

# **Delaware Bankruptcy American Inn of Court**

**January 25, 2011 Presentation:**  
*So Your Case Has an Examiner—What Now?*

**Panelists:**

**Justin Alberto for the Debtor  
Mike Busenkell for the Target  
Kim Lawson for the Committee  
Luke Murley for the Examiner  
Pat Tinker for the U.S. Trustee**

**(Applicable Sections of the United States Bankruptcy Code)**

**11 U.S.C. § 1104. Appointment of trustee or examiner**

**(a)** At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

**(1)** for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor;

**(2)** if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

**(3)** if grounds exist to convert or dismiss the case under section 1112, but the court determines that the appointment of a trustee or an examiner is in the best interests of creditors and the estate.

**(b)**

**(1)** Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title.

**(2)**

**(A)** If an eligible, disinterested trustee is elected at a meeting of creditors under paragraph (1), the United States trustee shall file a report certifying that election.

**(B)** Upon the filing of a report under subparagraph (A)—

**(i)** the trustee elected under paragraph (1) shall be considered to have been selected and appointed for purposes of this section; and

**(ii)** the service of any trustee appointed under subsection (d) shall terminate.

**(C)** The court shall resolve any dispute arising out of an election described in subparagraph (A).

**(c)** If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or by current or former management of the debtor, if—

**(1)** such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

**(2)** the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.

**(d)** If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case.

(e) The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.

**(Applicable Federal Rules of Bankruptcy Procedure)**

**Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case**

**(a) Order to appoint trustee or examiner.**

In a chapter 11 reorganization case, a motion for an order to appoint a trustee or an examiner under § 1104(a) or § 1104(c) of the Code shall be made in accordance with Rule 9014...

**(c) Approval of appointment.**

An order approving the appointment of a trustee or an examiner under § 1104(d) of the Code shall be made on application of the United States trustee. The application shall state the name of the person appointed and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, or persons employed in the office of the United States trustee. The application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

**Rule 9014. Contested Matters**

**(a) Motion.**

In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.

**(b) Service.**

The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R.Civ.P.

# **APPOINTMENT ORDERS**

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

<b>In re:</b>	:	<b>Chapter 11</b>
	:	
<b>NEW CENTURY TRS HOLDINGS, INC.,</b>	:	<b>Case No. 07-10416 (KJC)</b>
<b>a Delaware Corporation, et al.,</b>	:	
	:	
<b>Debtors.</b>	:	<b>Jointly Administered</b>

**ORDER DENYING IN PART AND GRANTING IN PART MOTION OF THE UNITED STATES TRUSTEE FOR AN ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE, OR IN THE ALTERNATIVE, AN EXAMINER**

This matter came before this Court for hearing on May 15, 2007, on the Motion of the United States Trustee for an Order Directing the Appointment of a Chapter 11 Trustee or, in the Alternative, an Examiner (the "Motion"). Due and sufficient notice of the Motion was given to interested parties in accordance with the Bankruptcy Code and Rules. This Court, having considered the evidence in the record and arguments of counsel, concluded that the United States Trustee had not proven by clear and convincing evidence that cause exists for the appointment of a chapter 11 trustee. The Court therefore denied the Motion insofar as it sought such an appointment under 11 U.S.C. § 1104(a)(1). Based upon the record, however, the Court found that grounds exist for the appointment of an examiner under 11 U.S.C. § 1104(c)(1), which provides that "if the court does not order the appointment of a trustee under this section, . . . on request of a party in interest or the United States Trustee, and after notice and a hearing, the court shall order the appointment of an examiner. . .if . . .such appointment is in the interests of creditors, any equity security holders, and other interests of the estate. . . ." The Court finds that the appointment of an examiner is in the interests of creditors, any equity security holders, and other interests of the estate.

Based on the foregoing and on the record in this case, it is hereby

ORDERED that:

1. The Motion is denied insofar as it seeks the appointment of a chapter 11 trustee for cause pursuant to 11 U.S.C. § 1104(a)(1), and granted, pursuant to 11 U.S.C. § 1104(c)(1), insofar as it seeks the appointment of an examiner;

2. The United States Trustee is directed to appoint an examiner (the "Examiner") pursuant to 11 U.S.C. § 1104(c)(1);

3. The Examiner shall: (a) investigate any and all accounting and financial statement irregularities, errors or misstatements, including but not limited to such irregularities, errors or misstatements that (i) gave rise to the announced need to restate the Debtors' financial statements for the first three quarters of 2006 and/or (ii) led the Debtors' management and Audit Committee to conclude that it was more likely than not that pre-tax earnings in the 2005 financial statements were materially overstated, and identify and evaluate any claims or rights of action that the estates might have arising from or relating to such irregularities, errors or misstatements, (b) investigate any possible post-petition unauthorized use of cash collateral by the Debtor,<sup>1</sup> and (c) otherwise

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<sup>1</sup>The hearing on the Motion was held on May 15, 2007. After submission of competing orders, the Court had further discussion on May 21, 2007 on the record with the parties; however, before any order memorializing the Court's ruling on the Motion, was entered, the U.S. Trustee, by letter dated May 25, 2007, requested the insertion of additional language in any order directing the appointment of an Examiner, which request was occasioned by statements contained in the Debtor's form 8-K, filed with the Securities and Exchange Commission on May 24, 2007. The Debtors, by letter of the same date, agreed to the insertion of additional language, but differed as to the specifics of such language. The Court, therefore, directed that this matter be added to the agenda for the May 30, 2007 hearing, already scheduled to consider other matters. After yet further discussion with the parties, the Court will adopt the language suggested by the U.S. Trustee with respect to the additional language (paragraph 3(a)(ii)).

At the May 30, 2007 hearing, upon consideration of the Debtors' Motion to Provide Adequate Protection (Docket No. 736) and the various responses and objections thereto, it appeared that the Debtors may have used certain cash collateral without the required consent or court order. See 11 U.S.C.

perform the duties of an examiner set forth in section 1106(a)(3) (as limited by this Order) and 1106(a)(4) of the Bankruptcy Code (collectively the "Investigation");

4. The Examiner shall, before commencing the Investigation, meet and confer with the Debtors, the Committee, and the U.S. Trustee, if the U.S. Trustee requests participation. The Debtors and the Committee shall use their respective best efforts to coordinate with the Examiner to avoid unnecessary interference with, or duplication of, the Investigation. Such "meet and confer" shall occur prior to June 15, 2007, and the Court shall hold a status conference on June 15, 2007 at 10:00 o'clock a.m. to discuss with the parties the results of such "meet and confer" and to order, if appropriate, further relief as will aid the Examiner in the performance of the Examiner's duties and/or to accommodate the needs of the estate;

5. The Examiner shall prepare and file a report, as is required by 11 U.S.C. § 1106(a)(4), within 90 days of the date of appointment, unless such time shall be extended by order of the Court, advising as to (x) the status of the investigation, (y) whether the Examiner believes that the Examiner requires additional time to complete the Investigation, and (z) whether the Examiner has identified additional areas or topics which should be investigated and therefore whether the scope of the Investigation as defined herein should be broadened or otherwise amended; all parties in interest shall have the right to appear and be heard on whether the scope of the Investigation should be amended as requested by the Examiner;

6. Until the Examiner has filed his or her report, neither the Examiner nor the Examiner's representatives or agents shall make any public disclosures concerning the

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§363(c)(2). The Court, therefore, sua sponte, has added to the Examiner's charge, investigation of the possible unauthorized use of cash collateral by the Debtors.



performance of the Examiner's duties, except in hearings before the Court; provided further, that no portion of any report containing any evaluation of the strengths or weakness of any potential claim or right of action the estates may have or suggested litigation strategy in connection therewith shall be disclosed publicly without further order of this Court;

7. The Examiner may retain counsel and other professionals if he or she determines that such retention is necessary to discharge his or her duties, with such retention to be subject to Court approval under standards equivalent to those set forth in 11 U.S.C. § 327;

8. The Examiner and any professionals retained by the Examiner pursuant to any order of this Court shall be compensated and reimbursed for their expenses pursuant any procedures for interim compensation and reimbursement of expenses of professionals which are established in these cases. Compensation and reimbursement of the Examiner shall be determined pursuant to 11 U.S.C. § 330, and compensation and reimbursement of the Examiner's professionals shall be determined pursuant to standards equivalent to those set forth in 11 U.S.C. § 330;

9. The Examiner shall have the standing of a "party-in- interest" with respect to the matters that are within the scope of the Investigation, and shall be entitled to appear and be heard at any and all hearings in these cases; provided however, this Order is not intended to confer upon the Examiner any "party in interest" status for the purpose of intervening or joining in any adversary proceeding or contested matter in connection with disputes involving the non-debtor counter parties to repurchase agreements or any lenders of the Debtor<sup>2</sup>;

10. The Examiner shall cooperate fully with any governmental agencies (such

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<sup>2</sup>This proviso is included to address the concern expressed by certain parties at the May 30, 2007 hearing that the Court's expansion of the Investigation (see paragraph 3(b) hereof) not delay disposition of their rights.

cooperation shall not be deemed a public disclosure as referenced in paragraph 6 hereof, including, but not limited to, any federal, state or local government agency that may be investigating the Debtors, its management or its financial condition), and the Examiner shall use best efforts to coordinate with such agencies in order to avoid unnecessary interference with, or duplication of, any investigations conducted by such agencies;

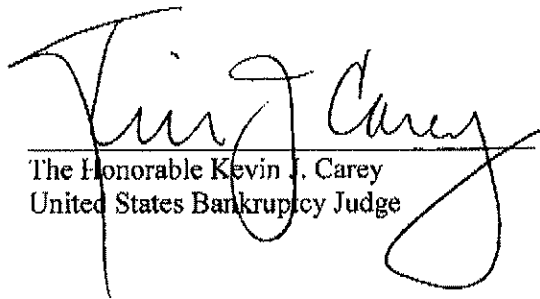
11. The Debtors and all of the Debtors' affiliates, subsidiaries and other companies under their control and the Examiner shall mutually coordinate and cooperate in connection with the performance of any of the Examiner's duties. The Debtors shall provide to the Examiner all non-privileged documents and information relevant to the Investigation that the Examiner requests. Nothing herein shall prohibit the Debtors from objecting to requests, including, without limitation, on the ground that the documents or information requested are beyond the scope of the Investigation. If the Examiner seeks the disclosure of documents or information as to which any of the Debtors assert a claim of privilege or have objected and the Examiner and the Debtors are unable to reach a resolution on whether or on what terms such documents or information should be disclosed to the Examiner, the matter may be brought before the Court for resolution. The Debtors' privileges, including, but not limited to, the attorney-client privilege and attorney work product privilege, remain and are not deemed waived or in any way impaired by the parties' stipulation referenced above or by this Order;

12. Subject to any applicable confidentiality agreement between the Committee and the Debtors, the Committee shall provide the Examiner with access to all materials it has received in response to discovery authorized by the Court or voluntarily provided by the Debtors, and the Examiner and the Committee shall cooperate and coordinate their efforts to assure, to the extent

possible, that their investigations are not unduly duplicative;

13. Subject to the requirements for mutual cooperation and coordination set forth herein, nothing contained in this Order shall diminish the powers and authority of the Debtors or the Committee under the Bankruptcy Code, including the powers to investigate transactions and entities, to commence contested matters and adversary proceedings, and to object to claims; and

14. Nothing in this Order shall impede the right of the United States Trustee or any other party to request any other lawful relief, including but not limited to a request to further expand the scope of the Investigation, if during such Investigation other relevant matters are revealed which the Examiner, the Debtor, the Committee or the United States Trustee believe should be brought to the attention of the Court, or to have the Examiner's report, or parts thereof, filed under seal.



The Honorable Kevin J. Carey  
United States Bankruptcy Judge

Dated: June 1, 2007

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

<b>In re:</b>	:	<b>Chapter 11</b>
	:	
<b>NEW CENTURY TRS HOLDINGS, INC., a Delaware corporation, <u>et al.</u><sup>1</sup></b>	:	<b>Case No. 07-10416 (KJC)</b>
	:	
<b>Debtors.</b>	:	<b>Jointly Administered</b>
	:	
	:	<b>Re: Docket No. 1023 and 2665</b>

**ORDER (I) SUPPLEMENTING JUNE 1, 2007 ORDER DIRECTING THE  
APPOINTMENT OF AN EXAMINER AND (II) GRANTING MOTION OF  
MICHAEL J. MISSAL, EXAMINER FOR AN EXTENSION OF TIME  
TO FILE HIS REPORT WITH THE COURT**

On June 1, 2007, the Court entered an Order directing the appointment of an Examiner (the "June 1, 2007 Order"). The June 1, 2007 Order specified that the "Debtors, and all of the Debtors' affiliates, subsidiaries and other companies under their control and the Examiner shall mutually coordinate and cooperate in connection with the performance of any of the Examiner's duties." On June 7, 2007, the Court entered an Order approving the appointment of Michael J. Missal as Examiner. On September 5, 2007, the Examiner filed the Motion of Michael J. Missal, Examiner, for an Extension of Time to File His Report with the Court (the "Motion"). Upon consideration of the Motion, as well as the Limited Objection of Committee of Unsecured Creditors to Motion of Michael J. Missal, Examiner, for an Extension of Time to File His Report, and with the consent of the Debtors, it is hereby:

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<sup>1</sup> The Debtors are the following entities: New Century Financial Corporation, a Maryland corporation; New Century TRS Holdings, Inc. (f/k/a New Century Financial Corporation), a Delaware corporation; New Century Mortgage Corporation, a California corporation; NC Capital Corporation, a California corporation; Home123 Corporation, a California corporation; New Century Credit Corporation (f/k/a Worth Funding Incorporated), a California corporation; NC Asset Holding, L.P. (f/k/a NC Residual II Corporation), a Delaware limited partnership; NC Residual III Corporation, a Delaware corporation; NC Residual IV Corporation, a Delaware corporation; New Century R.E.O. Corp., a California corporation; New Century R.E.O. II Corp., a California corporation; New Century R.E.O. III Corp., a California corporation; New Century Mortgage Ventures, LLC, a Delaware limited liability company; NC Deltex, LLC, a Delaware limited liability company; NCORAL, L.P., a Delaware limited partnership; New Century Warehouse Corporation, a California corporation.

ORDERED, that the delivery of any documents or information to the Examiner by the Debtors, counsel or other professionals engaged by the Debtors, the Debtors' Board of Directors, or any of the Debtors' affiliates, subsidiaries or other companies or entities under their control, does not constitute a waiver of the attorney-client privilege, the work product doctrine, or any other applicable privilege or protection held by the Debtors, and that the delivery of such documents or information to the Examiner shall not be the basis for any third party to assert that the Debtors have waived any protections or privileges with respect to such documents or information. Notwithstanding anything to the contrary herein, the Debtors are not obligated or required to deliver any documents or information to the Examiner that are protected by the attorney-client privilege, the work product doctrine or any similar privilege or protection held by the Debtors. The Debtors' cooperation with the Examiner shall include, but not be limited to, providing the Examiner and the Examiner's professionals immediate access to any non-privileged documents or information obtained by the Debtors or their professionals from the investigation, described below, conducted by the Special Investigative Committee (the "SIC") of the Board of Directors; and it is further

ORDERED, that the SIC, and counsel or other professionals engaged by the SIC with the Court's authorization, are directed to cooperate fully with the Examiner in conjunction with the Examiner's duties, and that any documents or information provided to the Examiner by the SIC or its counsel, or other professionals employed by the SIC, does not constitute a waiver of the attorney-client privilege, the work product doctrine, or any other applicable privilege or protection held by the SIC or the Debtors (including the Debtors' Board of Directors), and that the delivery of such documents or information to the Examiner shall not be the basis for any third party to assert that the Debtors or the SIC have waived any protections or privileges with

respect to such documents or information. The cooperation of the SIC, any retained counsel or other retained professionals includes, but is not limited to, providing the Examiner or the Examiner's professionals immediate access to any non-privileged information reviewed by the SIC, any retained counsel or other retained professionals as part of the investigation by the SIC commenced as a result of Debtors' decision to restate certain of their financial statements on February 7, 2007. The SIC shall coordinate with the Examiner regarding the content and scope of its investigation in order to, among other things, avoid unnecessary duplication of effort by the Examiner; and it is further

ORDERED, that until the Examiner has filed the Examiner's report or reports pursuant to 11 U.S.C. § 1106(4)(A), neither the Examiner nor the Examiner's representatives or agents shall make any public disclosures of any information that the Examiner received during the performance of its duties other than those disclosures which are authorized under paragraphs 6 and 10 of this Court's June 1, 2007 Order Denying in Part and Granting in Part the Motion of the United States Trustee for an Order Directing the Appointment of a Chapter 11 Trustee, or in the Alternative, an Examiner (the "June 1 Order"); and it is further

ORDERED, that the Motion is GRANTED, and that the June 1 Order is hereby modified to extend the deadline for the Examiner to file his report through and including January 15, 2008, unless such time is extended by further order of the Court; and it is further

ORDERED, that the Examiner shall file his report pertaining to the Debtors' post-petition use of cash collateral upon completion of that portion of the investigation; and it is further

ORDERED, that any report or reports filed by the Examiner with the Court (collectively, a "Report") shall be filed initially under seal with copies provided to the Debtors,

the Debtors' Official Committee of Unsecured Creditors ("Creditors Committee") and the Office of the U.S. Trustee (the "UST" and is defined to include any district office and the Executive Office of the United States Trustee in Washington, D.C.). The Creditors Committee and the UST shall maintain and protect the Report's status as under seal and shall not disclose any of the information contained therein unless and until such Report or any portions thereof are unsealed. To the extent that a Report contains or reveals information that is or may be protected by 11 U.S.C. § 107(b), the attorney-client privilege, the work product doctrine, or any other applicable privilege or protection, the Examiner's submission of such Report to the Court or his provision of a copy of such Report to the Creditors' Committee or the UST shall not constitute a waiver of such privileges or protections and any reference or inclusion of any privileged or protected documents in such Report shall not be the basis for any third party to assert that the Debtors have waived any protections or privileges with respect to such documents or information. Within ten (10) days following the filing of a Report by the Examiner, the Debtors, the Committee or another interested party may file a motion with the Court seeking to maintain any portion or portions of such Report under seal (with the movant bearing the burden) because, inter alia, such portion or portions contain or reveal information that is protected by 11 U.S.C. § 107(b), the attorney-client privilege, the work product doctrine, or any other applicable privilege or protection (a "Protection Motion"). If no party timely files a Protection Motion, such Report shall be unsealed. If a Protection Motion is timely filed, then only that portion or portions of such Report that are sought to be protected shall remain under seal until the Court enters an order on such Protection Motion and the balance of such Report shall be unsealed.

