAL**  
16 ) **COMMITTEE OF UNSECURED**  
17 ) **CREDITORS FOR ORDER APPROVING**  
18 ) **INFORMATION ACCESS PROTOCOL**  
19 ) **UNDER SECTION 1102(B)(3) OF THE**  
20 ) **BANKRUPTCY CODE**  
21 ) [No Hearing Required]

22 The Official Committee of Unsecured Creditors (the “Committee”) of SeraCare Life  
23 Sciences, Inc. (the “Debtor”), hereby moves this Court (the “Motion”) for entry of an order pursuant  
24 to sections 105(a), 107(b), and 1102(b)(3)(A) of title 11 of the United States Code (the “Bankruptcy  
25 Code”) and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”),  
26 approving the Committee’s adoption of certain information sharing procedures pursuant to newly-  
27 enacted section 1102(b)(3)(A) of the Bankruptcy Code.

28 Specifically, the Committee requests authority to (a) withhold confidential and privileged  
information under the “information access” prong of the statute, and (b) satisfy its duties under the  
“comment solicitation” prong of the statute by means of a link to a web page posted on, and

1 accessible via, Committee counsel’s existing internet site (or, if infeasible, via another web site  
2 dedicated to the Committee). The Committee is cognizant of the Debtor’s operating constraints and,  
3 hence, seeks to satisfy its information sharing obligations in as streamlined and inexpensive a  
4 manner as possible. To the extent that Committee counsel incurs out-of-pocket expenses in  
5 connection with the establishment and maintenance of the web page, the Committee requests  
6 authority to seek reimbursement from the Debtor for such charges (which are estimated to be  
7 approximately \$1,000 to \$3,000, depending on the potential need for a unique domain name and  
8 dedicated hardware to host the site).

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **JURISDICTION**

11 1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334.  
12 Venue of this case and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

13 2. The statutory predicates for the relief sought herein are sections 105(a), 107(b), and  
14 1102(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9018.

15 **BACKGROUND**

16 3. On March 22, 2006, the Debtor filed a voluntary petition for relief under chapter 11  
17 of the Bankruptcy Code. The Debtor continues to operate its business and manage its property as a  
18 debtor-in-possession. No trustee or examiner has been appointed herein.

19 4. On April 11, 2006, the United States Trustee appointed the Committee in the  
20 Debtor’s bankruptcy case pursuant to section 1102 of the Bankruptcy Code. The Committee is  
21 presently comprised of the following three members: (a) Alix Partners, LLC; (b) Sereux, Inc.; and  
22 (c) DCI Management Group, LLC. The chairperson of the Committee is Michael P. Murphy of Alix  
23 Partners, LLC. To date, no other committees have been appointed in the Debtor’s case.

24 **ARGUMENTS & AUTHORITIES**

25 5. On April 20, 2005, as part of the Bankruptcy Abuse Prevention & Consumer  
26 Protection Act of 2005, Congress enacted new section 1102(b)(3) of the Bankruptcy Code. Section  
27 1102(b)(3)(A) states, in relevant part, that a creditors’ committee appointed under section 1102(a) of  
28 the Bankruptcy Code shall “provide access to information for creditors who (i) hold claims of the

1 kind represented by that committee; and (ii) are not appointed to the committee[.]” 11 U.S.C. §  
2 1102(b)(3)(A). Section 1102(b)(3)(B) further provides that a committee must “solicit and receive  
3 comments from the creditors described in subparagraph (A)[.]” 11 U.S.C. § 1102(b)(3)(B).

4 6. Sections 1102(b)(3)(A) and (B) do not indicate how a creditors’ committee should  
5 provide “access to information” for creditors, or “solicit and receive comments” from creditors.  
6 There is no legislative history to section 1102(b)(3) to provide guidance on the application of this  
7 new provision, or whether it could be construed to apply to confidential or privileged information.

8 7. For purposes of this Motion, the term “Confidential Information” means any **non-**  
9 **public** or **proprietary** information of the Debtor or the Committee, including, without limitation,  
10 information concerning the Debtor’s assets, liabilities, business operations, projections or analyses.<sup>1</sup>  
11 The term “Privileged Information” means any information that is subject to the **attorney-client** or  
12 **attorney work product** privilege, whether such privilege is solely controlled by the Committee or is  
13 a joint privilege with the Debtor or some other party.

