

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In re)	Chapter 11
)	
SENCORP, <u>et al.</u> , ¹)	Case No. 09-12869 (JVA)
)	(Joint Administration Requested)
)	
)	Honorable J. Vincent Aug, Jr.
Debtors.)	
)	

**MOTION OF THE DEBTORS FOR AN ORDER PROVIDING THAT
CREDITORS’ COMMITTEES ARE NOT AUTHORIZED OR REQUIRED
TO PROVIDE ACCESS TO CONFIDENTIAL INFORMATION OF
THE DEBTORS OR TO PRIVILEGED INFORMATION**

(“CREDITORS’ COMMITTEES CONFIDENTIALITY MOTION”)

The above-captioned debtors and debtors-in-possession (collectively, the “**Debtors**”), hereby move this Court (the “**Motion**”) for entry of an order (the “**Order**”), in substantially the form attached hereto as Exhibit A, providing that any creditors’ committee appointed under Section 1102(a) of the Bankruptcy Code in these cases (the “**Creditors’ Committee**”) is not authorized required, pursuant to Section 1102(b)(3)(A) of the Bankruptcy Code, to provide access to the Debtors’ confidential and other non-public proprietary information, or to privileged information, to the creditors it represents. In support of this Motion, the Debtors respectfully state:²

¹ The Debtors in these Chapter 11 cases are: SENCORP, Senco Products, Inc., Senco Export, Inc., SenSource Global Sourcing, LLC, TyRex, LLC, Global Fastening Solutions, LLC, Agrifast, LLC, Nexicor, LLC, Omnifast, LLC, S C FINANCIAL, INC., Senco International, Inc., Sentron Medical, Inc., and Gregg Laboratories, Inc.

² The facts and circumstances supporting this Motion are set forth in the Affidavit of David T. Fyffe, Vice President-Corporate Financial Operations and Treasurer of SENCORP, in Support of First Day Motions (the “**First Day Affidavit**”), filed contemporaneously herewith.

JURISDICTION

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are Sections 105(a), 107(b) and 1102(b)(3)(A) of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “**Bankruptcy Code**”) and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

BACKGROUND

3. The Debtors commenced these above-captioned cases (the “**Chapter 11 Cases**”) by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code on May 8, 2009 (the “**Petition Date**”). Pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors are operating their businesses and managing their affairs as debtors-in-possession. As of the date hereof, no creditors’ committee, trustee or examiner has been appointed in any of these Chapter 11 Cases.

4. The Debtors are a group of privately-held companies that collectively constitute a leading designer, manufacturer and distributor of branded pneumatic and battery powered staplers, nailers and screw systems and collated staples, nails and screws. The Debtors’ brand names are well-known in the industry for quality, reliability and service. The Debtors sell to a diversified customer base, including pro trades, industrial, consumer, international and

commercial customer segments. Certain aspects of the Debtors' businesses, including the SENCO name, have existed for over 50 years. As further evidence of the Debtors' long-term success, most of the Debtors' top ten customers have purchase products from the Debtors for more than 20 years.

5. Despite the Debtors' historical strength, the Debtors have not been immune to the recent widespread economic downturn. Over the past several years, the Debtors' sales volume and profitability have been negatively impacted by several economic factors, including (a) the sharp rise in the price of steel rod (the Debtors' primary raw material) to historic levels in 2008, (b) a severe decline in residential and commercial construction (the Debtors' primary customer segments) and (c) the deteriorating economic conditions leading to the current recession.

6. In response to these economic challenges, the Debtors implemented several critical initiatives in 2008 and early 2009. Among other things, the Debtors have implemented significant workforce reductions, as well as significant pay reductions for all of the Debtors' remaining employees, including senior management. The Debtors have also consolidated domestic manufacturing operations from two facilities to one, and have closed three of their six distribution centers. The Debtors have also implemented several moves designed to increase efficiency in inventory, supply and international operations.

7. Despite these efforts, it has recently become clear that the Debtors do not have sufficient liquidity to survive the current economic downturn in their current state. As a result, the Debtors engaged Mesirow Financial, Inc. ("Mesirow") on March 9, 2009 to serve as

investment bankers for the Debtors to assist the Debtors in exploring possible sale transactions. Mesrirow contacted over 100 financial and strategic parties, and after an intense, expedited marketing period the Debtors determined that the highest and best offer presently available to the Debtors was an offer from Wynnchurch Capital, Ltd. ("Wynnchurch") to serve as a stalking horse bidder in a sale of substantially all of the Debtors' assets under Section 363 of the Bankruptcy Code.

