

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

In re:

**RITA RESTAURANT CORP., ET AL.,**

Debtors.

Chapter 11

Case No. 16-52272-rbk

Jointly Administered

**MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER (I) ESTABLISHING INFORMATION SHARING PROCEDURES AND (II) GRANTING RELATED RELIEF**

**THIS PLEADING REQUESTS RELIEF THAT MAY BE ADVERSE TO YOUR INTERESTS.**

**IF NO TIMELY RESPONSE IS FILED WITHIN 21 DAYS FROM THE DATE OF SERVICE, THE RELIEF REQUESTED HEREIN MAY BE GRANTED WITHOUT A HEARING BEING HELD.**

**A TIMELY FILED RESPONSE IS NECESSARY FOR A HEARING TO BE HELD.**

TO THE HONORABLE RONALD B. KING, U.S. BANKRUPTCY JUDGE:

The Official Unsecured Creditors' Committee (the "Committee") of Rita Restaurant Corp., ("Rita"), one of the debtors and debtors in possession in the above-captioned case (the "Debtors") under chapter 11 of Title of the United States Code (as amended, the "Bankruptcy Code"), by and through its undersigned proposed counsel, hereby moves (the "Motion") this Court for entry of an order, pursuant to sections 105(a), 107(b), and 1102(b)(3)(A) of the Bankruptcy Code and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), clarifying the requirement of the Committee to provide

information to creditors and establishing information sharing procedures. In support of the Motion, the Committee respectfully states as follows:

### **JURISDICTION**

1. Jurisdiction in this Court is proper pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

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

### **BACKGROUND**

3. On October 4, 2016 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Western District of Texas, San Antonio Division (the "Court"), thereby commencing these chapter 11 cases (the "Cases"). The Debtors continue in possession of their property and are operating and managing their business as debtors in possession pursuant to the provisions of 11 U.S.C. §§ 1107(a) and 1108. No trustee or examiner has been appointed in the Debtors' Chapter 11 Cases.

4. On October 14, 2016, the United States Trustee for Region 7 appointed the Committee to represent the interests of all unsecured creditors in this Case pursuant to section 1102 of the Bankruptcy Code. The members appointed to the Committee are: (i) Gordon Food Service; (ii) Washington Prime Group, Inc.; and (iii) SDM, LLC. The Notice of Appointment of Committee of Unsecured Creditors was filed on October 14, 2016. [Docket No. 84].

### **RELIEF REQUESTED**

5. By this Motion, the Committee seeks entry of an order clarifying section 1102(b)(3)(A) of the Bankruptcy Code, which requires the Committee to provide access to information to any creditor the Committee that holds a claim of the kind represented by the Committee. Specifically, the Committee seeks to (a) clarify that the Committee is not required to provide access to Confidential Information (as defined below) and/or Privileged Information (as defined below) and (b) establish procedures that will help assure 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 Committee in performing its statutory functions.

### **BASIS FOR RELIEF**

6. Section 1102(b)(3) of the Bankruptcy Code 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). However, section 1102(b)(3)(A) does not indicate how a creditors' committee should provide "access to information" to creditors nor does the associated legislative history provide any guidance.

7. The lack of specificity in section 1102(b)(3)(A) creates significant issues for debtors and creditors' committees. Typically, a debtor and other parties will share various confidential and other non-public proprietary information with a creditors' committee (the "Confidential Information").<sup>1</sup> Creditors' committees then use this Confidential Information to

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<sup>1</sup> For purposes of this Motion, the term "Confidential Information" shall mean all non-public documents, agreements, records, reports, data, forecasts, appraisals, projections, business plans, interpretations, audit reports,

assess, among other things, a debtor's capital structure, opportunities for the restructuring of a debtor's business in chapter 11, potential asset sales, potential litigation, the results of any revised operations of the debtor, and the debtor's overall prospects for reorganization or liquidation under a chapter 11 plan. Section 1102(b)(3)(A) raises the question of whether a creditors' committee could be required to share another party's (including a debtor's) Confidential Information with any creditor. In this case, the Committee expects the Debtors and other parties to provide, among other things, information about asset sales, valuations of properties, information pertaining to potential litigation claims, and historical financial and related information which may be confidential under section 107 of the Bankruptcy Code, Rule 9018 of the Federal Rules of Bankruptcy Procedures and applicable state or federal law.