Dated: Oct 10, 2007  
Wilmington, Delaware

  
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THE HONORABLE KEVIN J. CAREY  
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

*Beneh Yuliel*  
9/10/08

*In re*

SEMCRUDE, L.P., *et al.*,

Debtors.

Chapter 11

Case Number 08-11525 (BLS)  
(Jointly Administered)

Related Docket No. 667

**ORDER DIRECTING UNITED STATES TRUSTEE TO APPOINT AN EXAMINER**

This matter came before the Court for hearing on September 10, 2008, on the Motion of the United States Trustee for an Order Directing the Appointment of an Examiner dated August 12, 2008 (the "Motion"). Due and sufficient notice of the Motion was given to interested parties in accordance with the Bankruptcy Code and Rules. This Court, having considered the evidence in the record and arguments of counsel, concluded that the appointment of an examiner under 11 U.S.C. § 1104(c)(2) of the Bankruptcy Code to investigate the affairs of the Debtors<sup>1</sup> is mandatory as the Debtors' fixed, liquidated, unsecured debts, other than debts for goods and services or taxes, or owing to an insider, exceed \$5 million. The Court further finds that grounds exist for the appointment of an examiner under 11 U.S.C. § 1104(c)(1) as the appointment of an examiner to investigate the affairs of the Debtors and the Debtors' affiliates and subsidiaries is in the best interests of creditors, any equity security holders, and other interests of the estate.

Accordingly it is, hereby, ORDERED AND DECREED that:

1. The United States Trustee is directed to appoint one examiner ("Examiner") pursuant to 11 U.S.C. § 1104(c); and

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<sup>1</sup> Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.



2. The Examiner is directed to: (a) investigate the circumstances surrounding (i) the Debtors' Trading Strategy and the transfer of their NYMEX account, (ii) the Insider Transactions and the formation of Energy Partners, and (iii) the potential improper use of borrowed funds and funds generated from the Debtors' operations and the liquidation of their assets to satisfy margin calls related to the Trading Strategy for the Debtors and certain entities owned or controlled by the Debtors' officers and directors; and (b) otherwise perform the duties of an examiner set forth in 11 U.S.C. § 1106(a)(3) and 1106(a)(4) of the Bankruptcy Code (collectively, the "Investigation"); and

3. Within 10 business days after entry of the order approving the appointment of the Examiner is entered on the docket in these cases, the Examiner shall propose a work plan and shall provide his or her estimated costs for the Investigation, which shall be subject to the approval of the Court on 10 days notice to all parties that have requested notice pursuant to Federal Rule of Bankruptcy Procedure 2002; and

4. The Examiner, the Debtors, the Committee, the Pre-petition Secured Parties (as defined in the Interim DIP Financing Order) or the United States Trustee shall have the right to petition the Court to further expand the scope of the Investigation, if during such Investigation other relevant matters are revealed which the Examiner, the Debtors, the Committee or the United States Trustee believe should be brought to the attention of the Court; and

5. The Debtors, the Debtors' affiliates and subsidiaries, the Committee and the Pre-petition Secured Parties are directed to fully cooperate with the Examiner in conjunction with the performance of any of the Examiner's duties and the Investigation, and that the Debtors and the Committee shall use their respective best efforts to coordinate with the Examiner to avoid unnecessary interference with, or duplication of, the Investigation; and

6. In addition to reporting on the facts ascertained by the Investigation conducted pursuant to paragraph 2 hereof, the Examiner shall report on whether (a) any directors, officers, or employees of the Debtors participated in fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the Debtors and (b) the Debtors' estates have claims or causes of action against current or former officers, directors, or employees of the Debtors arising from any such participation. Nothing herein shall preclude the Committee from conducting its own investigation into the affairs of third parties that are not current or former officers, directors, or employees of the Debtors to determine whether the estate has claims or causes of action against such or other third parties. To the extent that the Committee's investigation is duplicative of the foregoing scope, the Committee will refrain from seeking such discovery until the Examiner issues his or her report; and

7. Until the Examiner has filed his or her report, neither the Examiner nor the Examiner's representatives or agents shall make any public disclosures concerning the performance of the Investigation or the Examiner's duties; and

8. The Examiner shall prepare and file a report, as is required by 11 U.S.C. § 1106(a)(4), within 120 days following the approval of the work plan by the Court, unless such time shall be extended by order of the Court on Notice to all parties that have requested notice pursuant to Federal Rule of Bankruptcy Procedure 2002; and

9. The Examiner may retain counsel and other professionals, if he or she determines that such retention is necessary to discharge his or her duties, with such retention to be subject to Court approval under standards equivalent to those set forth in 11 U.S.C. § 327; and

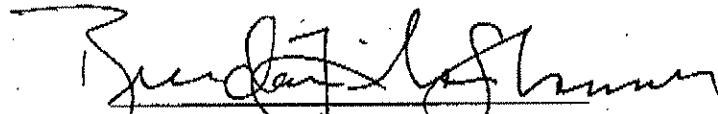
10. The Examiner and any professionals retained by the Examiner pursuant to any order of this Court shall be compensated and reimbursed for their expenses pursuant to any

procedures for interim compensation and reimbursement of expenses of professionals that are established in these cases. Compensation and reimbursement of the Examiner shall be determined pursuant to 11 U.S.C. § 330, and compensation and reimbursement of the Examiner's professionals shall be determined pursuant to standards equivalent to those set forth in 11 U.S.C. § 330; and

11. The Examiner shall cooperate fully with any governmental agencies (such cooperation shall not be deemed a public disclosure as referenced in paragraph 7 above) including, but not limited to, any federal, state or local government agency that may be investigating the Debtors, its management or its financial condition, and the Examiner shall use best efforts to coordinate with such agencies in order to avoid unnecessary interference with, or duplication of, any investigations conducted by such agencies; and

12. The Examiner shall have the standing of a "party-in-interest" with respect to the matters that are within the scope of the Investigation, and shall be entitled to appear and be heard at any and all hearings in these cases; and

13. Nothing in this Order shall impede the right of the United States Trustee or any other party to request any other lawful relief, including but not limited to the appointment of a trustee.

  
The Honorable Brendan L. Shannon  
United States Bankruptcy Judge

Dated: 9/10/08

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

*In re* :  
 : Chapter 11  
 :  
 : Case No. 08-12687 (PJW)  
 :  
 : Jointly Administered  
 :  
 : Related to Docket No. 1276 & 2962

**ORDER DIRECTING UNITED STATES TRUSTEE TO APPOINT AN EXAMINER**

This matter came before the Court for hearing on March 13, 2009, on the Motion of the State of Idaho Department of Finance for the Appointment of an Examiner Pursuant to 11 U.S.C. §1104(c) (the "Motion"). Due and sufficient notice of the Motion was given to interested parties in accordance with the Bankruptcy Code and Rules. This Court, having considered the evidence in the record and arguments of counsel, concluded that the appointment of an examiner under 11 U.S.C. § 1104© is appropriate to investigate certain affairs of the Debtors and the Debtors' affiliates and subsidiaries and that such appointment is in the best interests of creditors, any equity security holders, and other interests of the estate, and for other good cause;

**IT IS HEREBY ORDERED AND DECREED that:**

1. The United States Trustee is directed to appoint one examiner ("Examiner") pursuant to 11 U.S.C. § 1104(c); and,
2. The Examiner is directed to: (a) investigate the circumstances surrounding (i) any and all of the Debtors' inter-company transactions and transfers, (ii) any and all transactions and transfers between and among the Debtors and any non-debtor affiliates, and (iii) any and all transactions and transfers between and among the Debtors and any insiders, officers, directors and principals of the Debtors and ; and (b) otherwise perform the duties of an examiner set forth in 11 U.S.C. § 1106(a)(3) and 1106(a)(4) of the Bankruptcy Code (collectively, the "Investigation"); and,

3. Reasonably promptly following entry of the order approving the appointment of the Examiner on the docket in these cases, the Examiner shall meet with the FTI Consulting, Inc., financial advisor to the Official Committee of Unsecured Creditors (the "Committee" ) and such other parties-in-interest that the Examiner deems appropriate to discuss the Investigation. Reasonably promptly after such meeting, the Examiner shall propose a work plan and shall provide his or her estimated costs for the Investigation, which shall be subject to the approval of the Court on 10 days notice to all parties that are entitled to, or have requested, notice pursuant to Federal Rule of Bankruptcy Procedure 2002; and,

4. The Examiner, the Debtors, the Committee, the State of Idaho, or the United States Trustee shall have the right to petition the Court to further expand the scope of the Investigation, if during such Investigation other relevant matters are revealed which the Examiner, the Debtors, the Committee, the State of Idaho or the United States Trustee believe should be brought to the attention of the Court; and,

5. The Debtors, the Debtors' affiliates and subsidiaries, and the Committee are directed to fully cooperate with the Examiner in conjunction with the performance of any of the Examiner's duties and the Investigation, and the Debtors and the Committee shall use their respective best efforts to coordinate with the Examiner to avoid unnecessary interference with, or duplication of, the Investigation; and,

6. Until the Examiner has filed his or her report, neither the Examiner nor the Examiner's representatives or agents shall make any public disclosures concerning the performance of the Investigation or the Examiner's duties; and,

7. The Examiner shall prepare and file a report, as is required by 11 U.S.C. § 1106(a)(4), within 120 days following the approval of the work plan by the Court, unless such time shall be

extended by order of the Court on Notice to all parties that have requested notice pursuant to Federal Rule of Bankruptcy Procedure 2002; and,

8. The Examiner may retain counsel and other professionals, if he or she determines that such retention is necessary to discharge his or her duties, with such retention to be subject to Court approval under standards equivalent to those set forth in 11 U.S.C. § 327; and,

9. The Examiner and any professionals retained by the Examiner pursuant to any order of this Court shall be compensated and reimbursed for their expenses pursuant to any procedures for interim compensation and reimbursement of expenses of professionals that are established in these cases. Compensation and reimbursement of the Examiner shall be determined pursuant to 11 U.S.C. § 330, and compensation and reimbursement of the Examiner's professionals shall be determined pursuant to standards equivalent to those set forth in 11 U.S.C. § 330; and,

10. The Examiner shall cooperate fully with any governmental agencies (such cooperation shall not be deemed a public disclosure as referenced in paragraph 6 above) including, but not limited to, any federal, state or local government agency that may be investigating the Debtors, its management or its financial condition, and the Examiner shall use best efforts to coordinate with such agencies in order to avoid unnecessary interference with, or duplication of, any investigations conducted by such agencies; and,

11. The Examiner shall have the standing of a "party-in-interest" with respect to the matters that are within the scope of the Investigation, and shall be entitled to appear and be heard at any and all hearings in these cases; and,

12. Nothing in this Order shall impede the right of the United States Trustee or any other party to request any other lawful relief, including but not limited to the appointment of a trustee.



The Honorable Peter J. Walsh  
United States Bankruptcy Judge

Dated: March 25, 2009

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

TRIBUNE COMPANY, et al.,<sup>1</sup>

Debtors.

Chapter 11

Case No. 08-13141 (KJC)

Jointly Administered

Related to Docket No. 3062, 4117

**AGREED ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER**

Upon the Motion<sup>2</sup> of Wilmington Trust Company (“WTC”) in the above-captioned chapter 11 cases for appointment of an examiner pursuant to § 1104(c) of the Bankruptcy Code; the Court having reviewed the objections, responses and/or statements related to the Motion filed

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Tribune Company (0355); 435 Production Company (8865); 5800 Sunset Productions Inc. (5510); Baltimore Newspaper Networks, Inc. (8258); California Community News Corporation (5306); Candle Holdings Corporation (5626); Channel 20, Inc. (7399); Channel 39, Inc. (5256); Channel 40, Inc. (3844); Chicago Avenue Construction Company (8634); Chicago River Production Company (5434); Chicago Tribune Company (3437); Chicago Tribune Newspapers, Inc. (0439); Chicago Tribune Press Service, Inc. (3167); ChicagoLand Microwave Licensee, Inc. (1579); Chicagoland Publishing Company (3237); Chicagoland Television News, Inc. (1352); Courant Specialty Products, Inc. (9221); Direct Mail Associates, Inc. (6121); Distribution Systems of America, Inc. (3811); Eagle New Media Investments, LLC (6661); Eagle Publishing Investments, LLC (6327); forsalebyowner.com corp. (0219); ForSaleByOwner.com Referral Services, LLC (9205); Fortify Holdings Corporation (5628); Forum Publishing Group, Inc. (2940); Gold Coast Publications, Inc. (5505); GreenCo, Inc. (7416); Heart & Crown Advertising, Inc. (9808); Homeowners Realty, Inc. (1507); Homestead Publishing Co. (4903); Hoy, LLC (8033); Hoy Publications, LLC (2352); InsertCo, Inc. (2663); Internet Foreclosure Service, Inc. (6550); JuliusAir Company, LLC (9479); JuliusAir Company II, LLC; KIAH Inc. (4014); KPLR, Inc. (7943); KSWB Inc. (7035); KTLA Inc. (3404); KWGN Inc. (5347); Los Angeles Times Communications LLC (1324); Los Angeles Times International, Ltd. (6079); Los Angeles Times Newspapers, Inc. (0416); Magic T Music Publishing Company (6522); NBBF, LLC (0893); Neocomm, Inc. (7208); New Mass. Media, Inc. (9553); Newscom Services, Inc. (4817); Newspaper Readers Agency, Inc. (7335); North Michigan Production Company (5466); North Orange Avenue Properties, Inc. (4056); Oak Brook Productions, Inc. (2598); Orlando Sentinel Communications Company (3775); Patuxent Publishing Company (4223); Publishers Forest Products Co. of Washington (4750); Sentinel Communications News Ventures, Inc. (2027); Shepard's Inc. (7931); Signs of Distinction, Inc. (3603); Southern Connecticut Newspapers, Inc. (1455); Star Community Publishing Group, LLC (5612); Steamweb, Inc. (4276); Sun-Sentinel Company (2684); The Baltimore Sun Company (6880); The Daily Press, Inc. (9368); The Hartford Courant Company (3490); The Morning Call, Inc. (7560); The Other Company LLC (5337); Times Mirror Land and Timber Company (7088); Times Mirror Payroll Processing Company, Inc. (4227); Times Mirror Services Company, Inc. (1326); TMLH 2, Inc. (0720); TMLS I, Inc. (0719); TMS Entertainment Guides, Inc. (6325); Tower Distribution Company (9066); Towering T Music Publishing Company (2470); Tribune Broadcast Holdings, Inc. (4438); Tribune Broadcasting Company (2569); Tribune Broadcasting Holdco, LLC (2534); Tribune Broadcasting News Network, Inc., n/k/a Tribune Washington Bureau Inc. (1088); Tribune California Properties, Inc. (1629); Tribune CNLBC, LLC, f/k/a/ Chicago National League Ball Club, LLC (0347); Tribune Direct Marketing, Inc. (1479); Tribune Entertainment Company (6232); Tribune Entertainment Production Company (5393); Tribune Finance, LLC (2537); Tribune Finance Service Center, Inc. (7844); Tribune License, Inc. (1035); Tribune Los Angeles, Inc. (4522); Tribune Manhattan Newspaper Holdings, Inc. (7279); Tribune Media Net, Inc. (7847); Tribune Media Services, Inc. (1080); Tribune Network Holdings Company (9936); Tribune New York Newspaper Holdings, LLC (7278); Tribune NM, Inc. (9939); Tribune Publishing Company (9720); Tribune Television Company (1634); Tribune Television Holdings, Inc. (1630); Tribune Television New Orleans, Inc. (4055); Tribune Television Northwest, Inc. (2975); ValuMail, Inc. (9512); Virginia Community Shoppers, LLC (4025); Virginia Gazette Companies, LLC (9587); WATL, LLC (7384); WCWN LLC (5982); WDCW Broadcasting, Inc. (8300); WGN Continental Broadcasting Company (9530); WLVI Inc. (8074); WPIX, Inc. (0191); and WTXN Inc. (1268). The Debtors' corporate headquarters and the mailing address for each Debtor is 435 North Michigan Avenue, Chicago, Illinois 60611.