8. On April 10, 2009, the Debtors executed a Letter of Intent (the "LOI") with Wynnchurch representing Wynnchurch's stalking horse bid for substantially all of the Debtors' assets. Thereafter, on May 7, 2009, the Debtors entered into a binding asset purchase agreement (the "APA") with Wynnchurch and Wynnchurch's affiliate Senco Holdings, Inc. for the purchase of substantially all of the Debtors' assets for \$41 million in cash, plus the assumption of certain liabilities. The APA requires the Debtors, among other things, to commence these Chapter 11 Cases by May 11, 2009, obtain by May 28, 2009 an order from this Court approving bidding procedures for the sale of the Debtors' assets, and to obtain an order from this Court by July 7, 2009 approving the sale of substantially all of the Debtors' assets to Wynnchurch (or its affiliates) or such other successful bidder as may be selected at the auction in accordance with the bidding procedures. The Debtors are proceeding with a proposed sale process on those timelines.

9. Subject to the approval of this Court, the Debtors have obtained a proposed debtor-in-possession financing facility (the "DIP Facility") from the Debtors' prepetition secured lenders, led by Bank of America, NA, as administrative agent (the "DIP

Agent”) and as a lender, which the Debtors believe will provide the Debtors with sufficient liquidity through the above-described sale process.

RELIEF REQUESTED

10. By this Motion, the Debtors seek the entry of an order by this Court confirming that Section 1102(b)(3)(A) of the Bankruptcy Code does not authorize or require any Creditors’ Committee appointed in these cases to provide access to the Debtors’ Confidential Information (as defined below) to any creditor that such Creditors’ Committee represents. Furthermore, the Debtors seek entry of an order clarifying that any Creditors’ Committee is not authorized or required to provide access to Privileged Information (as defined below) to any creditor that such Creditors’ Committee represents. The relief requested herein will help ensure that confidential, privileged, proprietary and/or material non-public information will not be disseminated to the detriment of the Debtors’ estates, and will aid the Creditors’ Committee in performing its statutory function.

BASIS FOR RELIEF

11. On April 20, 2005, as part of the Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Congress enacted Section 1102(b)(3) of the Bankruptcy Code. That Section states, in relevant part, that a Creditors’ Committee appointed under Section 1102(a) of the Bankruptcy Code shall “provide access to information for creditors who (i) hold claims of the kind represented by that committee; and (ii) are not appointed to the committee.” 11 U.S.C. § 1102(b)(3)(A). Section 1102(b)(3)(A) does not indicate how a Creditors’

Committee should provide “access to information,” to the creditors it represents. There is no legislative history to Section 1102(b)(3) to provide guidance on the application of this provision.

12. The lack of specificity in Section 1102(b)(3)(A) creates significant issues for debtors and Creditors’ Committees. Typically, a debtor will share various confidential and other non-public proprietary information with a Creditors’ Committee (the “**Confidential Information**”).³ Creditors’ Committees use this information to assess, among other things, a debtor’s capital structure, the results of any revised operations of the debtor in the bankruptcy case, and the debtor’s overall prospects for confirmation of a chapter 11 plan. In addition, Creditors’ Committees typically execute confidentiality agreements or enter into other similar arrangements with debtors. Through these agreements and other arrangements a debtor can ensure that a Creditors’ Committee’s members will keep its information confidential and will not use Confidential Information except in connection with a chapter 11 case and on terms acceptable to the debtor.

13. The enactment of Section 1102(b)(3)(A) raises the issue of whether a Creditors’ Committee could be required to share a debtor’s Confidential Information with any

³ For purposes of this Motion, the term “**Confidential Information**” shall mean any nonpublic information of the Debtors, including, without limitation, information concerning the Debtors’ assets, liabilities, business operation, projections, analyses, compilations, studies, and other documents prepared by the Debtors or their advisors or other agents, which is furnished, disclosed, or made known to the Creditors’ Committee, whether intentionally or unintentionally and in any manner, including written form, orally, or through any electronic, facsimile or computer-related communication. Confidential Information shall include (a) any notes, summaries, compilations, memoranda, or similar written materials disclosing or discussing Confidential Information; (b) any written Confidential Information that is discussed or presented orally; and (c) any other Confidential Information conveyed to the Creditors’ Committee orally that the Debtors or their advisors or other agents advise the Creditors’ Committee should be treated as confidential. Notwithstanding the foregoing, Confidential Information shall not include any information or portions of information that: (i) is or becomes generally available to the public or is or becomes available to the Creditors’ Committee on a non-confidential basis, in each case to the extent that such information became so available other than by a violation of a contractual, legal, or fiduciary obligation to the Debtors; or (ii) was in the possession of the Creditors’ Committee prior to its disclosure by the Debtors and is not subject to any other duty or obligation to maintain confidentiality.

