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[Proposed] Attorneys for The Official Committee
of Unsecured Creditors of Western Medical, Inc.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re:
WESTERN MEDICAL, INC., an Arizona
corporation,

Debtor.

Case No.: 2-06-br-01784-RTBP

Chapter 11

**NOTICE OF MOTION AND MOTION
OF THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS FOR
ORDER APPROVING INFORMATION
ACCESS PROTOCOL UNDER
SECTION 1102(b)(3) OF THE
BANKRUPTCY CODE**

Date: TBD

Time: TBD

Location:

Chrm of Judge Redfield T. Baum
U.S. Bankruptcy Court
230 North First Ave.
Phoenix, AZ 85003

**TO THE HONORABLE REDFIELD T. BAUM, UNITED STATES BANKRUPTCY JUDGE;
THE DEBTOR; THE OFFICE OF THE UNITED STATES TRUSTEE; ALL PARTIES
REQUESTING SPECIAL NOTICE; AND THEIR RESPECTIVE COUNSEL:**

PLEASE TAKE NOTICE THAT the Official Committee of Unsecured Creditors (the
“Committee”) of Western Medical, Inc. (the “Debtor”), will and hereby does move (the “Motion”)
for entry of an order pursuant to Sections 105(a), 107(b), and 1102(b)(3)(A) of title 11 of the United
States Code (the “Bankruptcy Code”) and Rule 9018 of the Federal Rules of Bankruptcy Procedure

1 (the “Bankruptcy Rules”), approving the Committee’s adoption of certain information sharing
2 procedures pursuant to newly-enacted Section 1102(b)(3)(A) of the Bankruptcy Code.

3 **PLEASE TAKE FURTHER NOTICE THAT** the Committee requests authority to
4 withhold confidential and privileged information under the “information access” prong of the statute,
5 and satisfy its duties under the “comment solicitation” prong of the statute by creating a web page
6 posted on, and accessible via, Committee counsel’s existing internet site (or, if infeasible, via
7 another web site dedicated to the Committee). The Committee is cognizant of the Debtor’s lack of
8 liquid assets and, seeks to satisfy its information sharing obligations in a streamlined and
9 inexpensive manner. To the extent that Committee counsel incurs out-of-pocket expenses in
10 connection with the establishment and maintenance of the web page, the Committee requests
11 authority to seek reimbursement from the Debtor for such charges (which are estimated to be
12 approximately \$1,000 to \$3,000, depending on the potential need for a unique domain name and
13 dedicated hardware to host the site).

14 **PLEASE TAKE FURTHER NOTICE THAT**, pursuant to Local Rule 90113-1(c), unless
15 otherwise set forth by an order of the Court, any party responding in opposition to this Motion shall
16 have 15 days after service within which to serve and file a responsive memorandum. Thus, the
17 deadline for filing and serving any opposition to the Motion is August 9, 2006.

18 **PLEASE TAKE FURTHER NOTICE THAT** the Court may vacate the hearing and grant
19 the requested relief at the Committee’s request if no timely objection is served and filed.

20 Dated: July __, 2006

PACHULSKI STANG ZIEHL YOUNG JONES
& WEINTRAUB LLP

22 By

23 _____
Samuel R. Maizel
24 [Proposed]Attorneys for the Official
Committee of Unsecured Creditors
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MEMORANDUM OF POINTS AND AUTHORITIES

JURISDICTION

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

5 2. The statutory predicates for the relief sought herein are Sections 105(a), 107(b), and
6 1102(b)(3) of the Bankruptcy Code¹ and Bankruptcy Rule 9018.

7 **FACTS**

8 3. On June 15, 2006, the Debtor filed a voluntary petition for relief under chapter 11 of
9 the Bankruptcy Code. The Debtor continues to operate its business and manage its property as a
10 debtor-in-possession.

11 4. On June 27, 2006, the United States Trustee appointed the Committee in the Debtor's
12 bankruptcy case pursuant to Section 1102. The Committee is comprised of the following four
13 members: (a) McKesson Medical-Surgical, Inc.; (b) Pride Mobility Products; (c) PRN Marketing,
14 Inc.; and (d) Convaid Inc.

15 5. On July 24, 2006 the Committee filed an Application To Employ Pachulski Stang
16 Ziehl Young Jones & Weintraub LLP as Counsel to the Committee.

17 6. Section 1102(b)(3)(A) states, in relevant part, that a committee appointed under
18 Section 1102(a) shall "provide access to information for creditors who (i) hold claims of the kind
19 represented by that committee; and (ii) are not appointed to the committee[.]" 11 U.S.C.
20 § 1102(b)(3)(A). Section 1102(b)(3)(B) further provides that a committee must "solicit and receive
21 comments from the creditors described in subparagraph (A)[.]" 11 U.S.C. § 1102(b)(3)(B).

22 7. Sections 1102(b)(3)(A) and (B) do not indicate how a creditors' committee should
23 provide "access to information" for creditors, or "solicit and receive comments" from creditors.
24 There is no legislative history to Section 1102(b)(3) to provide guidance on the application of this
25 new provision, and whether it could be construed to apply to confidential or privileged information.
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28 ¹ All references to "Section" herein are to sections of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330,
as amended.