<sup>2</sup> Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Motion.

or made by the above-captioned debtors and debtors in possession (the "Debtors"), the Official Committee of Unsecured Creditors appointed in the Debtors' cases (the "Committee"), JPMorgan Chase Bank, N.A. ("JPMC"), Merrill Lynch Capital Corporation ("MLCC"), the Credit Agreement Lenders (the "Credit Agreement Lenders"), certain retirees (the "TM Retirees"), Citicorp North America, Inc./Citigroup Global Markets Inc. (together, "Citigroup"), Bank of America, N.A. and Banc of America Securities LLC (together, "BofA"), Law Debenture Trust Company of New York, as Indenture Trustee ("Law Debenture"), Centerbridge Credit Advisors LLC ("Centerbridge") (collectively the "Parties"), and the Office of the United States Trustee (the "U.S. Trustee"), and considered the arguments and representations of counsel made thereon; and due and proper notice having been given under the circumstances; and it appearing that this is a core proceeding under 28 U.S.C. § 157(b)(2); and the Parties having consented to appointment of an examiner, it is hereby ORDERED as follows:

1. The U.S. Trustee is directed to appoint an examiner (the "Examiner") pursuant to 11 U.S.C. § 1104(c)(1).
2. The Examiner shall (i) evaluate whether there are potential claims and causes of action held by the Debtors' estates in connection with the leveraged buy-out of Tribune that occurred in 2007 (the "LBO") which may be asserted against any entity which may bear liability, including, without limitation, the Debtors, the Debtors' former and/or present management, including former/present members of Tribune's Board, the Debtors' lenders and the Debtors' advisors, said potential claims and causes of action including, but not being limited to, claims for fraudulent conveyance (including both avoidance of liability and disgorgement of payments), breach of fiduciary duty, aiding and abetting the same, and equitable subordination and whether



there are any potential defenses which may be asserted to such potential claims and causes of action, (ii) evaluate whether Wilmington Trust Company violated the automatic stay under 11 U.S.C. § 362 by its filing, on March 3, 2010, of its Complaint for Equitable Subordination and Disallowance of Claims, Damages, and Constructive Trust (docketed at Adv. No. 10-50732, D.I. 1), (iii) evaluate the assertions and defenses made by certain of the Parties in connection with the Motion of JPMorgan Chase Bank, N.A., for Sanctions Against Wilmington Trust Company for Improper Disclosure of Confidential Information in Violation of Court Order (D.I. 3714), and (iv) otherwise perform the duties of an examiner set forth in 11 U.S.C. §§ 1106(a)(3) and (4) (as limited by this Order) (collectively, the "Investigation").

3. The Examiner shall, before commencing the Investigation, meet and confer with the Parties, and the U.S. Trustee, if the U.S. Trustee requests participation. The Parties shall use their respective best efforts to coordinate with the Examiner and to avoid unnecessary interference with, or duplication of, the Investigation, and the Examiner, in his or her conduct of the Investigation, shall use best efforts to utilize relevant materials obtained by the Parties via informal and/or formal discovery to avoid unnecessary duplication of work performed to date. Nothing in this Order shall be deemed to require any Party to waive any applicable privilege.

4. Within seven (7) days after the later of entry of this Order or the date on which the U.S. Trustee files a notice of the Examiner's appointment, the Examiner shall propose a work and expenses plan (the "Work and Expenses Plan"), which shall include a good faith estimate of the fees and expenses of the Examiner and the Examiner's proposed professionals for conducting the Investigation (the "Budget"). The Court will hold a status conference on May 10, 2010 at 11:00 a.m. to (i) consider the Work and Expenses Plan (along with any responses thereto).

including an opportunity for any of the Parties to be heard on the appropriateness of the Budget) and (ii) order, if appropriate, further relief as will aid the Examiner in the performance of the Examiner's duties and/or to accommodate the needs of the estates. Notwithstanding the foregoing, the Examiner is authorized to commence the Investigation after the "meet and confer" referenced in the prior paragraph of this Order.

5. The Examiner shall prepare and file a report (the "Report"), as required by 11 U.S.C. § 1106(a)(4), on or before July 12, 2010, unless such time shall be extended by order of the Court upon application by the Examiner on notice to the Parties.

6. Until the Examiner has filed the Report, neither the Examiner nor the Examiner's representatives or agents shall make any public disclosures concerning the performance of the Examiner's duties, except in hearings before the Court; provided, however, that neither any information asserted to be confidential pursuant to applicable agreement or treated as confidential pursuant to court order, nor any evaluation of the strengths or weaknesses of any potential claim or right of action the estates may have or suggested litigation strategy in connection therewith, shall be disclosed publicly without further order of this Court.

7. The Examiner may retain counsel and other professionals if the Examiner determines that such retention is necessary to discharge the Examiner's duties, with such retention to be subject to Court approval after notice under standards equivalent to those set forth in 11 U.S.C. § 327.

8. The Examiner and any professionals retained by the Examiner pursuant to order of this Court shall be compensated and reimbursed for their expenses pursuant to any procedures for interim compensation and reimbursement of expenses of professionals which are established

in these cases. Compensation and reimbursement of the Examiner shall be determined pursuant to 11 U.S.C. § 330, and compensation of the Examiner's professionals shall be determined pursuant to standards equivalent to those set forth in 11 U.S.C. § 330.

9. The Examiner shall have the standing of a party in interest with respect to matters that are within the scope of the Investigation, and shall be entitled to appear and be heard at any and all hearings in these cases.

10. The Debtors and all of the Debtors' affiliates, subsidiaries and other companies and the Examiner shall mutually coordinate and cooperate in connection with the performance of the Examiner's duties. In addition to full access to the documents in the depository as set forth below, the Debtors shall provide to the Examiner all other non-privileged documents and information relevant to the Investigation that the Examiner requests. Nothing herein shall prohibit the Debtors from objecting to requests, including, without limitation, on the ground that the documents or information requested are beyond the scope of the Investigation. If the Examiner seeks the disclosure of documents or information as to which the Debtors assert a claim of privilege or have objected and the Examiner and the Debtors are unable to reach a resolution on whether or on what terms such documents or information should be disclosed to the Examiner, the matter may be brought before the Court for resolution. The Debtors' and the Committee's privileges, including, but not limited to, the attorney-client privilege and attorney work-product privilege, remain and are not deemed waived or in any way impaired by this Order.

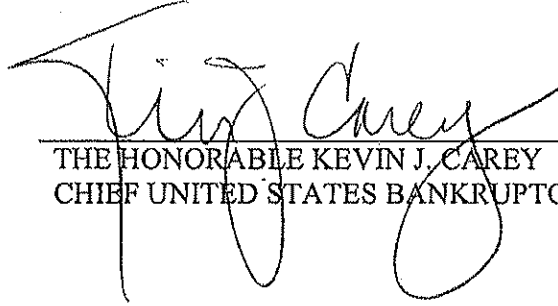
11. Subject to any applicable confidentiality agreement and orders entered by this Court, the Parties will as promptly as practicable take all necessary and appropriate steps to give

the Examiner and professionals retained by the Examiner access to the document depository referenced in the Order (i) Authorizing the Debtors to Establish a Document Depository and Directing the Committee to Deliver Certain Documents to the Depository and (ii) Establishing Settlement Negotiation Protections (D.I. 2858) (the "Depository Order"). The Examiner and professionals retained by the Examiner shall have full and complete access to all documents in the depository, notwithstanding the rights of Producing Parties (as that term is defined in the Depository Order) to object to the review of documents produced by such Producing Party. Notwithstanding any other provision of this Order, documents in the Depository and other information subject to orders of this Court relating to confidentiality shall not be disclosed by the Examiner, except in accordance with such orders or further order of this Court. The Parties shall reasonably cooperate with the Examiner.

12. Subject to the requirements for mutual cooperation and coordination set forth herein, nothing contained in this Order shall diminish the powers and authority of the Debtors or the Committee under the Bankruptcy Code, including the powers to investigate transactions and entities, to commence adversary proceedings and contested matters, and to object to claims.

13. Nothing in this Order shall impede the rights of the U.S. Trustee, the Parties (including WTC), or any other party in interest to request any other lawful relief, including but not limited to a request to further expand the scope of the Investigation, if during such Investigation other relevant matters are revealed which the Examiner or other party believes should be brought to the attention of the Court, or to have the Report (or parts thereof) filed under seal.

Dated: Wilmington, Delaware  
April 20, 2010



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THE HONORABLE KEVIN J. CAREY  
CHIEF UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

-----X	
<i>In re</i>	: Chapter 11
WASHINGTON MUTUAL, INC., <u>et al.</u> , <sup>1</sup>	: Case No. 08-12229 (MFW)
Debtors.	: (Jointly Administered)
-----X	
	Re: Docket No. 4644, 5119

**AGREED ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER**

Upon the motion, dated June 8, 2010 (the "Second Motion"), of the Official Committee of Equity Security Holders (the "Equity Committee") for entry of an order appointing an examiner pursuant to section 1104 of title 11 of the United States Code (the "Bankruptcy Code"); and Washington Mutual, Inc. ("WMI") and WMI Investment Corp. (collectively, the "Debtors") having filed that certain Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated July 1, 2010, as may be further amended from time to time (the "Plan"), which embodies the compromise and settlement set forth in that certain Settlement Agreement, dated as of May 21, 2010 (the "Settlement Agreement"),<sup>2</sup> by and among the Debtors, the Creditors' Committee, JPMC, the FDIC Receiver, FDIC Corporate and the other parties thereto and a disclosure statement in connection therewith (the "Disclosure Statement"); and by motion, dated April 26, 2010 (the "First Motion"), the Equity Committee having previously requested the appointment of an examiner pursuant to

<sup>1</sup> The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

<sup>2</sup> Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed thereto in the Settlement Agreement.

section 1104 of the Bankruptcy Code; and by order, dated May 5, 2010 (the "Denial Order"), the Court having denied the relief requested in the First Motion; and by separate notices of appeal, the Equity Committee and the Office of the United States Trustee (the "U.S. Trustee") having appealed from the Denial Order (collectively, the "Appeals"); and by petition, dated July 7, 2010, the Equity Committee having requested that the United States Court of Appeals for the Third Circuit consider its Appeal of the Denial Order under direct certification; and the Court contemporaneously herewith having (a) adjourned the hearing to consider the adequacy of the information contained in the Disclosure Statement in connection with the Plan in accordance with section 1125 of the Bankruptcy Code to September 7, 2010, and (b) subject to the provisions set forth herein, established November 1, 2010, at 9:30 a.m., as the date and time for the hearing to consider confirmation of the Plan in accordance with section 1129 of the Bankruptcy Code (the "Confirmation Hearing"); and based upon the Court's ruling with respect to the scheduling of the Confirmation Hearing, the Debtors having consented to the entry of this Order and the granting of the relief provided herein; and the Court having overruled the objections of the WMI Senior Noteholders Group, the FDIC Receiver and others to the appointment of an examiner; upon due consideration and sufficient cause appearing therefor, it is hereby ORDERED as follows:

1. The U.S. Trustee is directed to (a) solicit from the Parties and the Equity Committee the names of persons such entities believe are qualified to serve as examiner (the "Examiner") to perform the Investigation, as defined below, and (b) appoint the Examiner pursuant to section 1104 of the Bankruptcy Code on or prior to 5:00 p.m. (prevailing Eastern time) on July 26, 2010.

2. The Examiner is directed to investigate (the "Investigation") (a) the claims and assets that may be property of the Debtors' estates that are proposed to be conveyed, released or otherwise compromised and settled under the Plan and Settlement Agreement, including all Released Claims, as defined in the Settlement Agreement, and the claims and defenses of third parties thereto (the "Settlement Component") and (b) such other claims, assets and causes of actions which shall be retained by the Debtors and/or the proceeds thereof, if any, distributed to creditors and/or equity interest holders pursuant to the Plan, and the claims and defenses of third parties thereto (the "Retained Asset Component"); provided, however, that the foregoing is without prejudice to the Court modifying the foregoing scope of the Investigation in the event that the Court otherwise deems appropriate.

3. The Examiner shall promptly meet and confer, separately if requested, with the Debtors, each of the other Parties, the Equity Committee, and, if the U.S. Trustee requests participation, the U.S. Trustee. The Parties and the Equity Committee shall use their respective best efforts to coordinate with the Examiner and to avoid unnecessary interference with, or duplication of, the Investigation, and the Examiner, in his or her conduct of the Investigation, shall use best efforts to utilize relevant materials obtained by the Parties and the Equity Committee in the course of any informal and/or formal discovery to avoid unnecessary duplication of work performed to date.

4. On or prior to 5:00 p.m. (prevailing Eastern time) on August 6, 2010, the Examiner shall file with the Court a work and expenses plan (the "Work and Expenses Plan/Report"), which shall include a good faith estimate of the fees and expenses to be incurred by or on behalf of the Examiner in connection with the Investigation, and a status report detailing the Examiner's efforts to date. The Court will hold a status conference on August 10, 2010, at



1:30 p.m., to (a) consider the Work and Expenses Plan/Report (along with any responses thereto) and (b) order, if appropriate, further relief as will aid the Examiner in the performance of the Examiner's duties and/or to accommodate the needs of the Debtors' estates. Notwithstanding the foregoing, the Examiner is authorized to commence the Investigation immediately upon the Examiner's appointment.

5. The Examiner shall prepare and file (a) a preliminary report (the "Preliminary Report"), as required by 11 U.S.C. § 1106(a)(4), with respect to the Settlement Component and the Retained Asset Component on or before September 7, 2010 and (b) unless the Court finds that additional time for discovery is required, a final report (the "Final Report")<sup>3</sup> on or before October 8, 2010; provided, however, that such time may be extended by order of the Court, issued *sua sponte* or upon application by the Examiner on notice to all parties entitled to the same under Federal Rule of Bankruptcy Procedure 2002, for cause shown; and, provided, further, that, in the event that such time is extended with respect to the Final Report, the Court may, if necessary, adjourn commencement of the Confirmation Hearing.

6. Until the Examiner has filed the Reports, neither the Examiner nor the Examiner's representatives or agents shall make any public disclosures concerning the Investigation or performance of the Examiner's duties, except in hearings before the Court; provided, however, that, unless otherwise ordered by the Court, no information asserted to be confidential pursuant to applicable agreement, law or regulation, privileged or treated as such pursuant to court order, nor any evaluation of the strengths or weaknesses of any potential claim or right of action any of the Parties or the Equity Committee or any other party in interest may have or suggested litigation strategy in connection therewith (the "Evaluation Information"),

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<sup>3</sup> The Preliminary Report and the Final Report are sometimes hereinafter collectively referred to as the "Reports".

shall be disclosed by the Examiner publicly or to any other party other than the party or parties providing such information, or, in the case of Evaluation Information, to any person other than publicly in connection with the filing of the Reports.