8. In this case, absent appropriate protections, the Debtors and other parties might be unwilling or unable to share Confidential Information with the Committee, thereby impeding the Committee's ability to function effectively. As such, given the importance of the issue, the Committee seeks an order of the Court clarifying the requirement that the Committee to provide access to information to exclude Confidential Information.

9. Section 1102(b)(3)(A) could also be read to permit the disclosure of attorney-client privileged information (or information protected by any other applicable privilege or doctrine). Such a reading of the statute raises the question of whether the Committee could be

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and all other non-public information, written, visual or oral regardless of how transmitted, concerning the Debtors' financial condition or performance, the Debtors' business operations, including, without limitation, any and all information relating to the Debtors' suppliers and customers, the valuation of the Debtors and/or their assets, or the sale of the Debtors' assets provided to the Committee by the Debtors, and prepared by, or on behalf of, or furnished by, or on behalf of, the Debtors (whether or not marked confidential), or any other materials provided to the Committee by or on behalf of the Debtors, as well as derivations, summaries, and analyses of the same.

required to disclose another party's or its own privileged information (collectively, the "Privileged Information").<sup>2</sup> Clearly, any obligation to disseminate Privileged Information could hamstring Committee counsel's ability to effectively communicate with and advise the Committee. Thus, the Committee seeks an order of the Court clarifying that the Committee is not obligated under section 1102 to provide access to any Privileged Information. However, the Committee should 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 Committee.

10. 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)).

11. The Committee respectfully submits 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

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<sup>2</sup> For the purposes of this Motion, 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 Committee or is a joint or common interest privilege with the Debtors or some other party.

to provide access to all information provided to it by any party, 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 (where applicable). *See* 17 C.F.R. §§243.100 to 243.103 (2005).

12. The legislative history for section 1102 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.”). As such, the Court should look to other sections of the Bankruptcy Code for guidance regarding whether Congress intended to require committees to disclose confidential information pursuant to section 1102(b)(3). Based on the terms of the Bankruptcy Code and Rules, it is clear that 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 another party. If this had been the intention, section 1102(b)(3) would then frustrate other provisions of the Bankruptcy Code and Rules, such as section 107(b) or Rule 9018.

13. 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.” The language of section

107(b)(1) is mandatory, not permissive. *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).

14. That any interpretation of section 1102(b)(3) must be in keeping with the mandatory provisions of 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. As a result, section 107(b)(1) and Bankruptcy Rule 9018 strongly suggest that this Court should protect the Confidential Information and all Privileged Information from disclosure to general creditors.

15. In addition, section 105(a) of the Bankruptcy Code empowers the Court to “issue any order . . . that is necessary or appropriate to carry out the provisions of this title.” The Committee submits the requested relief is necessary for the Committee to fulfill its obligations as set forth under section 1103(c) of the Bankruptcy Code. Moreover, the requested relief is appropriate and within the Court’s authority.

16. The relief sought by the Committee is not only for the benefit of the Debtors and the Committee, but for the benefit of all constituents in that it ensures the proper functioning of the chapter 11 process. Further, the Committee needs the benefit of the relief sought in this Motion to ensure that it does not breach any confidentiality provisions in its Bylaws. A creditors’ committee cannot be put in a position of either violating the statute or

breaching a confidentiality agreement and thereby subjecting itself to suit by the Debtors and potentially other parties.

17. Finally, the risk to the Committee of having to provide its constituency with access to Privileged Information creates obvious and serious problems. If the Committee believes 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 as that time, the entire purpose of such privilege would be eviscerated, and both the Debtors and the 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.

