

**Debtors' Motion for an Order Authorizing the Debtors to Release Certain Postpetition Funds Contributed to a Rabbi Trust Under a Supplemental Savings Plan to the Participating Employees (the "SSP Motion").**

By the SSP Motion, the Debtors seek entry of an order authorizing the Debtors to release certain funds contributed postpetition to a rabbi trust under that certain supplemental savings plan, effective January 1, 2005 (the "Supplemental Savings Plan").<sup>1</sup>

The Debtors maintain that the Supplemental Savings Plan provides benefits similar to those available under the Debtors' 401(k) plan for contributions that are in excess of the limits imposed by federal law on contributions to the 401(k) plan. The accounts under the Supplemental Savings Plan have been held pursuant to a rabbi trust established by the Debtors (the "Rabbi Trust"),<sup>2</sup> and four executive employees currently participate in the Supplemental Savings Plan (the "SSP Participants"). If an SSP Participant has contributed to the Debtors' 401(k) plan during the plan year up to the contribution limits imposed by federal law, the SSP Participant may also contribute to the Supplemental Savings Plan.

The Debtors continued to administer the Supplemental Savings Plan in the ordinary course of business and, through July 31, 2009, continued to contribute such funds to the Rabbi Trust (the "Postpetition Trust Contributions"), which included \$62,000 of employee contributions as well as the employer matching portion.

Prior to the petition date, Internal Revenue Code section 409A(b)(3) was amended to impose restrictions on an employer operating under chapter 11 with respect to the funding of trusts that provide deferred compensation benefits. Specifically, the amendment included certain adverse tax consequences to such transactions. In order to ameliorate such adverse tax consequences, the Debtors and the SSP Participants have agreed to make certain changes to the administration of the Supplemental Savings Plan. Accordingly, since August 1, 2009, no additional Postpetition Trust Contributions have been made pursuant to the Supplemental Savings Plan, but instead have been deposited into a general un-segregated account maintained by the Debtors.

By the SSP Motion, the Debtors propose to release the SSP Participants' Postpetition Trust Contributions from the Rabbi Trust to the SSP Participants. The Debtors submit that such distribution is permitted pursuant to Internal Revenue Code section 409A. The Debtors are not seeking to release the matching employer Postpetition Trust Contributions at this time, but instead propose to release such funds and all earnings to a general account of the Debtors.

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<sup>1</sup> The Supplemental Savings Plan was implemented to provide certain of the Debtors' executive employees with the opportunity to participate in a non-qualified, defined contribution plan within the meaning of, and administered in accordance with, the requirements of Internal Revenue Code section 409A and other application sections.

<sup>2</sup> A rabbi trust is "an irrevocable trust that functions as a type of retirement plan or deferred compensation arrangement that offers a limited amount of security to the deferring employee." *See* <http://www.irs.gov/businesses/small/article/0,,id=106553,00.html>.

The Debtors contend that the release of certain of the Postpetition Trust Contributions directly to the SSP Participants does not prejudice the rights of any creditors even though the funds in the Rabbi Trust are subject to creditor claims, because the Debtors believe that the SSP Participants would otherwise be entitled to administrative expense claims for their contributions, as such contributions are deferrals of compensation for services performed postpetition. Accordingly, the Debtors believe good business reasons exist to release the Postpetition Trust Contributions made by the SSP Participants.

***The SSP Motion has been scheduled for presentment on December 18, 2009 at 12:00 p.m. (ET), with a corresponding objection deadline of December 15, 2009 at 11:30 p.m. (ET).***