7. The Debtors, the other Parties and the Equity Committee are directed to fully cooperate with the Examiner in conjunction with the performance of any of the Examiner's duties and the Investigation. The Debtors shall provide to the Examiner all documents and information relevant to the investigation that the Examiner requests. The Debtors, the other Parties, the Equity Committee and any other party in interest may submit briefing memoranda to the Examiner with respect to matters pertaining to the Investigation, including, without limitation, the basis for the position that certain claims are available or unavailable to the Debtors. The Examiner shall consider all timely submitted memoranda in connection with the Investigation and the preparation of the Preliminary Report and Final Report. Nothing contained in this paragraph 7 shall prohibit the Debtors or any other of the Parties subject to requests from (a) objecting to requests on any ground or (b) seeking a protective order for any reason whatsoever.

8. The Examiner may retain counsel and other professionals if the Examiner determines that such retention is necessary to discharge the Examiner's duties, with such retention to be subject to Court approval after notice under standards equivalent to those set forth in 11 U.S.C. § 327.

9. The Examiner and any professionals retained by the Examiner pursuant to order of this Court shall be compensated and reimbursed for their fees and expenses pursuant to any procedures for interim compensation and reimbursement of professionals which are

established in these cases. Compensation and reimbursement of the Examiner shall be determined pursuant to 11 U.S.C. § 330.

10. In addition to full access to the documents in the Depository, as set forth below, the Debtors shall provide to the Examiner all other non-privileged documents and information relevant to the Investigation that the Examiner requests. Nothing herein shall prohibit the Debtors or any other party in interest, including the FDIC Receiver or FDIC Corporate, from (a) objecting to requests on any ground or (b) seeking a protective order for any reason whatsoever. If the Examiner seeks the disclosure of documents or information as to which the Debtors assert a claim of privilege and the Examiner and the Debtors are unable to reach a resolution, the matter may be brought before the Court for resolution. The Debtors' and the other Parties' privileges, including, but not limited to, the attorney-client privilege and attorney work-product privilege, in accordance with Federal Rule of Evidence 502(d), remain and are not deemed waived or in any way impaired by any production to the Examiner of materials protected by such privileges, or by any other aspect of this Order. The production of assertedly privileged documents to the Examiner shall not constitute a determination by the Court that such documents are, in fact, privileged, nor shall such production prejudice the rights of the producing party or parties in interest to challenge the assertion of any privilege.

11. The Parties will as promptly as practicable take all necessary and appropriate steps to give the Examiner and professionals retained by the Examiner full and complete access to all documents in the Depository referenced in that certain Confidentiality Agreement Governing Confirmation Discovery, as "So Ordered" in accordance with that certain Order Governing the Production and use of Discovery Materials in Connection with Plan Confirmation, dated July 2, 2010 (the "Depository Order"). Notwithstanding any other provision

of this Order, documents in the Depository and other information subject to orders of this Court relating to confidentiality shall not be disclosed by the Examiner, except in accordance with such orders or further order of this Court.

12. Unless the Court orders otherwise, the Examiner shall have the standing of a party in interest with respect to matters that are within the scope of the Investigation until completion of the Investigation.

13. The Equity Committee is directed to take all such actions as are necessary to withdraw, with prejudice, the appeal pending before the United States Court of Appeals for the Third Circuit (the "Third Circuit Court"), including, without limitation, filing such pleadings as are appropriate with the Clerk of the Third Circuit Court.

14. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

15. Nothing contained in this Order shall impede the right of any party in interest to seek such legal or equitable relief as is appropriate and any party in interest to contest any requested relief.

Dated: July 22, 2010  
Wilmington, Delaware

  
\_\_\_\_\_  
THE HONORABLE MARY F. WALRATH  
UNITED STATES BANKRUPTCY JUDGE

# **DISCHARGE ORDERS**

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re : CHAPTER 11  
: (Jointly Administered)  
NEW CENTURY TRS HOLDINGS, :  
INC., *et al.*<sup>1</sup> : Case No. 07-10416 (KJC)  
Debtors :  
: Re: docket nos 8665 and 9044

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ORDER DISCHARGING MICHAEL J. MISSAL AS EXAMINER  
AND  
GRANTING, IN PART, THE EXAMINER'S MOTION REGARDING THIRD-PARTY  
DISCOVERY AND PROCEDURES FOR THE DISPOSITION AND  
SHARING OF CERTAIN DOCUMENTS AND INFORMATION  
AND  
GRANTING NEW CENTURY LIQUIDATING TRUSTEE'S MOTION REGARDING  
THE TRANSFER OF CERTAIN DOCUMENTS FROM THE FORMER OFFICIAL  
COMMITTEE OF UNSECURED CREDITORS TO THE LIQUIDATING TRUSTEE

Upon consideration of the "Motion of Michael J. Missal, Examiner for Order Discharging the Examiner, Granting Relief From Third Party Discovery, and Establishing Procedures for the Disposition and Sharing of Certain Documents and Information (docket no. 8665) (the "Examiner's Motion"), and

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<sup>1</sup>The Debtors are the following entities: New Century Financial Corporation (*f/k/a* New Century REIT, Inc.), a Maryland corporation; New Century TRS Holdings, Inc. (*f/k/a* New Century Financial Corporation), a Delaware corporation; New Century Mortgage Corporation (*f/k/a* JBE Mortgage) (*d/b/a* NCMC Mortgage Corporate, New Century Corporation, New Century Mortgage Ventures, LLC), a California corporation; NC Capital Corporation, a California corporation; Home123 Corporation (*f/k/a* The Anyloan Corporation, 1800anyloan.com, Anyloan.com), a California corporation; New Century Credit Corporation (*f/k/a* Worth Funding Incorporated), a California corporation; NC Asset Holding, L.P. (*f/k/a* NC Residual II Corporation), a Delaware limited partnership; NC Residual III Corporation, a Delaware corporation; NC Residual IV Corporation, a Delaware corporation; New Century R.E.O. Corp., a California corporation; New Century R.E.O. II Corp., a California corporation; New Century R.E.O. III Corp., a California corporation; New Century Mortgage Ventures, LLC (*d/b/a* Summit Resort Lending, Total Mortgage Resource, Select Mortgage Group, Monticello Mortgage Services, Ad Astra Mortgage, Midwest Home Mortgage, TRATS Financial Services, Elite Financial Services, Buyers Advantage Mortgage), a Delaware limited liability company; NC Deltex, LLC, a Delaware limited liability company; and NCoral, L.P., a Delaware limited liability partnership. These entities are referred to herein as the "Debtors" or "New Century," collectively.

upon consideration of the objections to the Examiner's Motion filed by KPMG LLC, certain former officers and underwriters of New Century, the New York State Teachers' Retirement System (the "NYSTS"), and the New Century Liquidating Trust and Reorganized New Century Warehouse Corporation (the "Liquidating Trustee"); and the responses of the Liquidating Trustee and the Examiner thereto; and

upon consideration of the "Motion by the New Century Liquidating Trustee and Reorganized New Century Warehouse Corporation for an Order Permitting the Transfer to the Liquidating Trustee of Certain Documents by the Former Official Committee of Unsecured Creditors" (docket no. 9044) (the "Liquidating Trustee's Motion"); and

upon consideration of KPMG LLC's Objection to the Liquidating Trustee's Motion; and the Court having conducted hearings on September 18, 2008, and November 19, 2008, during which interested parties were given the opportunity to be heard with respect to the Examiner's Motion and the Liquidating Trustee's Motion; and

after due deliberation and sufficient cause appearing therefore; it is hereby ORDERED:

1. The Examiner's Motion is GRANTED, in part, to the extent provided herein.
2. The Examiner is discharged from his duties under the terms of the Order Denying in Part and Granting in Part Motion of the United States Trustee for an Order Directing the Appointment of a Chapter 11 Trustee, or in the Alternative, an Examiner dated June 1, 2008 (the "June 1 Order"), as subsequently amended, and his appointment as Examiner is hereby terminated.
3. Notwithstanding paragraph 2, above, the Examiner shall continue to cooperate as contemplated in the June 1 Order, with governmental agencies, the United States

Trustee, her counsel and staff and the Liquidating Trustee and his professionals provided, however, that the payment of fees and expenses incurred by the Examiner and his professionals under this paragraph will be subject to the cap as set forth in paragraph 9 herein.

4. The Examiner shall transfer to the Liquidating Trustee, as requested by the Liquidating Trustee, copies of all of (a) the documents that were produced to the Examiner by a number of parties, including the Debtors, the Debtors' independent auditors, KPMG LLP ("KPMG"), and the Debtors' independent directors (collectively, the "Investigative Record") and (b) the documents that were created and compiled by the Examiner and his professionals, Kirkpatrick & Lockhart Preston Gates Ellis LLP (now K&L Gates LLP) ("K&L Gates"), Saul Ewing LLP ("Saul"), and BDO Seidman LLP ("BDO") (collectively, the "Professionals"), in connection with the Examiner's investigation, including but limited to, requests for information received by the Examiner or his Professionals from government agencies and any materials or communications provided in response to those requests (the "Other Investigative Materials" and collectively with the Investigative Record, the "Examiner's Materials"). The Examiner is not required by this Order to transfer documents (or parts of documents, as the case may be) that contain privileged and otherwise confidential or protected communications and interaction between the Examiner and the Professionals of the type as described generally by the Examiner's counsel at the September 18, 2008 hearing



before this Court (the "Protected Materials").<sup>2</sup> To the extent that such transfer of the Examiner's Materials is not permitted under prior orders of this Court (the October 10, 2007 Order (docket no. 3261) or the August 21, 2007 Order (docket no. 2368) regarding the KPMG documents), the Court modifies its prior orders to permit this transfer.

5. The Examiner shall provide the Liquidating Trustee with a description by category of the Protected Materials as requested by the Liquidating Trustee. The Liquidating Trustee reserves all rights, on any grounds, to request that the Examiner provide him with copies of any of the Protected Materials and, if such request is refused, to move this Court, or other forum, to direct the production of such refused Protected Materials subject to the terms of this Order applicable to Examiner's Materials. The Examiner reserves all rights, on any grounds including that of privilege, to refuse to provide any of the Protected Materials to the Liquidating Trustee and to oppose any motion by the Liquidating Trustee to direct the production thereof.
6. Subject to his obligations under paragraphs 3 and 4 above, the Examiner and his Professionals are relieved from any duty to produce documents or information to third parties gathered by, produced to, or created by the Examiner or his Professionals, [e.g., the Examiner's Materials], in response to any formal or informal discovery requests, including, but not limited to, any subpoena, request for production of documents, request for admissions, interrogatories, request for

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<sup>2</sup>See Tr. 9/18/2008 at 33.

testimony or any other discovery of any kind related to this proceeding and/or the Examiner's investigation, except that this prohibition:

- a) shall not apply to requests for information and materials that the third party demonstrates that it cannot obtain through discovery from any other source so long as such production would not violate any protective or other order of this Court and the requests do not seek the production of documents protected by the attorney-client privilege, the work product doctrine or any other applicable privilege or protection; it being understood that nothing herein is intended to create a privilege or protection in favor of the Examiner and/or his Professionals that did not already exist; and, further, with all rights to dispute the attorney-client privilege, the work product doctrine or any other applicable privilege or protection as asserted by the Examiner being preserved; and
- b) shall not apply to requests related to the compensation and reimbursement applications submitted by the Examiner and his Professionals to this court.

7. Upon receipt of a formal or informal discovery request related to the above-captioned cases, the Examiner shall provide the proponent of the request with a copy of this Order within a reasonable period of time after receiving the request and, at the same time and to the extent permitted by law, provide the Liquidating Trustee with a copy of the formal or informal discovery request.
8. The Examiner shall retain the Examiner's Materials and Protected Materials (collectively the "Records") for a period of two (2) years from the date of this

Order (the "Initial Retention Period"). After the Initial Retention Period, and upon written consent of the Liquidating Trustee and the United States Trustee, the Examiner may move this Court for an order permitting his destruction of the Records (the "Destruction Motion"). Notice of the Destruction Motion shall be provided by the Examiner no less than thirty (30) days prior to the scheduled hearing date of the Destruction Motion to counsel of record for those parties who have filed objections to the Examiner's Motion, the Liquidating Trustee, the United States Trustee, and any other party as the Court may direct. Any and all objections to the Destruction Motion shall be served upon the Examiner, the Liquidating Trustee and the United States Trustee and filed at least ten (10) days prior to the scheduled hearing date of the Destruction Motion or as otherwise directed by this Court.

9. The Examiner and his Professionals shall be reimbursed for reasonable time and expenses incurred from and after the date of entry of this order in (a) handling of the Records as provided herein, (b) cooperating with the entities and persons specified in paragraph 3, and (c) responding to any formal or informal discovery requests to the extent such requests are served, notwithstanding the prohibitions set forth in this Order, upon the submission of invoices to the Liquidating Trust without the necessity of filing further fee applications, provided, however, that payment of the first \$100,000 of fees and expenses incurred by the Examiner and his Professionals will be the responsibility of the Liquidating Trust (the "Paragraph 9 Cap") and the payment of fees and expenses thereafter incurred by

the Examiner and his Professionals in excess of the Paragraph 9 Cap shall be the sole responsibility of the party requesting the Examiner's cooperation or services. This Court shall retain jurisdiction to resolve professional compensation issues for the Examiner and his Professionals in connection with these bankruptcy cases.

10. To the extent there is any dispute concerning the payment of all or any part of any such invoices, the undisputed portion of the invoices will be paid and the Court will retain jurisdiction to hear and determine any such dispute on motion of the former Examiner or his counsel, and after notice and a hearing.
11. To the extent the Examiner's Motion seeks an order providing that its sharing of documents with governmental agencies, the office of the United States Trustee, and the Liquidating Trustee does not constitute a waiver of any applicable protections belonging to the Examiner and his Professionals, such request is hereby denied, without prejudice.
12. If KPMG and the Liquidating Trustee become parties to an arbitration and as to that portion of the Investigative Record to be provided by the Examiner and/or the former Official Committee of Unsecured Creditors to the Liquidating Trustee hereunder that consists of documents that were produced by KPMG to the Examiner and/or the former Official Committee of Unsecured Creditors (the "KPMG Investigative Record"), nothing in this Order is intended to address or decide any positions taken or arguments advanced in such arbitration by either KPMG or the Liquidating Trustee as to the KPMG Investigative Record with respect to the provision in the engagement letter between KPMG and New

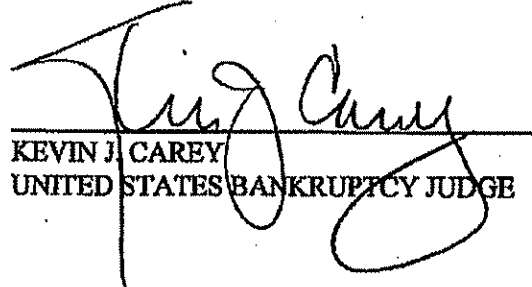
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Century which reads: "[d]iscovery shall be permitted in connection with the arbitration only to the extent, if any, expressly authorized by the arbitration panel upon a showing of substantial need by the party seeking discovery".

13. In addition to the Document Retention policy described in paragraph 33 of the Order Confirming the Second Amended Joint Chapter 11 Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors Dated as of April 23, 2008, the Liquidating Trustee shall preserve and maintain any and all documents and electronic data, including the Records, provided to the Liquidating Trustee by the Examiner and/or the former Official Committee of Unsecured Creditors pursuant to this Order and the Liquidating Trustee shall not destroy or otherwise abandon any or all of the Records absent further order of the Bankruptcy Court after a hearing upon notice to parties in interest and an opportunity to be heard, in the same manner as prescribed in paragraph 8 hereof.
14. The Liquidating Trustee's Motion, to the extent it is not rendered moot by the decision with respect to Examiner's Motion, is GRANTED.

15. The Court reserves jurisdiction as to all matters related to and arising from the implementation, interpretation and enforcement of this Order including, without limitation, any requested revision or modification thereof.

BY THE COURT:



Handwritten signature of Kevin J. Carey in black ink, written over a horizontal line.

KEVIN J. CAREY  
UNITED STATES BANKRUPTCY JUDGE

Dated: May 1, 2009

cc: David W. Carickhoff, Jr., Esquire<sup>1</sup>

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<sup>1</sup>Counsel shall serve a copy of this Order and the accompanying Memorandum upon all interested parties and file a Certificate of Service with the Court.