18. Accordingly, bankruptcy courts in this district which have considered this issue have issued orders clarifying that creditors' committees are not required to provide access to confidential or privileged information. *See, e.g., In re Extreme Power Inc. and Extreme Power Grove, LLC*, No. 14-10096 (HCM) (Bankr. W.D. Tex. Mar. 4, 2014); *In re Advanced Living Technologies, Inc.*, No. 13-10313 (HCM) (Bankr. W.D. Tex. Apr. 18, 2013); and *In re Physicians Specialty Hospital of El Paso East, L.P. and Physicians Specialty Hospital of East El Paso, LP*, No. 07-30633 (LMC) (Bankr. W.D. Tex. Aug. 8, 2007).

19. In order to carry out its statutory reporting obligations in an orderly manner, the Committee proposes the following protocol for providing access to information for

creditors (the “Creditor Information Protocol”) in accordance with section 1102(b)(3)(A) and (B) of the Bankruptcy Code:

- a. Privileged and Confidential Information. The Committee shall not be required to disseminate to any entity (all references to “entity” herein shall be as defined in section 101(15) of the Bankruptcy Code, “Entity”) (i) without further order of the Court, Confidential Information, and (ii) Privileged Information. In addition, the Committee shall not be required to provide access to information or solicit comments from any Entity that has not demonstrated to the satisfaction of the Committee, in its sole discretion, or to the Court, that it holds claims of the kind described in section 1102(b)(3) of the Bankruptcy Code.
- b. Information Obtained Through Discovery. Any information received (formally or informally) by the Committee from any Entity in connection with an examination pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure or in connection with any formal or informal discovery in any contested matter, adversary proceeding or other litigation shall not be governed by any order entered with respect to this Motion but, rather, by any order governing such discovery. Nothing herein shall obligate the Committee to provide any information the Committee obtains from third parties.
- c. Creditor Information Requests. If a creditor (the “Requesting Creditor”) submits a written request to the Committee (the “Information Request”) for the Committee to disclose information, pursuant to section 1102(b)(3)(A) of the Bankruptcy Code the Committee shall as soon as practicable, but no more than thirty (30) days after receipt of the Information Request, provide a response to the Information Request (the “Response”), including providing access to the information requested or the reasons the Information Request cannot be complied with. If the Response is to deny the Request because the Committee believes the Information Request implicates Confidential Information or Privileged Information that need not be disclosed (i) pursuant to the terms of this Order or otherwise under section 1102(b)(3)(A) of the Bankruptcy Code, (ii) because such disclosure is prohibited under applicable law, (iii) because such information was obtained by the Committee pursuant to an agreement to maintain it as confidential, or (iv) that the Information Request is unduly burdensome, the Requesting Creditor may, after a good faith effort to meet and confer with an authorized representative of the Committee regarding the Information Request and the Response, seek to compel such disclosure for cause pursuant to a motion. Such motion shall be served and the hearing on such motion shall be noticed and scheduled. Nothing herein shall be deemed to preclude the Requesting Creditor from requesting (or the Committee objecting to such request) that the

Committee provide the Requesting Creditor a log or other index of any information specifically responsive to the Requesting Creditor's request that the Committee deems to be Confidential Information or Privileged Information. Furthermore, nothing herein shall be deemed to preclude the Requesting Creditor from requesting that the Court conduct an in camera.

- d. Release of Confidential Information of Third Parties. If the Information Request implicates Confidential Information of the Debtors (or any other Entity) and the Committee agrees that such request should be satisfied, or if the Committee on its own wishes to disclose such Confidential Information to creditors, the Committee may demand (the "Demand") for the benefit of the Debtors' creditors: (a) if the Confidential Information is information of the Debtors, by submitting a written request, each captioned as a "Committee Information Demand," to counsel for the Debtors, stating that such information will be disclosed in the manner described in the Demand unless the Debtors object to such Demand on or before fifteen (15) days after the service of such Demand; and, after the lodging of such an objection, the Committee, the Requesting Creditor and the Debtors may schedule a hearing with the Court seeking a ruling with respect to the Demand and (b) if the Confidential Information is information of another Entity, by submitting a written request to such Entity and its counsel of record, with a copy to Debtors' counsel, stating that such information will be disclosed in the manner described in the Demand unless such Entity objects to such Demand on or before fifteen (15) days after the service of such Demand; and, after the lodging of such an objection, the Committee, the Requesting Creditor, such Entity and the Debtors may schedule a hearing with the Court seeking a ruling with respect to the Demand.