creditor that the Creditors' Committee represents. In the absence of appropriate protections for the Debtors' Confidential Information, the Debtors might be unwilling to share such information with any Creditors' Committee, which would undoubtedly impede the Creditors' Committee's ability to do its work and impair the working relationship between the Debtors and the Creditors' Committee. Given the importance of the issue, the Debtors are seeking an order of this Court confirming that Section 1102(b)(3)(A) does not authorize or require any Creditors' Committee in these cases to provide access to the Debtors' Confidential Information to any creditor that the Creditors' Committee represents.

14. The enactment of Section 1102(b)(3)(A) also raises the issue of whether a Creditors' Committee could be required to share with any creditor that the Creditors' Committee represents information subject to the attorney-client or some other state, federal, or other jurisdictional law privilege, whether such privilege is solely controlled by the Creditors' Committee or is a joint privilege with the debtor or some other party (collectively, "**Privileged Information**"). Of course, the Creditors' Committee would be permitted, but not required, to provide access to Privileged Information to any party so long as (a) such Privileged Information was not Confidential Information, and (b) the relevant privilege was held and controlled solely by the Creditors' Committee.

15. When a statute is clear and unambiguous, "the sole function of the courts is to enforce it according to its terms." U.S. v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)). However, in "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the

intention of its drafters... the intention of the drafters, rather than the strict language, controls.” *Id.* at 242-43 (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) (internal quotation omitted)).

16. The Debtors respectfully submit that Section 1102(b)(3)(A) is unclear and ambiguous. The statute simply requires a Creditors’ Committee “to provide access to information,” yet sets forth no guidelines as to the type, kind and extent of the information to be provided. In its extreme, Section 1102(b)(3)(A) could be read as requiring a Creditors’ Committee to provide access to all information provided to it by a debtor, or developed through exercise of its investigative function, regardless of whether the information is confidential, privileged, proprietary or material non-public information and regardless of whether disseminating such information implicates securities laws disclosure requirements. See 17 C.F.R. §§243.100 to 243.103 (2005). Accordingly, this Court and other courts which have considered this issue have issued orders clarifying that Creditors’ Committees are not authorized or required to provide access to confidential or privileged information. See In re Milacron Inc., Case No. 09-11235 (JVA) (Bankr. S.D. Ohio March 20, 2009); In re Metromedia Steakhouses Company, L.P., Case No. 08-12490 (MFW) (Bankr. D. Del. Nov. 18, 2008); In re Western Nonwovens, Inc., Case No. 08-11435 (PJW) (Bankr. D. Del. July 14, 2008); In re Mortgage Lenders Network USA, Inc., Case No. 07-10146 (PJW) (Bankr.D. Del. Feb. 5, 2007) (providing that creditors’ committee is not required to provide access to confidential or privileged information); In re Refco, Inc., Case No. 05-60006 (RDD) (Bankr. S.D.N.Y. Nov. 1, 2005) (provisionally granting the motion of the committee for an order clarifying the requirement to provide access to

information pursuant to Section 1102(b)(3)(A) until the court further clarifies the requirements under 1102 or the committee establishes an information-sharing protocol).

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

18. Given the ability to share information through the internet or otherwise, the drafters of Section 1102(b)(3) likely intended this provision to mean that a Creditors’ Committee’s constituency should have easier access to relevant public information about a debtor without the burden of retaining counsel to monitor the numerous proceedings within a bankruptcy case. Congress could not have intended for a Creditors’ Committee to be required to provide unfettered access to every type and kind of information that a Creditors’ Committee receives from a debtor. If this had been the intention, Section 1102(b)(3) would then frustrate numerous provisions of the Bankruptcy Code.

19. Furthermore, Section 107(b)(1) of the Bankruptcy Code provides that “on request of a party in interest, the bankruptcy court shall...protect an entity with respect to trade secret or confidential research, development, or commercial information.” Section 107(b)(1) is further supported by Bankruptcy Rule 9018, which states, in relevant part, that “on motion or on its own initiative, with or without notice, the court may make any order which justice requires to

protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information...” Fed. R. Bankr. P. 9018.