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re	:	CHAPTER 11
	:	(Jointly Administered)
NEW CENTURY TRS HOLDINGS, INC., <i>et al.</i> <sup>1</sup>	:	Case No. 07-10416 (KJC)
Debtors	:	

**MEMORANDUM**<sup>2</sup>

**BY: KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE**

The following two motions are currently before the Court for consideration:

- (1) Motion of Michael J. Missal, Examiner, for Order Discharging the Examiner, Granting Relief From Third-Party Discovery, and Establishing Procedures for the Disposition and Sharing of Certain Documents and Information (docket no. 8665)(the Examiner's Motion"); and
- (2) Motion by the New Century Liquidating Trustee and Reorganized New Century Warehouse Corporation for an Order Permitting the Transfer to the Liquidating

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<sup>1</sup>The Debtors are the following entities: New Century Financial Corporation (f/k/a New Century REIT, Inc.), a Maryland corporation; New Century TRS Holdings, Inc. (f/k/a New Century Financial Corporation), a Delaware corporation; New Century Mortgage Corporation (f/k/a JBE Mortgage) (d/b/a NCMC Mortgage Corporate, New Century Corporation, New Century Mortgage Ventures, LLC), a California corporation; NC Capital Corporation, a California corporation; Home123 Corporation (f/k/a The Anyloan Corporation, 1800anyloan.com, Anyloan.com), a California corporation; New Century Credit Corporation (f/k/a Worth Funding Incorporated), a California corporation; NC Asset Holding, L.P. (f/k/a NC Residual II Corporation), a Delaware limited partnership; NC Residual III Corporation, a Delaware corporation; NC Residual IV Corporation, a Delaware corporation; New Century R.E.O. Corp., a California corporation; New Century R.E.O. II Corp., a California corporation; New Century R.E.O. III Corp., a California corporation; New Century Mortgage Ventures, LLC (d/b/a Summit Resort Lending, Total Mortgage Resource, Select Mortgage Group, Monticello Mortgage Services, Ad Astra Mortgage, Midwest Home Mortgage, TRATS Financial Services, Elite Financial Services, Buyers Advantage Mortgage), a Delaware limited liability company; NC Deltex, LLC, a Delaware limited liability company; and NCoral, L.P., a Delaware limited liability partnership. These entities are referred to herein as the "Debtors" or "New Century," collectively.

<sup>2</sup>This Memorandum constitutes the findings of fact and conclusions of law required by Fed.R.Bankr.P. 7052. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and §157(a). Venue is proper pursuant to 28 U.S.C. § 1409. This contested matter involves a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A) and (O).

Trustee of Certain Documents by the Former Official Committee of Unsecured Creditors (docket no. 9044)(the "Liquidating Trustee's Motion").

For the reasons set forth herein, the Examiner's Motion and the Liquidating Trustee's Motion, to the extent it is not moot, will be granted, in part.<sup>3</sup> To the extent the Examiner's Motion seeks an order providing that the sharing of documents does not cause a waiver of any applicable protection or privilege, that relief will be denied, without prejudice.

### **BACKGROUND**

New Century TRS Holdings, Inc. and its affiliates filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code on April 2, 2007. On June 1, 2007, the Court directed the United States Trustee to appoint an examiner pursuant to 11 U.S.C. §1104(c)(1) to perform the following duties:

(a) investigate any and all accounting and financial statement irregularities, errors or misstatements, including but not limited to such irregularities, errors or misstatements that (i) gave rise to the announced need to restate the Debtors' financial statements for the first three quarters of 2006 and/or (ii) led the Debtors' management and Audit Committee to conclude that it was more likely than not that pre-tax earnings in the 2005 financial statements were materially overstated, and identify and evaluate any claims or rights of action that the estates might have arising from or relating to such irregularities, errors or misstatements, (b) investigate any possible post-petition unauthorized use of cash collateral by the Debtor, and (c) otherwise perform the duties of an examiner set forth in section 1106(a)(3) (as limited by this order) and 1106(a)(4) of the Bankruptcy Code (collectively, the "Investigation").

Order dated June 1, 2007, ¶3 (docket no. 1023)(the "June 1, 2007 Order"). This Order also directed the examiner to prepare and file a report as required by Bankruptcy Code §1106(a)(4). *Id.* at ¶5. The June 1, 2007 Order further provides that:

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<sup>3</sup>See Liquidating Trustee Motion, p. 2 (stating that the Liquidating Trustee Motion would be rendered moot if the court grants the Examiner's Motion regarding transfer of the KPMG Materials).



10. The Examiner shall cooperate fully with any governmental agencies ( . . . including, but not limited to, any federal, state or local government agency, that may be investigating the Debtors, its management or its financial condition), and the Examiner shall use best efforts to coordinate with such agencies in order to avoid unnecessary interference with, or duplication of, any investigations conducted by such agencies.

....

12. Subject to any applicable confidentiality agreement between the Committee and the Debtors, the Committee shall provide the Examiner with access to all materials it has received in response to discovery authorized by the Court or voluntarily provided by the Debtors, and the Examiner and the Committee shall cooperate and coordinate their efforts to assure, to the extent possible, that their investigations are not unduly duplicative.

*Id.*, at ¶10, ¶12. On June 5, 2007, the United States Trustee appointed Michael J. Missal as the examiner (the “Examiner”). The Court approved that appointment on June 7, 2007 (docket no. 1162).

On October 10, 2007, the Court amended its June 1, 2007 Order to extend the deadline for filing the Examiner’s report and to provide that any report filed by the Examiner be filed initially under seal (the “October 10, 2007 Order”)(docket no. 3261).

On November 21, 2007, the Examiner filed his First Interim Report related to the possible unauthorized post-petition use of cash collateral by the Debtors (docket no. 3934). On February 29, 2008, the Examiner filed his Final Report (docket no. 5132).

On July 15, 2008, this Court entered an Order (docket no. 8596) confirming the Debtors’ Second Amended Joint Chapter 11 Plan of Liquidation (the “Plan”) and appointing Alan M. Jacobs as the Liquidating Trustee of the Debtors (the “Liquidating Trustee”).

(1) The Examiner’s Motion.

On July 29, 2008, the Examiner filed the Examiner’s Motion, which seeks the following

relief:

- (a) an order noting that the Examiner has completed his duties under the June 1, 2007 Order and discharging him from further commitments or representations, except that the Examiner shall continue to cooperate with entities including governmental agencies, the office of the United States Trustee, and the Liquidating Trustee;
- (b) permission to transfer portions of the Investigative Record and Other Investigative Materials<sup>4</sup> to the Liquidating Trustee, including privileged material received from the Debtors and KPMG<sup>5</sup>, and permission to destroy documents as the Examiner deems appropriate;
- (c) an order providing that the Examiner's sharing of documents or information with governmental agencies, the office of the United States Trustee and the Liquidating Trustee does not cause or constitute a waiver of any applicable protection belonging to the Examiner, including, but not limited to, the attorney-client privilege or the work product doctrine;
- (d) an order precluding any third party from issuing or serving upon the Examiner or

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<sup>4</sup>The Examiner's Motion defines these terms as follows:

- (a) "Investigative Record" means the millions of pages of documents produced to the examiner during the investigation by a number of parties, including the Debtors, the Debtors' independent auditors, KPMG, LLP ("KPMG"), and the Debtors' independent directors. The Investigative Record includes the Debtors' Privileged Materials and KPMG's Materials, as defined in n.4 [of the Motion].
- (b) "Other Investigative Materials" means the documents created or compiled by the Examiner and/or his professionals (including his legal counsel, Kirkpatrick & Lockhart Preston Gates Ellis LLP ("K&L Gates"), and Saul Ewing, LLP ("Saul") and his forensic accountants, BDO Seidman LLP ("BDO")) that are protected from discovery by the attorney/client privilege or the work product doctrine. This term does not include documents relating to requests for information received by the Examiner or his professionals from governmental agencies.

<sup>5</sup>The Debtors produced certain privileged and potentially privileged documents to the Examiner pursuant to an Order dated October 10, 2007 (docket no. 3261), in which the Court ordered that production of such documents did not constitute a waiver of any applicable privileges belonging to the Debtors (the "Debtors' Privileged Materials"). After extensive negotiations and two hearings before this Court regarding the Examiner's request for a subpoena, KPMG produced documents to the Examiner pursuant to a Protective Order dated August 21, 2007 (docket no. 2368), which, among other things, limited the Examiner's ability to disseminate those materials and preserved KPMG's jurisdictional arguments, including arguments based upon the Discovery Limitation Provision in the Arbitration Agreement in the Engagement Letters between KPMG and the Debtors (the "KPMG Materials").

his professionals any formal or informal discovery request relating to the Investigative Record or Other Investigative Materials, unless the third party demonstrates that it cannot obtain the documents from any other source; and

- (e) approval to be reimbursed for time and expenses incurred with respect to handling the Investigative Record and Other Investigative Materials, cooperating with governmental entities, the Liquidating Trustee and others specified in the Motion, and responding to discovery requests.

Although four objections to the Examiner's Motion were filed, none objected to the Examiner's request to be discharged from his duties. The objections were as follows:

- (i) An objection filed by former officers and underwriters of the Debtors (docket no. 8867), who are defendants in a consolidated shareholder securities fraud class action pending in the Central District of California as Case No. 2:07-cv-00931 (DDP) (the "Class Action), concerning the Examiner's requests to be relieved of third-party discovery and to share documents and information (the "Former Officers' Objection").
- (ii) An objection filed by the New York State Teachers' Retirement System (docket no. 8870), lead plaintiff in the Class Action, also objecting to the Examiner's requests regarding third-party discovery and the guidelines for destruction of documents (the "NYSTS Objection").<sup>6</sup>
- (iii) An objection filed by the Liquidating Trustee (docket no. 8869) concerning the potential fees and expenses that the Examiner and his professionals may seek to have paid if they perform additional services (the "Liquidating Trustee Objection").
- (iv) An objection filed by KPMG (docket no. 8873) concerning the Examiner's request for sharing KPMG Materials with the Liquidating Trustee (the "KPMG Objection").

On September 18, 2008, the court held a hearing to consider the Examiner's Motion and the objections. Just prior to that hearing, the Examiner and the Liquidating Trustee each filed a

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<sup>6</sup>The parties have resolved their differences over the Examiner's request to destroy documents by agreeing to procedures for destruction as now embodied in paragraph 8 of the Order accompanying this Memorandum. Although KPMG did not agree specifically to the proposed language in the NYSTS order, KPMG asked for at least 20 notice prior to any destruction of records. The compromise language requires 30 days' notice of any motion for authority to destroy records.

“response” to the objections (dockets nos. 8954 and 8960, respectively). At the September 18, 2008 hearing, the parties agreed to meet and discuss a form of order to resolve the objections to the Examiner’s Motion. After conferring and exchanging proposed forms of orders, the parties resolved some issues, but important differences remained. On November 7, 2008, the NYSTS filed a Supplemental Response to the Examiner’s Motion (docket no. 9117), attaching its proposed form of order. Also on November 7, 2008, KPMG filed a Supplemental Brief and its proposed form of order regarding the Examiner’s Motion (docket no. 9119).

A second hearing regarding the Examiner’s Motion was heard on November 19, 2008, at which time the Liquidating Trustee, NYSTS and KPMG each provided the Court with their own versions of proposed forms of order regarding the Examiner’s Motion for the Court’s consideration.

(2) The Liquidating Trustee’s Motion.

On October 7, 2008, the Liquidating Trustee filed a motion for entry of an order permitting the former Official Committee of Unsecured Creditors (the “Creditors’ Committee”) to transfer to the Liquidating Trustee certain documents that had been provided to the former Creditors’ Committee or its counsel by KPMG pursuant to Bankruptcy Rules 2004 and 9016. KPMG filed an objection to the Liquidating Trustee’s Motion. (Docket no. 9118) and the matter was heard by the Court along with the Examiner’s Motion on November 19, 2008. The Liquidating Trustee states that his motion will be rendered moot if the Court grants that portion of the Examiner’s Motion which provides for the transfer of the KPMG Materials from the Examiner to the Liquidating Trustee.

## DISCUSSION

No party disputes that the Examiner has completed his duties as described in the June 1, 2007 Order and, accordingly, he will be discharged from further performance of those duties, except the Examiner shall continue to cooperate with entities including governmental agencies, the office of the United States Trustee, and the Liquidating Trustee. Objections remain outstanding, however, with respect to other relief sought in the Examiner's Motion, which must be addressed separately.

(a) Continuing Costs.

The Liquidating Trustee filed a limited objection to the Examiner's Motion, noting his concern about the Examiner's request for continued reimbursement for time and expenses incurred by the Examiner and his professionals for services not requested or approved by the Liquidating Trust. The Liquidating Trustee noted that the Examiner and his professionals had incurred nearly \$20 million of fees and expenses from the beginning of his appointment through the filing of the Final Report. Moreover, the Liquidating Trustee noted that the Examiner and his professionals had incurred another \$450,000 of fees and expenses since the filing of the Final Report.

The parties agreed to language and included a provision in the proposed orders submitted to the Court that limits the Liquidating Trust's responsibility for continued fees and costs as follows:

3. Notwithstanding [the Examiner's discharge] in paragraph 2, above, the Examiner (i) shall continue to cooperate as contemplated in the June 1 Order, with governmental agencies, the United States Trustee, her counsel and staff and the Liquidating Trustee and his professionals provided, however, that the payment of the first \$100,000 of fees and expenses incurred by the Examiner and his

professionals under this paragraph will be the responsibility of the Liquidating Trustee (the "Paragraph 3 Cap") and the payment of fees and expenses thereafter incurred by the Examiner in excess of the Paragraph 3 Cap shall be the sole responsibility of the party requesting the Examiner's cooperation under this paragraph, and (ii) this Court shall retain jurisdiction to resolve professional compensation issues for the Examiner and his professionals in connection with the cases.

I agree that a cap on fees and expenses is in the best interests of the creditors and that the Liquidating Trust should not be subject to additional exposure for additional services provided by the Examiner, such as continued cooperation with governmental agencies or other parties, transferring or disposing of the Investigative Record and Other Investigative Materials, and responding to discovery requests. I understand that this may require the Examiner to seek reimbursement of certain fees and costs incurred in excess of the cap elsewhere. An appropriate provision will be included in the Order accompanying this Memorandum.

(b) Transfer of Government Materials.

During his investigation, the Examiner obtained numerous documents and materials from a number of parties, including the Debtors, the Debtors' independent directors, and the Debtors' independent auditors (KPMG). The Examiner seeks an order authorizing him to transfer copies of the Investigative Record and the Other Investigative Materials to the Liquidating Trustee.<sup>7</sup> In the Examiner's proposed form of Order granting the Examiner's Motion, however, the term "Other Investigative Materials" specifically excludes the following materials from turnover:

- (I) "Government Materials," defined as including any requests for information received by the Examiner or his Professionals from governmental agencies and the responses to those requests; and

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<sup>7</sup>The definition of the terms "Investigative Record" and "Other Investigative Materials," as set forth in the Examiner's Motion, are found in n. 4, *supra*.

- (ii) "Internal Materials," defined as including documents reflecting internal privileged and otherwise confidential or protected communications and interaction between the Examiner and his Professionals of the type as described generally by the Examiner's counsel at the September 18, 2008 hearing before this Court.<sup>8</sup>

The NYSTS and the Former Officers jointly submitted an alternative proposed form of order which does not exclude the Government Materials from the documents to be turned over to the Liquidating Trustee. The Examiner has not asserted any privilege or other basis for excluding the Government Materials from turnover. Instead, the Examiner proposed to exclude those documents to allow governmental agencies investigating the Debtors, such as the U.S. Securities and Exchange Commission and the U.S. Department of Justice, an opportunity to take a position regarding turnover of such documents. Despite notice of the Examiner's Motion, no governmental agency has taken a position with respect to turnover of the Government Materials to the Liquidating Trustee. (Tr. 11/19/08 at 59:25 - 60:25). Because there is no basis for treating the Government Materials separately, they will be included in the Other Investigative Materials to be turned over to the Liquidating Trustee.<sup>9</sup>

- (c) No waiver of privilege.

The Examiner asks this Court to rule that his sharing of documents with the governmental agencies, the office of the United States Trustee, and the Liquidating Trustee should not cause or constitute a waiver of any applicable protection belonging to the Examiner and his professionals, including, but not limited to, the attorney-client privilege or the work product doctrine. The

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<sup>8</sup>See Tr. 9/18/2008 at 33.

<sup>9</sup>For ease of reference, the Order entered in connection with this Memorandum employs the terms proposed by NYSTS to describe the documents and materials to be turned over to the Liquidating Trustee, so that the Investigative Record and Other Investigative Materials, including the Governmental Materials, will be defined, collectively, in the accompanying Order, as the "Examiner's Materials").