1 reduce or eliminate value of such initiatives to the estate. In addition, the Debtor's other
2 Confidential Information, such as employee information, and patient records, is sensitive in nature,
3 and public disclosure of such information would cause serious problems for the Debtor, as well as
4 potentially violate federal and state privacy laws.

5 12. The enactment of Section 1102(b)(3)(A) raises the issue of whether the Committee
6 could be required to share Confidential Information or Privileged Information with any unsecured
7 creditor. Given the importance of this issue, the Committee seeks an order of the Court confirming
8 that Section 1102(b)(3)(A) does not authorize or require the Committee to provide access to each
9 and every piece of Confidential Information or Privileged Information to any creditor that the
10 Committee represents. In re Refco, Inc., 336 B.R. 187 (Bankr. S.D.N.Y. 2006) (Section 1102(b)(3)
11 does not require the dissemination of confidential information or such information that would
12 constitute a breach of attorney-client privilege. In determining whether to release information,
13 committees must consider the requesting party's willingness to agree to confidentiality and trade
14 restraints.).

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

25 14. When a statute is clear and unambiguous, "the sole function of the courts is to enforce
26 it according to its terms." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (quoting

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28 ³ 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 Caminetti v. United States, 242 U.S. 470, 485 (1917)). However, in “rare cases [in which] the literal
2 application of a statute will produce a result demonstrably at odds with the intention of its drafters ...
3 the intention of the drafters, rather than the strict language, controls.” Id. at 242-43 (citing Griffin v.
4 Oceanic Contractors, Inc., 458 U.S. 564 (1982) (internal quotation omitted)).

5 15. The Committee submits that Section 1102(b)(3) is unclear. The statute requires a
6 committee “to provide access to information” and to “solicit and receive comments” from creditors,
7 yet sets forth no guidelines as to the type, kind and extent of the information to be provided or the
8 method for soliciting input from creditors. In its extreme, Section 1102(b)(3)(A) could be read as
9 requiring a committee to provide access to all information provided to it by a debtor, or developed
10 through exercise of its investigative function, regardless of whether the information is confidential,
11 privileged, proprietary or material non-public information and regardless of whether disseminating
12 such information implicates securities laws disclosure requirements. See 17 C.F.R. §§243.100-
13 243.103 (2005); see also In re Refco, Inc., 336 B.R. 187 (S.D.N.Y. 2006) (Granting the motion of
14 the committee to clarify the requirement to provide access to information pursuant to Section
15 1102(b)(3)(A) until the court further clarifies the requirements under Section 1102 or the committee
16 establishes an information-sharing protocol); In re FLYi, Inc., Case No. 05-20011 (MFW) (Bankr.
17 D. Del. Nov. 17, 2005) (providing that creditors’ committees are not authorized or required to
18 provide access to confidential information of the debtors or to privileged information).

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

26 17. The Committee believes that Section 1102(b)(3) was intended to expand the
27 involvement of unsecured creditors in chapter 11 cases. In this regard, however, Congress could not
28 have intended for a committee to be required to provide unfettered access to every type and kind of

1 information that a committee receives from a debtor or assembles on its own. If this had been the
2 intention, Section 1102(b)(3) would frustrate numerous provisions of the Bankruptcy Code.

3 18. Further, Section 107(b)(1) provides that “on request of a party in interest, the
4 bankruptcy court shall . . . protect an entity with respect to trade secret or confidential research,
5 development, or commercial information.”⁴ Section 107(b)(1) is mandatory. Video Software
6 Dealers Ass’n v. Orion Pictures Corp., 21 F.3d 24, 27 (2d Cir. 1994) (providing that the protections
7 of Section 107(b)(1) are mandatory upon request). As a result, under Section 107(b)(1) and
8 Bankruptcy Rule 9018, this Court is empowered to protect the Committee from having to release
9 Confidential Information or Privileged Information to general creditors. The Court has further
10 authority under Section 105(a) to issue any order, process or judgment that is necessary or
11 appropriate to carry out the provisions of the Bankruptcy Code. Protecting the release of
12 Confidential Information and Privileged Information is necessary to accomplish that purpose.

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

19 20. In addition, given the lack of clarity in Section 1102(b)(3)(B) regarding the
20 Committee’s duty to solicit and receive comments from its constituency, the Committee seeks an
21 order establishing that this statutory obligation is satisfied by the Committee creating and
22 maintaining a web page, accessible via counsel’s existing internet site (or, if necessary, an alternate
23 domain), to make non-confidential and non-privileged information available to unsecured creditors.
24 If and to the extent the creation of the web page dedicated to the Committee results in additional
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27 ⁴ 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 expenses to Committee counsel, the Committee requests reimbursement from the Debtor for such
2 expense.

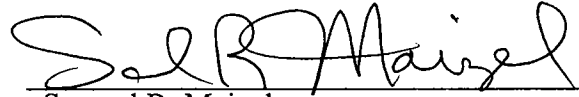
3 **CONCLUSION**

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

7 Dated: July 25, 2006

PACHULSKI STANG ZIEHL YOUNG JONES
& WEINTRAUB LLP

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9 By



10 Samuel R. Maizel
11 [Proposed] Attorneys for the Official
12 Committee of Unsecured Creditors
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