14 8. As is typical, the Committee expects that the Debtor will share Confidential  
15 Information and may, in instances where a joint defense is appropriate, also share Privileged  
16 Information with the Committee in connection with this case. The Committee will also assemble its  
17 own Confidential Information and/or Privileged Information.

18 9. The Committee will use the Confidential Information and Privileged Information to  
19 assess and analyze, among other things, the Committee’s strategies in the case, the prospects for the  
20 Debtor’s business, and the alternatives that are available to maximize returns to unsecured creditors.  
21 Of course, if there were a risk that Confidential Information given by the Debtor to the Committee  
22 would have to be turned over to any creditor, the Debtor would be highly discouraged from giving  
23 Confidential Information to the Committee in the first place. In fact, the Debtor might conclude that  
24 it could not give such information to the Committee at all. The inability of the Committee to gain  
25 access to Confidential Information, in turn, could limit the ability of the Committee to fulfill its

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27 <sup>1</sup> Confidential Information would not, however, include information that: (i) is or becomes generally available to  
28 the public or is or becomes available to the Committee on a non-confidential basis, in each case to the extent that such  
information became so available other than by a violation of a contractual, legal, or fiduciary obligation to the  
Committee or the Debtor; or (ii) was in the possession of the Committee prior to its disclosure by the Debtor and is not  
subject to any other duty or obligation to maintain confidentiality.

1 statutory obligations under the Bankruptcy Code. Hence, maintaining the confidentiality of  
2 Confidential Information and Privileged Information is critical for the Committee to adequately  
3 perform its duties in this case.

4 10. Public dissemination of Confidential Information could also harm the Debtor's estate.  
5 Among other things, the Debtor's business strategies and intended initiatives would become known  
6 to the Debtor's competitors, thereby allowing such competitors to adjust to the Debtor's plans and  
7 reduce or eliminate value of such initiatives to the estate. In addition, other Confidential Information  
8 of the Debtor, such as compensation levels or other employee information, is likely sensitive in  
9 nature, and public disclosure of such information would cause morale and similar problems for the  
10 Debtor, as well as potentially violate federal and state privacy laws.

11 11. The enactment of new section 1102(b)(3)(A) raises the issue of whether the  
12 Committee could be required to share Confidential Information or Privileged Information with any  
13 unsecured creditor. Given the importance of this issue, the Committee seeks an order of the Court  
14 confirming that section 1102(b)(3)(A) does not authorize or require the Committee to provide access  
15 to Confidential Information or Privileged Information to any creditor that the Committee represents.

16 12. Along similar lines, section 1102(b)(3)(B) does not specifically address how a  
17 committee should "solicit and receive comments" from its constituents. The Committee proposes to  
18 satisfy this statutory requirement by creating and maintaining a web page, accessible via Committee  
19 counsel's existing internet sit, dedicated to the *SeraCare Creditors' Committee*.<sup>2</sup> This web page will  
20 contain (a) links to public sources for pleadings and other case information (such as Pacer and this  
21 Court's internet site), (b) documents that can be downloaded or viewed using the Adobe Acrobat  
22 reader, (c) links to email addresses for Committee counsel to whom questions or information  
23 requests may be directed, and (d) periodic updates or reports to creditors generally. In each instance,  
24 of course, only non-confidential and non-privileged information would be made available to  
25 unsecured creditors.

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27  
28 <sup>2</sup> If this method proves infeasible, however, the Committee may seek to establish a web page with a unique domain dedicated to the Committee— as opposed to a web presence accessible through counsel's existing internet site.