Examiner also seeks a similar ruling that the Liquidating Trustee's consultation with or retention of the Examiner's forensic accountants (BDO) will not cause a waiver of any of the Examiner's applicable privileges or protections. The Examiner and the Liquidating Trustee argue that the Court may order this relief based upon other cases holding that sharing documents and information with third persons who have a common interest should not constitute a waiver. *See, e.g., Westinghouse Electric Corp. v. The Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991) (Disclosure to a third party does not necessarily waive the protection of the work product doctrine unless it enables an adversary to gain access to the information); *United States v. American Telephone and Telegraph Co.*, 642 F.2d 1285, 1299-1300 (C.A.D.C. 1980) (Disclosure made in pursuit of trial preparations to a third party with "common interests" may not suffice as a basis for waiver of the work product doctrine). *See also Teleglobe USA Inc. v. BCE Inc. (In re TeleGlobe Commc'ns Corp.)*, 493 F.3d 345, 363-66 (3d Cir. 2007) (discussing the "community-of-interest privilege," which allows attorneys representing different clients with similar legal interests to share information without waiving the attorney-client privilege as to third parties).

The Officers and Underwriters object to this request, arguing that the Examiner provided no factual basis for such relief, having failed to specify which privilege or protection is being asserted as to any particular document. KPMG filed a similar objection to this relief. The objecting parties argue that the Court should not make a decision about waiver in a vacuum. I agree. The *Westinghouse* and *American Telephone and Telegraph* cases cited above instruct that a court's analysis of an assertion of the attorney-client privilege differs from an analysis of an assertion of the work product doctrine. A blanket decision about waiver, without any context,



may also be in the nature of an improper advisory opinion. See *In re Grand Jury Matter*, 673 F.2d 688, 694 n. 12 (3d Cir. 1982) (“To avoid being merely advisory, a court’s judgment must resolve ‘a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts.’”) quoting *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975). When and if the issue does arise, the court or other forum directly involved in the discovery request will have the facts available to make an appropriate determination about waiver.<sup>10</sup>

(d) Protection from third party discovery.

The Examiner performs his duties at the request of the Court, for the benefit of the debtor, its creditors and shareholders, and not to “fuel the litigation fires of third party litigants.” *In re Baldwin United Corp.*, 46 B.R. 314, 316 (Bankr.S.D.Ohio 1985). To protect the Examiner from a possible deluge of discovery requests, the Examiner asks that this Court enter an order precluding third parties from serving formal or informal discovery requests upon the Examiner. However, the Examiner has proposed that, if a third party demonstrates that it cannot obtain documents or materials from the Investigative Record or Other Investigative Record from any other source, then discovery requests related to those documents or materials would be allowed.

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<sup>10</sup>The Liquidating Trustee, who does not oppose this request, cites to orders entered in the *Refco* case (*In re Refco, Inc.*, case no. 05-60006, Bankr.S.D.N.Y. Aug. 16, 2007, docket no. 5748) and the *Enron* case (*In re Enron Corp.*, case no. 01-16034, Bankr.S.D.N.Y. Feb. 19, 2004, docket no. 16382) in support of the argument that there is precedent for ordering that an Examiner’s sharing of documents does not waive any applicable privileges. However, without knowing background information with respect to entry of these orders, I cannot determine whether the orders were entered over the objections of other parties or if more particular facts were available to the judge entering each order. In the particular circumstances before me, the orders, without more, are not persuasive.

The Officers and Underwriters, the NYSTS, and KPMG each filed an objection to the requested relief on a limited basis. The objectors argue that the permitted discovery should not be limited only to those documents in the Investigative Record or Other Investigative Record (as defined by the Examiner). As discussed above, this does not include Government Materials and Internal Materials. The objectors argue that all of the Examiner's documents and materials should be subject to discovery if a third party demonstrates that it cannot obtain the documents from any other source. Further, the objectors argue that this Court should not be the sole forum for deciding issues related to the limited discovery.

I find no valid basis, for this purpose, to distinguish among different categories of information held by the Examiner and agree with the objectors on this issue.<sup>11</sup> All of the Examiner's documents and materials may be open to discovery if a third party demonstrates that it cannot obtain the requested documents and materials from another source. This Court will likely not be the sole forum for deciding third party discovery issues. Discovery issues should be brought before the court or forum that is hearing any third party litigation. *Baldwin*, 46 B.R. at 317. The Examiner will retain any right to assert that the attorney-client privilege or other protection applies in response to any discovery requests and, except as may be limited by the Order accompanying this decision, will have the right to seek recovery of any fees and costs related to such requests.

(e) Transfer of the KPMG Materials.

The Examiner's Motion seeks authority to transfer the KPMG Materials to the

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<sup>11</sup>I note the distinction between granting third parties access to the Examiner's investigative documents and allowing access to the same documents by a party who succeeded to the claims of the estate, such as the Liquidating Trustee. See the discussion in section (e) of this Memorandum, *infra*.

Liquidating Trustee. The Liquidating Trustee's Motion also asks this Court to enter an order permitting the Creditors' Committee to transfer its documents related to KPMG to the Liquidating Trustee. The parties agree that the materials held by the Committee are the same, or substantially the same, as the KPMG Materials held by the Examiner.<sup>12</sup> KPMG filed similar objections to both requests, so the two motions will be considered together.

KPMG objected to any transfer to the Liquidating Trustee of the KPMG Materials, arguing that allowing a transfer (1) violates the terms and the spirit of the Protective Order dated August 21, 2007 (the "Protective Order"); (2) is inconsistent with the Examiner's role of being an independent and neutral officer of the Court; and (3) eliminates KPMG's bargained-for arbitration rights.

During the bankruptcy case, the Creditors' Committee undertook an investigation of claims pursuant to its duties as set forth in Bankruptcy Code §1103(c)(2).<sup>13</sup> The June 1, 2007 Order appointing the Examiner specifically provided that the Examiner and the Creditors' Committee should cooperate and coordinate their discovery efforts in investigating possible claims that the estates might have for accounting and financial statement irregularities, errors, and misstatements. This was to assure that their investigations were not duplicative. (June 1, 2007 Order, ¶12). In furtherance of that goal, the Protective Order provided that the Examiner

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<sup>12</sup>See n. 3, *supra.*, and KPMG Objection to the Liquidating Trustee Motion (docket no. 9118), ¶4 (stating that the KPMG documents held by the Creditors' Committee are substantially the same documents, subject to a substantively identical protective order).

<sup>13</sup>Indeed, the Committee initially resisted appointment of an Examiner, asserting, among other things, that its investigation of the Debtors' affairs would suffice. See Response of Official Committee of Unsecured Creditors in Opposition to Motion of the United States Trustee to Appoint Chapter 11 Trustee or, in the Alternative, an Examiner, dated May 9, 2007 (docket no. 615).

could share information with the Creditors' Committee. (Protective Order, ¶5(b)).

KPMG argues that the Liquidating Trustee is not the successor to the Creditors' Committee and, therefore, the Protective Order prevents sharing the materials with the Liquidating Trustee. From the inception of this chapter 11 proceeding, the inexorable effort of all constituencies was to liquidate all of the Debtors' assets. So, while the Debtors had a fiduciary duty to the estate, they never had any economic stake in the outcome of this liquidation. After confirmation of the Debtors' Plan, the Creditors' Committee was deemed disbanded as of the Plan's effective date, and the Liquidating Trustee became responsible for prosecuting any claims or causes of action.<sup>14</sup> If the Liquidating Trustee is not the "legal" successor to the Creditors' Committee itself, the Liquidating Trustee is certainly the functional successor to the constituency whose economic interests were and are directly at stake.

The Protective Order provided that "[u]pon the Examiner's completion of the Examiner's duties under the June 1, [2007] Order, the Examiner shall hold and preserve KPMG's Materials subject to further order of the Court after notice and hearing." (Protective Order, ¶7). In effect, this provision of the Protective Order merely postponed determination of what was to become of any materials collected from KPMG. Allowing transfer of the KPMG Materials to the Liquidating Trustee is not inconsistent with the Protective Order and, in fact, furthers, at a minimum, one important purpose of the Protective Order, i.e., to prevent the bankruptcy estate from having to pay twice for the same investigation in pursuit of potential claims.

KPMG also argues that transfer of the materials is inconsistent with the Examiner's role

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<sup>14</sup>See Order Confirming the Second Amended Joint Chapter 11 Liquidating Plan (docket no. 8596), ¶19; and Second Amended Joint Chapter 11 Liquidating Plan (ex. 1 to docket no. 8596) at Section 8D (dissolution of the Creditors' Committee), and Section 8F (Liquidating Trust).

as a “disinterested and nonadversarial” court-appointed officer. See *Baldwin*, 46 B.R. at 316. KPMG argues that allowing the Examiner to transfer the KPMG Materials provides an unfair advantage to the Liquidating Trustee and transforms the Examiner from an independent party to an advocate aligned with one side in anticipated litigation. In support of this argument, KPMG relies primarily on *Baldwin* and *Vietnam Veterans Foundation v. Erdman*, 1987 WL 9033 (March 19, 1987 D.D.C. 1987).

In *Baldwin*, the plaintiffs in a pending securities fraud action asked the Bankruptcy Court to require the court-appointed examiner to preserve documents and other investigative materials obtained during his investigation. The Court noted that the examiner was given free access to documents in his investigation based upon assurances “that the order appointing him and his status as an investigatory arm of this Court would serve to shield [those documents] from disclosure to others and from the threat of waiving any applicable privilege.” *Baldwin*, 46 B.R. at 316. The *Baldwin* Court further wrote that

If Examiners in other cases are to perform these “civil grand jury” functions effectively, and if their nonadversarial role is to be maintained, they and the subjects of their investigation must be unhampered by the threat that any information which comes into the Examiner’s hands will be fair game for a plethora of anxious litigations, regardless of the limitations on disclosure that the Bankruptcy Court has imposed.

*Id.* at 317. The *Baldwin* Court recognized, however, that it was not deciding the issue regarding disclosure of the examiner’s investigative materials at that time, but ordered the examiner to (i) maintain documents and other materials, (ii) list every document which is subject to a claim of privilege, and (iii) not disclose, identify or produce any document or item obtained in the investigation without approval of the Bankruptcy Court or the District Court hearing the

securities fraud litigation. *Id.*

Similarly, the *Veterans Foundation* Court decided that a former bankruptcy examiner could not provide testimony based upon the documents and information he obtained during his investigation as a court-appointed examiner. *Veterans Foundation*, 1987 WL 9033 at \*2. The Court wrote that the “fruits of his investigation” for the bankruptcy court should serve no other purpose or interested party. *Id.* The written report provided by the examiner to the Bankruptcy Court, however, might be admissible, if relevant. *Id.* at \*3.

The present situation, however, can be distinguished from *Baldwin* and *Veterans Foundation*. Those courts were concerned with attempts by third parties to circumvent the usual discovery procedures by taking possession of materials provided to an examiner for a different purpose. The reluctance to allow third parties access to the Examiner’s investigative documents is appropriate, but is distinct from allowing access to the same documents by a party who succeeded to the claims of the debtor’s estate, such as the Liquidating Trustee, and is pursuing the claims for the benefit of creditors in accordance with the terms of a confirmed plan. The Examiner’s duties specifically included the investigation, identification and evaluation of any claims or causes of action that the estates might have arising from or relating to irregularities, errors or misstatements with respect to the Debtors’ financial statements. As recognized in *In re Carnegie Int’l Corp.*, 51 B.R. 252, 256 (Bankr.S.D.Ind. 1984),

The Examiner has invested numerous hours of research and investigation, an expense for which the estate is already liable. Common sense and the interests of creditors and equity holders suggest that such administrative expenses be kept to a minimum and that the estate derive the maximum benefit from costs already incurred.

*Id.* at 256. The *Carnegie* Court allowed the Examiner to bring the lawsuits identified in the

investigation to minimize expenses and maximize benefits to the estate. *Id.* Here, it is in the best interest of the estate and its creditors to pass the fruits of the Examiner's investigation on to the Liquidating Trustee. Unlike in *Baldwin* or *Veterans Foundation*, here there can be neither surprise to, nor frustrated expectation by, parties who provided information to the Examiner, because the order appointing the Examiner required him to investigate potential claims and causes of action, as well as to share that information with the Creditors' Committee, which was simultaneously evaluating potential claims that could be brought for the benefit of the estate and its creditors. As discussed above, this responsibility passed to the Liquidating Trustee upon confirmation of the Debtors' Plan.

Moreover, allowing the Examiner to transfer documents to the Liquidating Trustee cannot adversely impact the Examiner's independence, since his investigation is complete and his report already has been filed with this Court. *See Carnegie*, 51 B.R. at 255 (deciding that there was no risk of prejudice since the decision to expand the examiner's powers was made after the filing of his report). While it is true that the Examiner identified potential claims against KPMG (*see* the Examiner's Final Report at pp. 519-20) the Examiner's duties are completed and do not involve the assertion by him of any potential claims against KPMG. Indeed, the Examiner was never granted authority to pursue potential claims against any party and he asked for none.

Finally, KPMG also argues that transfer of the KPMG Materials to the Liquidating Trustee would violate its arbitration rights contained in the pre-petition engagement letter agreement between KPMG and the Debtors dated September 7, 2004 (the "Engagement Letter"). The Engagement Letter sets forth certain dispute resolution procedures, as detailed in an attached appendix, for any dispute or claim arising out of the services provided by KPMG to the Debtors

under the Engagement Letter. (See Ex. A to KPMG's Objection, docket no. 8873, at A9). The dispute resolution procedures specifically provide that "[d]iscovery shall be permitted in connection with the arbitration only to the extent, if any, expressly authorized by the arbitration panel upon a showing of substantial need by the party seeking discovery." (*Id.* at A18). KPMG argues that the transfer of the KPMG Materials would allow the Liquidating Trustee to obtain discovery in any potential claim against KPMG well beyond the bounds permissible in an arbitration proceeding under the terms as set forth in the Engagement Letter.

The Third Circuit has held that a bankruptcy court lacks authority to deny enforcement of an applicable arbitration clause unless the party opposing arbitration can establish, under the *McMahon* standard, that Congress, in enacting a particular statute, intended to override arbitration rights. *Mintze v. American Gen. Fin. Serv., Inc. (In re Mintze)*, 434 F.3d 222, 231 (3d Cir. 2006). The *McMahon* standard provides that:

To overcome enforcement of arbitration, a party must establish congressional intent to create an exception to the FAA's mandate with respect to the party's statutory claims. Congressional intent can be discerned in one of three ways: (1) the statute's text, (2) the statute's legislative history, or (3) "an inherent conflict between arbitration and the statute's underlying purposes."

*Mintze*, 434 F.3d at 229 citing *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 227, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). However, before I can consider whether an arbitration clause is enforceable, I must determine whether the particular clause is applicable to the motions before me.

In support of its argument for applying the arbitration clause to this matter, KPMG relies on the case *Ernst & Young, LLP v. Pritchard (In re Daisytek, Inc.)*, 323 B.R. 180 (N.D.Tex. 2005). In *Daisytek*, the Court vacated a bankruptcy court order allowing a post-confirmation



creditors' trust to take a Rule 2004 examination of the debtor's pre-bankruptcy accountants. As in this case, the accountants argued that a mandatory arbitration clause in the engagement letter prevented the discovery. The District Court decided that a court must look to the underlying proceeding to determine whether a matter in a bankruptcy must be submitted to arbitration. *Daisytek*, 323 B.R. at 186. "If the proceeding derives solely from the provisions of the Bankruptcy Code, and arbitration of the proceeding would conflict with the purposes of the Code, the bankruptcy court has discretion to refuse enforcement of a provision requiring arbitration." *Id.* at 187 citing *In re Gandy*, 299 F.3d 489, 495 (5<sup>th</sup> Cir. 2002). The *Daisytek* Court then rejected the premise that the Rule 2004 examination was the proceeding at issue, deciding that the "proper focus is on the underlying nature of the proceedings that could flow from the information obtained through the Rule 2004 examination." *Id.* at 187.

When a similar issue arose in *In re Friedman's, Inc.*, 356 B.R. 779 (Bankr.S.D.Ga. 2005), the Bankruptcy Court was not persuaded to apply the rationale of *Daisytek*. In *Friedman's*, the Court was faced with a debtor's motion to compel discovery, followed by the accountants' motion for a protective order from the discovery. The accountants argued that the arbitration clause in its engagement letter required all disputes to be handled through mediation and mandatory arbitration. *Friedman's*, 356 B.R. at 782. While the *Friedman's* Court recognized that "arbitration agreements are generally favored and have been enforced in bankruptcy courts," it determined that the arbitration clause and dispute resolution procedures in the engagement letter were not triggered by the discovery requests because "there is no identifiable, discrete dispute between the parties that could be argued to control the scope of discovery." *Id.* at 783. The *Friedman's* Court declined to adopt the reasoning of *Daisytek*, noting that the cases upon

which the *Daisytek* Court relied (i.e., *In re Nat'l Gypsum Co.*, 118 F.3d 1056 (5<sup>th</sup> Cir. 1997) and *Gandy*), involved situations “in which the parties were contesting identified and specific causes of action,” rather than cases in which potential claims were being investigated. *Id.* at 784. The *Friedman's* Court wrote, in articulating a paramount interest involved in the bankruptcy process:

To prospectively shut down any meaningful investigation would be fundamentally at odds with bankruptcy policy and severely damage the interest of unsecured creditors. *See In re Nat'l Gypsum*, 118 F.3d at 1069 (stating that the purpose of the Bankruptcy Code includes the “goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.”)