20. The foregoing procedures are necessary, narrowly tailored rules designed to protect the interests of the Debtors, the Committee and affected creditors.

21. The Committee, through its proposed counsel, will also establish and maintain a website, until the earliest to occur of dissolution of the Committee, dismissal, or conversion of this chapter 11 case and a further order of the Court. For the sake of efficiency and economy and ease of access by creditors, the Committee proposes to keep creditors informed as required by the statute by directing them to the Committee's own web page at [www.pszjlaw.com/ritarestaurant](http://www.pszjlaw.com/ritarestaurant) to make non-confidential and non-privileged information

available to unsecured creditors. The Committee website will contain links to the Court's ECF\CM website, posts of relevant pleadings, and provide creditors with the information necessary to email or contact Committee counsel. Further, in order to facilitate recognition and ease of access for creditors, the Committee further requests permission to use the Debtors' logo on the website during the period that this case is active.

22. The potential disclosure of nonpublic or privileged information to creditors will not foster a reorganization of the Debtors but will likely cause serious harm to the Debtors' estates. Therefore, pursuant to sections 105(a), 107(b)(1), and 1102(b)(3)(A) of the Bankruptcy Code, in order to maximize the value of the estates, the Committee respectfully requests that the relief herein be granted.

**NO PRIOR REQUEST**

23. No prior request for the relief sought in this Motion has been made to this or any other court.

**NOTICE**

24. Notice of this Motion has been given to the following parties: (a) the Office of the United States Trustee for the Northern District of Texas; (b) counsel to the Debtors; and (c) all other parties designated for service on the Initial Service List pursuant to the Complex Case Order [Dkt. No. 61]. The Committee submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Committee respectfully requests that this Court enter an order, substantially in the form attached hereto, granting the relief requested therein, and such other and further relief as this Court deems appropriate.

Dated: October 28, 2016

*/s/ Michael D. Warner*

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Michael D. Warner (TX Bar No. 00792304)  
Cole Schotz P.C.  
301 Commerce Street, Suite 1700  
Fort Worth, TX 76102  
Telephone: (817) 810-5250  
Facsimile: (817) 810-5255  
Email: mwarner@coleschotz.com

and

Jeffrey N. Pomerantz (CA Bar No. 143717)  
Pachulski Stang Ziehl & Jones LLP  
10100 Santa Monica Blvd., 13<sup>th</sup> Floor  
Los Angeles, CA 90067  
Telephone: (310) 277-6910  
Facsimile: (310) 201-0760  
Email: jpomerantz@pszjlaw.com

*Proposed Counsel to the Official  
Committee of Unsecured Creditors*

#### **CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of October, 2016, a true and correct copy of the foregoing document was filed with the Court and served electronically upon those parties registered to receive electronic notice via the Court's CM/ECF system and by First Class United States Mail on the parties listed on the attached service list.

*/s/ Michael D. Warner*

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Michael D. Warner

**LIMITED SERVICE LIST**

**In re Rita Restaurant Corp, et al.**

**Case No. 16-52272-rbk**  
**as of October 24, 2016**

**DEBTORS**

Rita Restaurant Corp.  
Don Pablo 's Operating, LLC  
Hops Operating, LLC  
c/o Adele Wang, Esq.  
120 Chula Vista Drive  
Hollywood Park, TX 78232