20. Section 107(b)(1) is mandatory. Video Software Dealers Ass’n v. Orion Pictures Corp., 21 F.3d 24, 27 (2d Cir. 1994) (providing that the protections of Section 107(b)(1) are mandatory upon request). As a result, under Section 107(b)(1) and Bankruptcy Rule 9018, this Court is empowered to protect the Debtors’ Confidential Information and Privileged Information from disclosure to general creditors.

21. The public dissemination of the Debtors’ Confidential Information likely would cause serious harm to the Debtors’ estates. Confidential Information of the Debtors, such as certain business related information and compensation levels or other employee information, is of a sensitive nature, and public disclosure of such information would cause morale and similar problems for the Debtors, as well as potentially violate federal and state privacy laws. Further, any documents of the Debtors that contain private consumer information must be protected in accordance with state and federal law. If the Debtors were to disclose such information to the Creditors’ Committee without adequate measures to protect such information, it may become liable to previous borrowers and other individuals in its records system.

22. Of course, if there were a risk that Confidential Information given by the Debtors to the Creditors’ Committee would have to be turned over to any creditor, the Debtors would be highly discouraged from giving Confidential Information to a Creditors’ Committee in the first place. In fact, the Debtors might conclude that they could not give such information to the Creditors’ Committee at all. The inability of the Creditors’ Committee to gain access to

Confidential Information, in turn, could limit the ability of the Creditors' Committee to fulfill its statutory obligations under the Bankruptcy Code.

23. As such, the relief sought by the Debtors is not only for the benefit of the Debtors but for the benefit of a Creditors' Committee as well. Any Creditors' Committee also will need the benefit of the relief sought in this Motion to ensure that it does not breach the confidentiality agreements it will execute with the Debtors or the bylaws it will execute that will contain confidentiality provisions for the express benefit of the Debtors. A Creditors' Committee cannot be put in a position of either violating the statute or breaching confidentiality agreements and thereby subjecting itself to suit by the Debtors and potentially other parties.

24. Finally, the risk to the Debtors and a Creditors' Committee of the Creditors' Committee having to provide access to Privileged Information to the creditors it represents creates obvious and serious problems. If the Debtors and Creditors' Committee believed that there could be a risk that Privileged Information would need to be turned over to such creditors, with the possible loss of the relevant privilege at that time, the entire purpose of such privilege would be eviscerated, and both the Debtors and the Creditors' Committee would likely be unable to obtain the independent and unfettered advice and consultation that such privileges are designed to foster. Indeed, unless it is made clear that the risk of dissemination of Privileged Information does not exist, the estate representation structure envisioned by the Bankruptcy Code would become immediately dysfunctional.

25. The disclosure of nonpublic or privileged information to such creditors will likely cause serious harm to the Debtors' estates. Therefore, pursuant to Section 105(a),

107(b)(1) and 1102(b)(3)(A) of the Bankruptcy Code, in order to maximize the value of the estate, the Debtors respectfully requests that the relief herein be granted.

WAIVER OF MEMORANDUM OF LAW

26. This Motion includes citations to the applicable authorities and a discussion of their application to this Motion. Accordingly, the Debtors respectfully submit that such citations and discussion satisfy the requirement that the Debtors submit a separate memorandum of law in support of this Motion pursuant to Local Bankruptcy Rule 9013-1(a).

NOTICE

27. No trustee, examiner or Creditors' Committee has been appointed in these Chapter 11 Cases. The Debtors have provided notice of this Motion to: (i) the Office of the United States Trustee for the Southern District of Ohio; (ii) counsel to the administrative agent for the Debtors' prepetition lenders; (iii) counsel to the administrative agent for the Debtors' proposed debtor-in-possession lenders; (iv) counsel to Wynnchurch; (v) the creditors listed on the Debtors' consolidated list of thirty largest unsecured creditors, as filed with the chapter 11 petitions; (vi) all parties asserting a security interest in the assets of the Debtors to the extent reasonably known to the Debtors; and (vii) any governmental unit listed in LBR 5003-1(d). In light of the nature of the relief requested, the Debtors submit that no further notice is required or needed under the circumstances.

NO PRIOR REQUEST

28. No prior motion for the relief requested herein has been made to this Court or any other court.

WHEREFORE, the Debtors respectfully request that this Court enter the Order, substantially in the form attached hereto as Exhibit A, (a) providing that any Creditors' Committee appointed under Section 1102(a) of the Bankruptcy is not authorized or required, pursuant to Section 1102(b)(3)(A) of the Bankruptcy Code, to provide access to the Debtors' confidential and other non-public proprietary information, or to privileged information, to the creditors it represents; and (b) granting such other and further relief as this Court deems appropriate.