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

7           14.     The Committee submits that section 1102(b)(3) is unclear. The statute requires a  
8 committee “to provide access to information” and to “solicit and receive comments” from creditors,  
9 yet sets forth no guidelines as to the type, kind and extent of the information to be provided or the  
10 method for soliciting input from creditors. In its extreme, section 1102(b)(3)(A) could be read as  
11 requiring a committee to provide access to all information provided to it by a debtor, or developed  
12 through exercise of its investigative function, regardless of whether the information is confidential,  
13 privileged, proprietary or material non-public information and regardless of whether disseminating  
14 such information implicates securities laws disclosure requirements. See 17 C.F.R. §§243.100 to  
15 243.103 (2005); see also In re FLYi, Inc., Case No. 05-20011 (MFW) (Bankr. D. Del. Nov. 17,  
16 2005) (providing that creditors’ committees are not authorized or required to provide access to  
17 confidential information of the debtors or to privileged information); In re Refco, Inc., Case No. 05-  
18 60006 (RDD) (Bankr. S.D.N.Y. Nov. 1, 2005) (provisionally granting the motion of the committee  
19 for an order clarifying the requirement to provide access to information pursuant to section  
20 1102(b)(3)(A) until the court further clarifies the requirements under 1102 or the committee  
21 establishes an information-sharing protocol).

22           15.     As discussed above, the legislative history does not provide meaningful guidance and  
23 merely reiterates the language of section 1102(b)(3). See H.R. Rep. No. 109-31, 109th Cong., 1st  
24 Sess. 87 (2005) (“Section 405(b) requires the committee to give creditors having claims of the kind  
25 represented by the committee access to information. In addition, the committee must solicit and  
26 receive comments for these creditors and, pursuant to court order, make additional reports and  
27 disclosures available to them.”).

1           16.     The Committee believes that section 1102(b)(3) was intended to expand the  
2 involvement of unsecured creditors in chapter 11 cases. In this regard, however, Congress could not  
3 have intended for a committee to be required to provide unfettered access to every type and kind of  
4 information that a committee receives from a debtor or assembles on its own. If this had been the  
5 intention, section 1102(b)(3) would then frustrate numerous provisions of the Bankruptcy Code.

6           17.     Further, section 107(b)(1) of the Bankruptcy Code provides that “on request of a  
7 party in interest, the bankruptcy court shall...protect an entity with respect to trade secret or  
8 confidential research, development, or commercial information.”<sup>3</sup> Section 107(b)(1) is mandatory.  
9 Video Software Dealers Ass’n v. Orion Pictures Corp., 21 F.3d 24, 27 (2d Cir. 1994) (providing that  
10 the protections of section 107(b)(1) are mandatory upon request). As a result, under section  
11 107(b)(1) and Bankruptcy Rule 9018, this Court is empowered to protect the Committee from  
12 having to release Confidential Information or Privileged Information to general creditors. The Court  
13 has further authority under section 105(a) to issue any order, process or judgment that is necessary or  
14 appropriate to carry out the provisions of the Bankruptcy Code. Protecting the release of  
15 Confidential Information and Privileged Information is necessary to accomplish that purpose.

16           18.     The disclosure of nonpublic or privileged information to unsecured creditors will  
17 impede the ability of the Committee to perform its statutory function in these cases and could  
18 prejudice the Debtor’s ability to reorganize its affairs. Therefore, pursuant to sections 105(a),  
19 107(b)(1), and 1102(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9018, the Committee  
20 requests confirmation that section 1102(b)(3)(A) does not authorize or require the Committee to  
21 provide access to Confidential Information or Privileged Information to any creditor that the  
22 Committee represents.

23           19.     In addition, given the lack of clarity in section 1102(b)(3)(B) regarding the  
24 Committee’s duty to solicit and receive comments from its constituency, the Committee seeks an  
25 order establishing that this statutory obligation is satisfied by the Committee creating and  
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27 <sup>3</sup> Section 107(b)(1) is further supported by Bankruptcy Rule 9018, which states, in relevant part, that “on motion  
28 or on its own initiative, with or without notice, the court may make any order which justice requires to protect the estate  
or any entity in respect of a trade secret or other confidential research, development, or commercial information ...” Fed  
R. Bankr. P. 9018.

1 maintaining a web page, accessible via counsel's existing internet site (or, if necessary, an alternate  
2 domain), to make non-confidential and non-privileged information available to unsecured creditors.  
3 If and to the extent the creation of the web page dedicated to the Committee results in additional  
4 expenses to Committee counsel, the Committee requests reimbursement from the Debtor for such  
5 expense.

6 **WHEREFORE**, the Committee respectfully requests that the Court enter an order approving  
7 the relief requested in this Motion and granting the Committee such other and further relief to which  
8 it may be entitled.

9 Dated: May 8, 2006

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