**DEBTORS' COUNSEL**

Akerman LLP  
David W. Parham, Esq.  
John E. Mitchell, Esq.  
2001 Ross Avenue, Suite 2550  
Dallas, TX 75201  
Phone: 214.720.4300  
Fax: 214.981.9339  
Email: [David.Parham@Akerman.com](mailto:David.Parham@Akerman.com)  
Email: [John.Mitchell@Akerman.com](mailto:John.Mitchell@Akerman.com)

Akerman LLP  
Esther McKean, Esq.  
420 South Orange Avenue  
Suite 1200  
Orlando, FL 32801  
Phone: 407.423.4000  
Fax: 407.843.6610  
Email: [Esther.McKean@Akerman.com](mailto:Esther.McKean@Akerman.com)

**GOVERNMENTAL AGENCIES**

Internal Revenue Services  
300 E. 8<sup>th</sup> Street  
Austin, TX 78701

Internal Revenue Services  
P.O. Box 7346  
Philadelphia, PA 19101

Office of the United States Trustee  
Attn: James Rose, Esq.  
615 E. Houston Ste. 533  
San Antonio, TX 75205

U. S. Attorney's Office  
601 NW Loop 410, Suite 600  
San Antonio, TX 78216

**INTERESTED PARTIES**

Mark Andrews, Esq.  
Dykema Cox Smith  
1717 Main Street, Suite 4200  
Dallas, TX 75201

Patrick Huffstickler, Esq.  
Dykema Cox Smith  
112 E. Pecan Street, Suite 1800  
San Antonio, TX 78205

MFC Beaver creek, LLC  
c/o Glimcher Properties, LP  
P.O. Box 46063  
Houston, TX 77210-6063

Gordon Foods  
P.O. Box 1787  
Grand Rapids, MI 49501-1787

Potomac Run LLC  
P.O. Box 6203  
Hicksville, NY 11802-6203

Roundhouse Alexandria, Inc.  
dba CPYR, Inc.  
P.O. Box 79798  
Baltimore, MD 21279-0798

TKG Christiana Center, LLC  
Boone County National Bank  
P.O. Box 7151  
Columbia, MO 65205

Federal Realty Investment Trust  
P.O. Box 8500-9320  
Philadelphia, PA 19178-9320

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**INTERESTED PARTIES**

FMP SA Management  
120 Chula Vista  
Hollywood Park, TX 78232

Ben E. Keith  
1805 Record Crossing  
Dallas, TX 75235

EMR Don Pablos IN, LLC  
4640 Admiralty Way  
Suite 700  
Marina Del Rey, CA 90292

Kimco Realty Corporation  
Owings Mills Mall, LLC  
333 New Hyde Park Road  
Suite 100  
New Hyde Park, NY 11042

Trimark United East  
505 Collins Street  
South Attleboro, MA 02703

US MJW East Gate IV, LLC  
20 South Clark Street  
Suite 3000  
Chicago, IL 60603

Gala Enterp. of Florida Inc.  
7543 International Dr.  
Orlando, FL 32819

RPI Ridgmar Town Square, LTD.  
2929 Carlisle Street  
Suite 170  
Dallas, TX 75204

Arbor Lakes Property  
16505 75th Ave  
North Maple Grove, MN 55331

**INTERESTED PARTIES**

Sanford Towne 100DP, LLC  
1401 Broad Street  
Clifton, NY 07013

Shelby Town Ctr. I, LLC  
34120 Woodward  
Birmingham, MI 48009

D. Wesley Newhouse, Esq.  
Newhouse, Prophater Kolman & Hogan LLC  
1 5025 Arlington Centre Blvd.  
Suite 400  
Columbus, OH 43220

North Richland Hills Pads, LLC  
605 E. Main Street  
Suite 7  
Aspen, CO 81611

Keany Produce Co.  
3310 75th Ave.  
Landover, MD 20785

SDM, LLC  
c/o Eclipse Management  
6402 Cornell Avenue  
Indianapolis, IN 46220

Pittsburgh PA Restaurant LP  
16 Roderer Drive  
Raritan, NJ 08869

Simon  
c/o Sandor Development  
10689 N. Pennsylvania St., # 100  
Indianapolis, IN 46280