Dated: May 8, 2009
Cincinnati, OH

Respectfully submitted,

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**PROPOSED ATTORNEYS FOR DEBTORS
AND DEBTORS-IN-POSSESSION**

EXHIBIT A

Proposed Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

_____)	Chapter 11
In re:)	
)	
SENCORP , <u>et al.</u>)	Case No. 09-12869 (JVA)
)	
Debtors.)	Jointly Administered
)	
_____)	

**ORDER PROVIDING THAT CREDITORS' COMMITTEES ARE NOT AUTHORIZED
OR REQUIRED TO PROVIDE ACCESS TO CONFIDENTIAL INFORMATION
OF THE DEBTORS OR TO PRIVILEGED INFORMATION**

Upon consideration of the motion (the "**Motion**")¹ of the Debtors² for entry of an order providing that any Creditors' Committee appointed under Section 1102(a) of the

¹ Capitalized terms used but not defined herein shall have the same meanings ascribed to them in the Motion.

² The Debtors in these Chapter 11 cases are: SENCORP, Senco Products, Inc., Senco Export, Inc., SenSource Global Sourcing, LLC, TyRex, LLC, Global Fastening Solutions, LLC, Agrifast, LLC, Nexicor, LLC, Omnifast, LLC, S C FINANCIAL, INC., Senco International, Inc., Sentron Medical, Inc., and Gregg Laboratories, Inc.

Bankruptcy is not authorized or required, pursuant to Section 1102(b)(3)(A) of the Bankruptcy Code, to provide access to the Debtors' confidential and other non-public proprietary information, or to privileged information, to the creditors it represents; and it appearing that the relief requested is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and it appearing that this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that this Motion is a core proceeding pursuant to 28 U.S.C. § 157; and adequate notice of the Motion and opportunity for objection having been given, with no objections or requests for hearing having been filed, or all objections having been overruled, as the case may be; and it appearing that no other notice need be given; and after due deliberation and sufficient cause therefore, it is hereby:

1. ORDERED that the Motion is GRANTED; and it is further;
2. ORDERED that no Creditors' Committee appointed in these cases shall be authorized or required pursuant to Section 1102(b)(3)(A) of the Bankruptcy Code to provide access to any Confidential Information of the Debtors to any creditor it represents. For the purposes of this Order, the term "**Confidential Information**" shall mean any nonpublic information of the Debtors, including, without limitation, information concerning the Debtors' assets, liabilities, business operation, projections, analyses, compilations, studies, and other documents prepared by the Debtors or their advisors or other agents, which is furnished, disclosed, or made known to the Creditors' Committee, whether intentionally or unintentionally and in any manner, including written form, orally, or through any electronic, facsimile or computer-related communication. Confidential Information shall include (a) any notes,

summaries, compilations, memoranda, or similar written materials disclosing or discussing Confidential Information; (b) any written Confidential Information that is discussed or presented orally; and (c) any other Confidential Information conveyed to the Creditors' Committee orally that the Debtors or their advisors or other agents advise the Creditors' Committee should be treated as confidential. Notwithstanding the foregoing, Confidential Information shall not include any information or portions of information that: (i) is or becomes generally available to the public or is or becomes available to the Creditors' Committee on a non-confidential basis, in each case to the extent that such information became so available other than by a violation of a contractual, legal, or fiduciary obligation to the Debtors; or (ii) was in the possession of the Creditors' Committee prior to its disclosure by the Debtors and is not subject to any other duty or obligation to maintain confidentiality; and it is further;

3. ORDERED that no Creditors' Committee shall be authorized or required pursuant to Section 1102(b)(3)(A) of the Bankruptcy Code to provide access to any Privileged Information (as defined below) to any creditor it represents. Nonetheless, any Creditors' Committee appointed shall be permitted, but not required, to provide access to Privileged Information to any party so long as (a) such Privileged Information is not Confidential Information, and (b) the relevant privilege is held and controlled solely by the Creditors' Committee. For the purposes of this Order, the term "**Privileged Information**" shall mean any information subject to the attorney-client or some other state, federal, or other jurisdictional law privilege (including attorney work product), whether such privilege is solely controlled by the Creditors' Committee or is a joint privilege with the Debtors or some other party; and it is

further;

4. ORDERED that nothing in this Order shall expand, restrict, affirm, or deny the right or obligation, if any, of a Creditors' Committee to provide access or not to provide access, to any information of the Debtor to any party except as explicitly provided herein; and it is further;

5. ORDERED that this Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

SO ORDERED.

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