*Friedman's*, 356 B.R. at 784.

The arbitration clause in the KPMG Engagement Letter is not implicated by the motions before me because, as of the time this relief was sought, no evidence was presented that any claim had been asserted or that any particular proceeding had been commenced against KPMG. The Examiner's Motion does not seek relief to take additional discovery. The Examiner asks only that the fruits of his investigation be transferred to the Liquidating Trustee. The plain language of the Engagement Letter's dispute resolution procedures, as cited by KPMG, provides that it applies to discovery “in connection with the arbitration.” The relief sought here is not in connection with any arbitration proceeding.

To the contrary, the relief requested in the motions do not prevent KPMG from asserting any right to arbitration (and attendant rights) if a proceeding is commenced. Moreover, it does not prevent KPMG from arguing that the Liquidating Trustee should not share the KPMG Materials with anyone else, or from arguing that all or part of the KPMG Materials are inadmissible in any later proceeding, whether before a court or an arbitrator. The motions seek

entry of an order providing that the materials held by the Examiner and the Creditors' Committee be transferred to Liquidating Trustee. Under these circumstances, the terms of the confirmed Plan, and in furtherance of the policies underlying the Bankruptcy Code, the transfer of the KPMG Materials is warranted.

### CONCLUSION

For the reasons set forth above, the Examiner's Motion will be granted, in part, and denied, in part, as follows:

- (1) the Examiner's request for a discharge will be granted;
- (2) the Examiner's request to be reimbursed by the Liquidating Trust for future time and expenses incurred will be limited to a cap of \$100,000, pursuant to the terms set forth in the attached order.
- (3) the Examiner's request for permission to transfer portions of the Investigative Record and Other Investigative Materials to the Liquidating Trustee will be granted and the materials to be turned over to the Liquidating Trustee will include, without limitation, the Government Materials;
- (4) the Examiner's request for an order providing that sharing documents with governmental agencies, the office of the United States Trustee, and the Liquidating Trustee does not cause a waiver of any applicable protection or privilege is denied, without prejudice; and
- (5) the Examiner's request for an order precluding third party discovery with respect to the Investigative Records, Other Investigative Materials, Governmental Materials and Other Materials, unless the third party demonstrates that it cannot

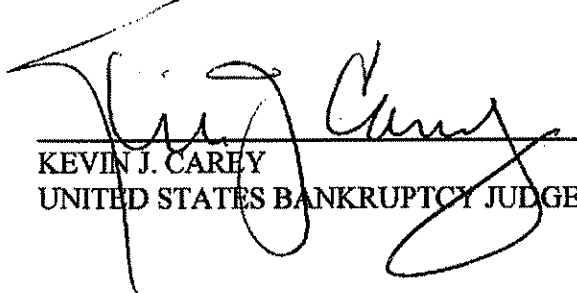
obtain the documents from any other source, is granted pursuant to the terms set forth in the attached order.

- (6) the Examiner's request to transfer the KPMG Materials to the Liquidating Trustee is granted.

The Liquidating Trustee Motion, to the extent not rendered moot by the decision with respect to the Examiner's Motion, will be granted.

An appropriate Order follows.

BY THE COURT:



KEVIN J. CAREY  
UNITED STATES BANKRUPTCY JUDGE

Dated: May 1, 2009

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

----- X  
In re: : Chapter 11  
SEMCRUDE, L.P., et al. : Case No. 08 - 11525 (BLS)  
Debtors : Jointly Administered  
: :  
: RE: Docket No. 4149  
----- X

**ORDER GRANTING IN PART THE EXAMINER'S MOTION FOR ENTRY OF AN  
ORDER REGARDING CERTAIN PROCEDURAL ISSUES IN CONNECTION WITH  
THE TERMINATION OF THE EXAMINATION OF SEMCRUDE, L.P., ET AL.**

Upon the Motion of Louis J. Freeh, the Examiner, with Respect to Certain Procedural Issues in Connection with the Termination of the Examination of SemCrude, L.P., et al. (the "Motion"); and adequate and sufficient notice of the Motion having been provided to all parties in interest; and the Court having conducted a hearing during which interested parties were given the opportunity to be heard with respect to the Motion; and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The Motion is granted in part.<sup>1</sup>
2. The Examiner<sup>2</sup> is discharged from his duties under the terms of the Examiner Order, and his appointment as Examiner in the Debtors' cases is hereby terminated.
3. Notwithstanding paragraph 2 above, the Examiner (a) shall continue to cooperate as contemplated in the Examiner Order with the governmental agencies, the UST, and the estate representatives including the Debtors, the Creditors Committee, the Oil Producers Committee,

<sup>1</sup> The remainder of the relief requested in the Motion will be addressed in a separate order.

the Agent, and any litigation trustee that is created on the effective date of the Debtors' plan of reorganization subject to any limitations contained in the Confidentiality Agreements and Informal Confidentiality Agreements and other confidential, protected or privileged information of the Examiner; and (b) shall remain subject to this Court's jurisdiction for the purpose of resolving professional compensation issues in connection with the Debtors' cases. Nothing in this Order shall constitute a determination that any information or material provided to or of the Examiner is confidential, protected or privileged and the rights of any creditor, party in interest or third party to challenge any such designation in this Court or another court of competent jurisdiction is reserved.

4. The Examiner and the Examiner's Professionals shall retain all materials produced to or by the Examiner or the Examiner's Professionals in connection with the Examination conducted pursuant to the Examiner's Order, including, but not limited to, documents, e-mails, electronic communications and other information produced or maintained electronically, memoranda of witness interviews, deposition transcripts and requests for information by any third parties (collectively, the "Records") for a period of two years from the date of this Order (the "Initial Retention Period"). After the Initial Retention Period, the Examiner may file a motion with the Court for an order permitting the destruction of the Records or, in accordance with any applicable Confidentiality Agreement or Informal Confidentiality Agreement, permitting the return of the Records to the party that produced them (the "Disposal Motion"). Notice of the Disposal Motion shall be provided by the Examiner no less than sixty (60) days prior to the scheduled hearing date of the Disposal Motion to counsel of record for those parties who have filed objections to the Motion, the United States Trustee, the SEC, the United States Attorney's Office for the Northern District of Oklahoma, the United

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<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

States Attorney's Office for the Southern District of New York, the Federal Bureau of Investigation (Oklahoma), the Federal Bureau of Investigation (New York), the United States Commodities Futures Trading Commission, the United States Department of Justice (Fraud Section), the United States Department of the Treasury (Office of the Comptroller of the Currency), the New York County District Attorney's Office, the Debtors, the Creditors Committee, the Oil Producers Committee, the Agent, parties to the Confidentiality Agreements and Informal Confidentiality Agreements, and any other party as the Court may direct. Any and all objections to the Disposal Motion shall be served upon the Examiner, the Examiner's counsel, and the United States Trustee and filed at least ten (10) days prior to the scheduled hearing date of the Disposal Motion or as otherwise directed by this Court. The Examiner may only dispose of the Records in accordance with the further order of this Court in connection with the Disposal Motion. The Examiner and the Examiner's Professionals have the right to and may oppose any efforts by a party to require the retention of the Records after the Initial Retention Period.

5. The Examiner's Professionals shall be entitled to reimbursement for their reasonable fees and actual costs after the date of the entry of this Order for (a) handling of the Records as provided herein including, without limitation, the prosecution of the Disposal Motion; (b) cooperating with the entities and persons specified in paragraph 3; (c) the prosecution of the Motion in connection with the remainder of the relief sought therein; (d) responding to any formal or informal discovery requests served upon the Examiner or the Examiner's Professionals; (e) the preparation and prosecution of interim and final fee applications; and (f) such other actions undertaken by the Examiner or the Examiner's Professionals at the request or direction of the Court.

6. Neither the Examiner nor the Examiner's Professionals shall have or incur any liability with respect to any act taken or omitted to be taken, statement or representation arising out of, relating to, or involving in any way, the Examination or any report, pleading or other writing filed by the Examiner or the Examiner's Professionals in connection with, related to, or arising out of the Debtors' bankruptcy cases including, without limitation, the Report; provided, however, that nothing contained in this paragraph shall be construed to limit the liability of the Examiner or the Examiner's Professionals for violation of any applicable disciplinary rule or code of professional responsibility or for any acts of willful misconduct or gross negligence as determined in a final and non-appealable order of a court of competent jurisdiction or release the Examiner or any of the Examiner's Professionals from compliance with any obligations arising under any confidentially order, including the Order Approving the Debtors' Confidentiality Agreement or the Confidentiality Agreements; and, provided further, that nothing contained herein shall preclude the Fee Auditor from filing advisory reports with respect to the fees incurred by the Examiner or the Examiner's Professionals.

7. The final fee applications of the Examiner and the Examiner's Professionals shall be filed by August 31, 2009. Objections, if any, to the final fee applications of the Examiner and the Examiner's Professionals must be filed by September 28, 2009. A hearing to consider the final fee applications of the Examiner and the Examiner's Professionals will be held on October 8, 2009, unless otherwise noticed.


8. In the event of a conflict between this Order and any provision of a plan of reorganization confirmed in the Debtors' cases, this Order shall control as it pertains to the rights, duties and obligations of the Examiner and the Examiner's Professionals.



9. This Court shall retain jurisdiction to resolve professional compensation issues for the Examiner's Professionals in connection with the Debtors' cases.

10. The Court reserves jurisdiction as to all matters related to and arising from the implementation, interpretation and enforcement of this Order including, without limitation, any requested revision or modification thereof.

DATED: Wilmington, Delaware  
July 21, 2009



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HONORABLE BRENDAN L. SHANNON  
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

----- X  
In re: : Chapter 11  
SEMCRUDE, L.P., et al. : Case No. 08 - 11525 (BLS)  
Debtors : Jointly Administered  
: :  
: Re: Docket No. 4149  
----- X

**SUPPLEMENTAL ORDER GRANTING IN PART THE EXAMINER'S MOTION FOR  
ENTRY OF AN ORDER REGARDING CERTAIN PROCEDURAL ISSUES IN  
CONNECTION WITH THE TERMINATION OF THE EXAMINATION OF  
SEMCRUDE, L.P., ET AL.**

Upon consideration of the Motion of Louis J. Freeh, the Examiner, with Respect to Certain Procedural Issues in Connection with the Termination of the Examination of SemCrude, L.P., et al. (the "Motion"); and adequate and sufficient notice of the Motion having been provided to all parties in interest; and upon consideration of Westback Purchasing Co., LLC's Response and Partial Objection to Motion, the Limited Objection of Lead Plaintiff to the Motion, Gregory C. Wallace's (1) Partial Objection to the Motion; and (2) Request to Clarify Committee's Obligations Regarding Examiner and Third-Party Documents (the "Wallace Partial Objection"), Thomas L. Kivisto's Joinder in the Wallace Partial Objection, and Gregory C. Wallace's Sur-Reply in Partial Objection to Examiner's Motion for an Order Regarding Certain Procedural Issues; and the Court having conducted hearings on July 14, 2009 and September 9, 2009, during which interested parties were given the opportunity to be heard with respect to the Motion; and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The Motion is granted in part as set forth herein<sup>1</sup>.

2. Subject to the provisions of paragraph 4, the Examiner<sup>2</sup> shall transfer to the litigation trustee appointed pursuant to the confirmation order approving the Debtors' plan of reorganization (the "Litigation Trustee") copies of: (A) all documents produced by third parties to the Examiner in connection with the Examination that are not subject to written or informal confidentiality agreements and/or stipulations (collectively, "Confidentiality Agreements"), unless the producing party has consented in writing to the Examiner's transfer of the documents to the Litigation Trustee; (B) all transcripts of Bankruptcy Rule 2004 Examinations conducted in connection with the Examination; (C) any written presentations regarding the Examination prepared by the Examiner or the Examiner's Professionals that were produced to any governmental agency; (D) any documents produced by third parties to the Examiner in connection with the Examination that the Examiner produced to any governmental agencies; (E) any documents that were created and/or compiled by the Examiner or the Examiner's Professionals that were shared with or produced to third parties; and (F) a list of the parties with whom the Examiner entered into Confidentiality Agreements.

3. Any creditor, party in interest to these cases, or third party is hereby precluded from issuing or serving upon the Examiner or the Examiner's Professionals any formal or informal discovery request, including but not limited to, any subpoena, request for production of documents, requests for admissions, interrogatories, subpoenas *duces tecum*, requests for testimony, letters rogatory or any other discovery of any kind whatsoever in any way related to the Debtors, the nondebtor affiliates of the Debtors, the bankruptcy cases, the Report, or the

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<sup>1</sup> The remainder of the relief requested in the Motion is addressed in a separate Order of this Court dated July 27, 2009. [Docket No. 4766]

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

Examination with respect to any knowledge or documents (as defined by Bankruptcy Rule 7034(c)) or any other material in the possession, custody or control of the Examiner or the Examiner's Professionals regarding, concerning or in any way related to the Debtors, the nondebtor affiliates of the Debtor, the Debtors' bankruptcy cases, the Examiner Order, the Report or the Examination; except that this prohibition:

a. shall not apply in the event a federal district court presiding over a criminal proceeding in which a party in interest is a defendant issues an order finding that the Examiner or the Examiner's Professionals are obliged to produce documents in their possession under the principals of *Brady v. Maryland*, 373 U.S. 83 (1963), as embodied in subsequent case law and the Federal Rules of Criminal Procedure, this Order shall not preclude such production as the federal district court may require. This Order in no way establishes or provides that obligations under *Brady* are applicable to the Examiner or the Examiner's Professionals. The Examiner and the Examiner's Professionals have the right to and may oppose any efforts by a party to secure such an order from a federal district court on any basis, including the applicability of *Brady* to the Examiner or the Examiner's Professionals, and seek reimbursement for any fees and costs associated with such opposition from the Debtors' estates;

b. shall not apply in the event a party in interest, after the filing of a motion upon at least thirty (30) days notice to the Examiner and the Examiner's counsel, demonstrates to this Court or another court of competent jurisdiction that it cannot obtain the requested documents from any other source, that the production would not violate any order of this Court including, without limitation, the Order Approving the Debtors' Confidentiality Agreement with the Examiner, and the request does not seek the production of documents that are determined to be protected by the attorney-client privilege, the work product doctrine or another applicable

privilege or protection. The Examiner and the Examiner's Professionals have the right to and may oppose any efforts by a party to secure such information and seek reimbursement for any fees and costs associated with such opposition from the Debtors' estates; and

c. shall not apply to requests related to the compensation and reimbursement applications submitted by the Examiner and the Examiner's Professionals submitted to this Court.

4. Notwithstanding anything to the contrary contained herein, and notwithstanding any provision of any plan of reorganization that is or may be confirmed in these cases, the Examiner and the Examiner's Professionals shall not be required to produce to any party, including the Debtors, the Creditors Committee, the Oil Producers Committee or the Litigation Trustee (or any successor to the Debtors or any other party) any material comprising the work product of the Examiner and/or the Examiner's Professionals and/or any material protected by the attorney-client privilege or other applicable privileges or protections. Nothing in this Order shall constitute a determination that any information or material provided to or of the Examiner or the Examiner's Professionals is confidential, protected or privileged and, subject to the limitations contained in paragraph 3 of this Order regarding the right to obtain discovery from the Examiner and the Examiner's Professionals, the rights of any creditor, party in interest or third party to challenge such designation in this Court or another court of competent jurisdiction is reserved.

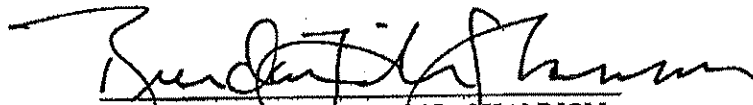
5. To the extent that the Examiner or the Examiner's Professionals are directed to produce documents pursuant to paragraph 3 of this Order and the Examiner or the Examiner's Professionals withhold the production of documents based upon a claim of attorney-client privilege, the work product doctrine or any other applicable privilege or protection, the Examiner

shall provide a privilege log, containing the information required under Bankruptcy Rule 7026(b)(5)(A) within thirty (30) days of the entry of an order directing the Examiner to produce the discovery.

6. In the event of a conflict between this Order and any provision of a plan of reorganization confirmed in the Debtors' cases, this Order shall control as it pertains to the rights, duties and obligations of the Examiner and the Examiner's Professionals.