L&M Associates One Oxford Centre  
c/o Oxford Development Company  
301 Grant St., Suite 4010  
Pittsburgh, PA 15219

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**INTERESTED PARTIES**

Rookwood Pavilion  
c/o Casto Southwest  
5391 Lakewood Ranch Blvd., Ste. 100  
Sarasota, FL 34240

Washington Prime Group, Inc.  
c/o Ronald E. Gold, Esq.  
Frost Brown Todd LLC  
3300 Great American Tower  
301 East Fourth Street  
Cincinnati, OH 45202

Outfield LLC  
c/o Lormax Stern  
Development Co.  
38500 Woodward Avenue  
Bloomfield Hills, MI 48304

Ouellette Enterprises, LLP  
18625 E. McDowell Mtn. Dr.  
Rio Verde, AZ 85263

G&K Services Inc.  
Attn: Maddy Shefferly  
P.O. Box 677057  
Dallas, TX 75267-7057

Bank of America  
300 Convent St., Floor 6  
San Antonio, TX 78205

PNC Bank, N.A.  
8020 Conroy Windermere Road  
Orlando, FL 32835

JP Morgan Chase Bank  
1734 N. Loop 1604 E.  
Suite 101  
San Antonio, TX 78232

**INTERESTED PARTIES**

Rachel R. Obaldo, Esq.  
Assistant Attorney General  
Bankruptcy & Collections Div., MC 008  
P. O. Box 12548  
Austin, TX 78711-2548

Schneider Thirty of Kentucky, Inc.  
c/o John J. Sparacino, Esq.  
Vorys, Sater, Seymour and Pease, LLP  
700 Louisiana Street, Suite 4100  
Houston, TX 77002

Tarrant County  
Linebarger Goggan Blair & Sampson, LLP  
2777 N. Stemmons Freeway  
Suite 1000  
Dallas, TX 75207

Dallas County  
Linebarger Goggan Blair & Sampson, LLP  
2777 N. Stemmons Freeway  
Suite 1000  
Dallas, TX 75207

Arizona Bank & Trust  
2036 E. Camelback Road  
Phoenix, AZ 85016-4711

Tarrant County  
c/o Don Stecker, Esq.  
Linebarger Goggan Blair & Sampson, LLP  
771 Navarro Street, Ste. 300  
San Antonio, TX 78205

Dallas County  
c/o Don Stecker, Esq.  
Linebarger Goggan Blair & Sampson, LLP  
771 Navarro Street, Ste. 300  
San Antonio, TX 78205

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**INTERESTED PARTIES**

Federal Realty Investment Trust  
c/o David L. Pollack, Esq.  
Ballard Spahr, LLP  
1735 Market Street, 51<sup>st</sup> Floor  
Philadelphia, PA 19103

All Jones, LLC  
c/o Bob Amaro  
120 Chula Vista Drive  
Hollywood Park, TX 78232

Federal Realty Investment Trust  
c/o Michael G. Colvard, Esq.  
Martin & Drought, P.C.  
2500 Bank of America Plaza  
300 Convent Street  
San Antonio, TX 78205

Lone Star State Bank of West Texas  
2975 JBS Parkway  
Odessa, TX 79762

TSCA-245 Limited Partnership  
c/o Jonathan L. Howell, PLLC  
Glast, Phillips & Murray, P.C.  
14801 Quorum Drive, Suite 500  
Dallas, TX 75254

Robert Yaquinto, Jr., Esq.  
Sherman & Yaquinto, LLP  
509 N. Montclair Avenue  
Dallas, TX 75208

Outfield, LLC  
c/o David S. Gragg, Esq.  
Langley & Banack Inc.  
Trinity Plaza II, Ninth Floor  
745 East Mulberry  
San Antonio, TX 78212-3166

RPI Ridgmar Town Square, Ltd.  
c/o Michelle E. Shiro, Esq.  
Singer & Levick, P.C.  
16200 Addison Road, Suite 140  
Addison, Texas 75001