7. Except as otherwise set forth in this Order, the Court reserves jurisdiction as to all matters related to and arising from the implementation, interpretation and enforcement of this Order including, without limitation, any requested revision or modification thereof.

DATED: Wilmington, Delaware  
October 21, 2009

  
HONORABLE BRENDAN L. SHANNON  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

**In re:**

DBSI, INC., et al.,

**Debtors.**

Chapter 11

Case No. 08-12687 (PJW)

Jointly Administered

**Related to Docket No. 5386**

**ORDER GRANTING THE EXAMINER'S  
MOTION TO DISCHARGE THE EXAMINER**

Upon the Motion of Joshua R. Hochberg, the Examiner herein, to Discharge the Examiner (the "Motion")<sup>1</sup>; and adequate and sufficient notice of the Motion having been provided to all parties in interest; and the Court having conducted a hearing during which interested parties were given the opportunity to be heard with respect to the Motion; and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The Motion is GRANTED.
2. The Examiner is discharged from his duties under the terms of the Examiner Order, and his appointment as Examiner in the Debtors' cases is hereby terminated as of the date of this Order.

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

3. Each of (i) the Discovery Motion Order (Docket No. 4932), which, among other things, prohibits third parties from serving subpoenas and other discovery upon the Examiner and establishes conditions and procedures for any party seeking documents and information from the Examiner and (ii) the Document and Cooperation Motion Order (Docket No. 5023), which, among other things, establishes procedures related to the turn over of documents and information to the Trustee and government agencies, authorizes the Examiner to retain or dispose of records related to the Investigation, and authorizes the Examiner to cooperate with the Trustee and with federal and state government agencies in accordance with the Examiner Order, shall remain in full force and effect after the date of entry of this Order and are not modified in any respect by this Order.

4. The Examiner's Professionals shall be entitled to reimbursement for their reasonable fees and actual costs after the date of the entry of this Order for (a) cooperation with the Trustee and governmental entities and estate representatives in accordance with the provisions of the Examiner Order and the Document and Cooperation Motion Order; (b) disposition of the documents in accordance with the Document and Cooperation Motion Order; (c) responding to any formal or informal discovery requests authorized pursuant to the Discovery Motion Order; to the extent that such requests are served upon the Examiner or the Examiner's



Professionals, notwithstanding the prohibitions established by the Court regarding such discovery; (d) the preparation and prosecution of fee applications including a pending motion; and (d) such other actions undertaken by the Examiner or the Examiner's Professionals at the request or direction of the Court, the Trustee or federal and state government agencies.

5. Neither the Examiner nor the Examiner's Professionals shall have or incur any liability with respect to any act taken or omitted to be taken, written or oral statement or representation arising out of, relating to, or involving in any way, the Examination, the Interim Report, the Final Report or any other report, pleading or other writing filed by the Examiner or the Examiner's Professionals in connection with, related to, or arising out of these bankruptcy cases, except only in the case of willful misconduct or gross negligence. Nothing contained herein shall preclude the Fee Auditor appointed in this case from filing advisory reports with respect to the fees or expenses incurred by the Examiner or the Examiner's Professionals.

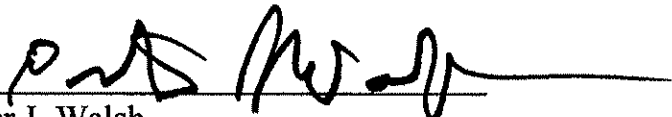
6. In the event of a conflict between this Order and any provision of a plan of reorganization or liquidation confirmed in these cases, this Order shall control as it pertains to the rights, duties and obligations of the Examiner and the Examiner's Professionals.

7. This Court shall retain jurisdiction to resolve professional compensation issues for the Examiner and Examiner Professionals in connection with these cases.

8. The Court reserves jurisdiction as to all matters related to and arising from the implementation, interpretation and enforcement of this Order including, without limitation, any requested revision or modification thereof.

9. Except as otherwise set forth in this Order, the Court reserves jurisdiction as to all matters related to and arising from the implementation, interpretation and enforcement of this Order including, without limitation, any requested revision or modification thereof.

Dated: Wilmington, Delaware  
May 25 2010

  
Peter J. Walsh  
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

TRIBUNE COMPANY, et al.,<sup>1</sup>

Debtors.

Chapter 11

Case No. 08-13141 (KJC)

Jointly Administered

Related to Docket No. 5115

**ORDER APPROVING MOTION OF COURT-APPOINTED EXAMINER,  
KENNETH N. KLEE, ESQ., FOR ORDER (I) DISCHARGING EXAMINER;  
(II) GRANTING RELIEF FROM THIRD-PARTY DISCOVERY; (III) APPROVING  
THE DISPOSITION OF CERTAIN DOCUMENTS AND INFORMATION; AND  
(IV) GRANTING CERTAIN ANCILLARY RELIEF**

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Tribune Company (0355); 435 Production Company (8865); 5800 Sunset Productions Inc. (5510); Baltimore Newspaper Networks, Inc. (8258); California Community News Corporation (5306); Candle Holdings Corporation (5626); Channel 20, Inc. (7399); Channel 39, Inc. (5256); Channel 40, Inc. (3844); Chicago Avenue Construction Company (8634); Chicago River Production Company (5434); Chicago Tribune Company (3437); Chicago Tribune Newspapers, Inc. (0439); Chicago Tribune Press Service, Inc. (3167); ChicagoLand Microwave Licensee, Inc. (1579); Chicagoland Publishing Company (3237); Chicagoland Television News, Inc. (1352); Courant Specialty Products, Inc. (9221); Direct Mail Associates, Inc. (6121); Distribution Systems of America, Inc. (3811); Eagle New Media Investments, LLC (6661); Eagle Publishing Investments, LLC (6327); [forsalebyowner.com](http://forsalebyowner.com) corp. (0219); [ForSaleByOwner.com](http://ForSaleByOwner.com) Referral Services, LLC (9205); Fortify Holdings Corporation (5628); [room](http://room) Publishing Group, Inc. (2940); Gold Coast Publications, Inc. (5505); GreenCo, Inc. (7416); Heart & Crown Advertising, Inc. (9808); Homeowners Realty, Inc. (1507); Homestead Publishing Co. (4903); Hoy, LLC (8033); Hoy Publications, LLC (2352); InsertCo, Inc. (2663); Internet Foreclosure Service, Inc. (6550); JuliusAir Company, LLC (9479); JuliusAir Company II, LLC; KIAH Inc. (4014); KPLR, Inc. (7943); KSWB Inc. (7035); KTLA Inc. (3404); KWGN Inc. (5347); Los Angeles Times Communications LLC (1324); Los Angeles Times International, Ltd. (6079); Los Angeles Times Newspapers, Inc. (0416); Magic T Music Publishing Company (6522); NBBF, LLC (0893); Nocomm, Inc. (7208); New Mass. Media, Inc. (9553); Newscom Services, Inc. (4817); Newspaper Readers Agency, Inc. (7335); North Michigan Production Company (5466); North Orange Avenue Properties, Inc. (4056); Oak Brook Productions, Inc. (2598); Orlando Sentinel Communications Company (3775); Patuxent Publishing Company (4223); Publishers Forest Products Co. of Washington (4750); Sentinel Communications News Ventures, Inc. (2027); Shepard's Inc. (7931); Signs of Distinction, Inc. (3603); Southern Connecticut Newspapers, Inc. (1455); Star Community Publishing Group, LLC (5612); Stemweb, Inc. (4276); Sun-Sentinel Company (2684); The Baltimore Sun Company (6880); The Daily Press, Inc. (9368); The Hartford Courant Company (3490); The Morning Call, Inc. (7560); The Other Company LLC (5337); Times Mirror Land and Timber Company (7088); Times Mirror Payroll Processing Company, Inc. (4227); Times Mirror Services Company, Inc. (1326); TMLH 2, Inc. (0720); TMLS I, Inc. (0719); TMS Entertainment Guides, Inc. (6325); Tower Distribution Company (9066); Towering T Music Publishing Company (2470); Tribune Broadcast Holdings, Inc. (4438); Tribune Broadcasting Company (2569); Tribune Broadcasting Holdco, LLC (2534); Tribune Broadcasting News Network, inc., n/k/a Tribune Washington Bureau Inc. (1088); Tribune California Properties, Inc. (1629); Tribune CNLBC, LLC, f/k/a Chicago National League Ball Club, LLC (0347); Tribune Direct Marketing, Inc. (1479); Tribune Entertainment Company (6232); Tribune Entertainment Production Company (5393); Tribune Finance, LLC (2537); Tribune Finance Service Center, Inc. (7844); Tribune License, Inc. (1035); Tribune Los Angeles, Inc. (4522); Tribune Manhattan Newspaper Holdings, Inc. (7279); Tribune Media Net, Inc. (7847); Tribune Media Services, Inc. (1080); Tribune Network Holdings Company (9936); Tribune New York Newspaper Holdings, LLC (7278); Tribune NM, Inc. (9939); Tribune Publishing Company (9720); Tribune Television Company (1634); Tribune Television Holdings, Inc. (1630); Tribune Television New Orleans, Inc. (4055); Tribune Television Northwest, Inc. (2975); ValuMail, (9512); Virginia Community Shoppers, LLC (4025); Virginia Gazette Companies, LLC (9587); WATL, LLC (7384); WCWN LLC (5982); WDCW Broadcasting, Inc. (8300); WGN Continental Broadcasting Company (9530); WLVI Inc. (8074); WPIX, Inc. (0191); and WTXN Inc. (1268). The Debtors' corporate headquarters and the mailing address for each Debtor is 435 North Michigan Avenue, Chicago, Illinois 60611.

Upon consideration of the Motion of Kenneth N. Klee, Esq. ("Examiner"), by and through his attorneys, for an Order granting the *Motion of Court-Appointed Examiner, Kenneth N. Klee, Esq., for Order (I) Discharging Examiner; (II) Granting Relief from Third-Party Discovery; (III) Approving the Disposition of Certain Documents and Information; and (IV) Granting Certain Ancillary Relief* (the "Motion"); and, after due deliberation and sufficient cause appearing therefore; it is hereby ORDERED<sup>2</sup>:

1. The Motion is GRANTED.
2. The Examiner is discharged from his duties under the Examiner Order effective on August 20, 2010, and his appointment as Examiner is hereby terminated. The discharge of the Examiner is without prejudice to the entry of an order, in the future, reengaging the Examiner and the Examiner's Professionals to provide such services as the Court deems necessary and appropriate.
3. Notwithstanding paragraph 2 above, the Examiner shall respond in writing to reasonable written inquiries from the Parties concerning the Investigation and the Report, and such inquiries and responses will be posted on the Examiner's secure website for access and review by all Parties. Further, the Examiner will respond to reasonable inquiries from the Parties concerning documents received, maintained or created during the Investigation, and will otherwise assist and cooperate with the estate representatives and the Parties in the manner provided in this Order.
4. The Examiner and his Professionals shall maintain all Depository Documents, Third-Party Documents, Transcripts and Privileged Materials (collectively the "Complete

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<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meaning set forth in the Motion. The term "Parties" as used in this Order shall include Aurelius Capital Management, LP

Examiner Record”) for a period of two years from the date of this Order (the “Initial Retention Period”), after which, the Examiner and his Professionals may destroy any such materials without further order of the Court. At least thirty (30) calendar days prior to the last day of the Initial Retention Period, the Debtors, or a successor estate representative as applicable, shall serve and file a notice upon all Parties, the Office of the United States Trustee, and all parties requesting notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure, reminding them of the Examiner’s ability to dispose of the Complete Examiner Record after the Initial Retention Period. Any party seeking to extend the Initial Retention Period, must file a motion requesting such relief prior to the expiration of the Initial Retention Period, with notice and an opportunity to object provided to all Parties, the Office of the United States Trustee, the estate representatives, the Examiner and his Professionals, and all parties requesting notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure. The Court will schedule a prompt hearing on any such motion, and the burden of extending the Initial Retention Period shall rest with the movant.

5. For purposes of clarity, the Complete Examiner Record includes the notes taken or created by the Examiner and his Professionals regarding non-transcribed witness interviews. It is the Examiner’s position that such notes constitute attorney-work product and are privileged from disclosure to any of the Parties. It is the Debtors’ position that notes taken by the Examiner and his Professionals that purport to record what the interviewee said do not constitute work product or otherwise privileged material. All issues related to whether or not such materials are protected from disclosure by the attorney work-product doctrine, or otherwise, and all other issues relating to claims of privilege (specifically including claims unrelated to interviews that

were not professionally transcribed), are expressly reserved, and the Court makes no ruling on this issue at this time.

6. Neither the Examiner nor his Professionals shall have or incur any liability with respect to (a) any act taken or omitted to be taken, (b) any statement or representation arising out of, relating to, or involving in any way, the Investigation, or (c) any report, pleading or other writing filed by the Examiner or the Examiner's Professionals in connection with, related to, or arising out of the Debtors' Chapter 11 Cases including, without limitation, the Report. Nothing contained in this paragraph, however, shall be construed to limit the liability of the Examiner or the Examiner's Professionals for violation of any applicable disciplinary rule or code of professional conduct or for any acts of willful misconduct or gross negligence.

7. Except as otherwise provided herein, the Examiner and his Professionals are relieved from any duty to respond, object or move for a protective order in response to any formal or informal discovery process, except that this prohibition shall not apply to (i) requests for documents, materials or information that the requesting party has demonstrated to this Court, upon notice to and an opportunity to object by the Examiner, cannot be reasonably obtained from any other source, (ii) production required in response to an order of a federal district court presiding over a criminal proceeding in which a party in interest is a defendant, which finds that the Examiner or his Professionals are obliged to produce documents or other materials to said defendant under the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), as embodied in subsequent caselaw and the Federal Rules of Criminal Procedure, and (iii) discovery of information related to compensation applications filed by the Examiner or his Professionals.

8. The Examiner and his Professionals shall be entitled to reimbursement from the Debtors, their estates, and their successors in interest, for their reasonable fees and actual costs

after the date of the entry of this Order for (a) maintaining the Complete Examiner Record; (b) responding to reasonable inquiries as set forth in paragraph 3 above; (c) responding to any formal or informal discovery requests served on the Examiner or the Examiner's Professionals; (d) the preparation and prosecution of interim and final fee applications; and (e) such other actions undertaken by the Examiner or the Examiner's Professionals at the request or direction of the Court. To the extent that the Examiner and his Professionals are entitled to payment or reimbursement of their reasonable fees and costs incurred subsequent to the time period covered by their final fee applications, the Examiner and/or his Professionals shall present invoices to the Debtors, or a successor estate representative, as applicable, with copies to the Official Creditors' Committee and United States Trustee, with sufficient detail to determine the basis for the fees and expenses incurred (the "Notice Parties"). Absent receipt by the Examiner and his Professionals of a written objection to any such invoice within fourteen (14) calendar days, the Debtors are authorized to pay or reimburse the Examiner and his Professionals without the need to file fee applications and without the need for Court approval; provided, however, that (i) if a timely objection is raised to such invoice and the matter cannot be resolved consensually, the objection shall be presented to the Court for resolution and (ii) notwithstanding the foregoing, if any invoice exceeds \$100,000, the Examiner and/or his Professionals shall be required to file an application and obtain approval from the Court, on reasonable notice to the Notice Parties, prior to payment.

9. The final fee applications of the Examiner and the Examiner's Professionals may be filed by August 31, 2010. Objections, if any, to any final fee applications filed by August 31, 2010, must be filed by September 21, 2010. A hearing to consider the final fee applications filed by August 31, 2010 will be held on October 22, 2010 at 2:00 p.m. EDT. To the extent that the

Examiner and/or any of his Professionals are unable to file their final fee applications by August 31, 2010, counsel shall contact the Court's Chambers to set an objection deadline and hearing for any such applications.

10. In the event of a conflict between this Order and any provision of a plan of reorganization confirmed in the Debtors' cases, this Order shall control as it pertains to the rights, duties and obligations of the Examiner and the Examiner's Professionals.

11. This Court shall retain jurisdiction to resolve professional compensation issues for the Examiner or his Professionals in connection with the Debtors' cases.

12. This Order shall survive confirmation of any plan or plans in the Debtors' bankruptcy cases, as well as the conversion of any of the Debtors' cases to cases under Chapter 7 of the Bankruptcy Code.

13. The Court reserves jurisdiction as to all matters related to and arising from the implementation, interpretation and enforcement of this Order including, without limitation, any requested revision or modification thereof.

Dated: Wilmington, Delaware  
August 26, 2010

  
Kevin J. Carey  
United States Bankruptcy Judge