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PROPOSED ATTORNEYS FOR THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE: § CHAPTER 11
§
CEI ROOFING, INC., *et al.*, § CASE NO. 04-35113-HDH-11
§
DEBTORS. § (Jointly Administered)

**LIMITED MOTION FOR RECONSIDERATION OF ORDER
GRANTING AUTHORITY TO PAY PREPETITION M&M LIEN CLAIMS**

TO THE HONORABLE HARLIN D. HALE, U.S. BANKRUPTCY JUDGE:

The Official Committee of Unsecured Creditors (the "Committee") of CEI Roofing, Inc. *et al.* files this Limited Motion for Reconsideration of Order Granting Authority to Pay Prepetition M&M Lien Claims (the "Motion"), and in support thereof would respectfully show the Court as follows:

I.

INTRODUCTION

1. This Motion requests reconsideration of the Court's Order Granting Authority to Pay Prepetition M&M Lien Claims ("Order") entered on May 5, 2004, concerning the

Emergency Motion for Authority to Pay Prepetition M&M Lien Claims ("Emergency Motion") filed by CEI Roofing, Inc. and its affiliated debtors (collectively, the "Debtors").

2. The Committee recognizes that the Debtors' ability to pay certain suppliers and subcontractors with M&M lien claims (or the ability to file M&M lien claims) ("M&M Lien Claims") is a critical component of the Debtors' continued operations and, therefore, the Committee does not object to the *concept* underlying the Debtors' requested authority to pay certain critical suppliers and subcontractors. The Committee objects, however, to the **unfettered discretion** requested by and granted to the Debtors to determine which M&M Lien Claims will be satisfied, without any input from any other party, particularly the Committee, and the process by which objections may be lodged to the payments made on M&M Lien Claims.

3. To the extent that the Debtors seek to use funds from the bankruptcy estates to satisfy prepetition obligations of the Debtors, the Committee should be an active participant in the process of validating which M&M Lien Claims are to be satisfied from funds of the estates, **prior to** the satisfaction of such M&M Lien Claims and not at some point subsequent to the M&M Lien Claims having already been satisfied.

II.

JURISDICTION

4. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Venue of this case is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

III.

BACKGROUND

5. On May 3, 2004 (the "Petition Date"), the Debtors filed their voluntary petitions for relief under Chapter 11 of title 11, United States Code. The Debtors continue to operate their

businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. On the Petition Date, the Debtors filed a number of "first day" pleadings, including the Emergency Motion, requesting authority to pay certain M&M Lien Claims in their "absolute and sole discretion". Emergency Motion at 4.

7. On May 5, 2004, the Court entered the Order on the Emergency Motion, which grants the Debtors authorization to satisfy those M&M Lien Claims that the Debtors determine in their business judgment and in their sole and absolute discretion should be paid.

8. On May 14, 2004, the Committee was appointed by the United States Trustee. At the Committee formation meeting held that same date, the Committee selected the undersigned law firm of Munsch Hardt Kopf & Harr, P.C. ("Munsch Hardt") as its proposed counsel. Accordingly, Munsch Hardt and the Committee did not have an opportunity to review and respond to the relief requested by the Debtors in the Emergency Motion prior to the Order being entered on May 5, 2004.

9. On May 18, 2004, the Debtors filed their Amended Emergency Motion for Order Authorizing Debtors to Pay Critical Prepetition Supplier Claims ("Amended Motion"). In the Amended Motion, the Debtors request that the Court enter an Order, among other things, "superceding" the referenced Order entered on May 5, 2004, such that the definition of "Critical M&M Lien Claims" as set forth therein may be revised and expanded. *See* Amended Motion at 4-5.

IV.

ARGUMENT

10. The Committee respectfully requests that the Court modify the Order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, made applicable in bankruptcy cases by Rule 9024 of the Federal Rules of Bankruptcy Procedure. Rule 60(b) states, in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

FED. R. CIV. P. 60(b).

11. In light of the broad, equitable powers held by bankruptcy courts, "Bankruptcy Rule 9024 'may be liberally construed to do substantial justice to allow parties to air meritorious claims in the absence of fault or prejudice.'" *In re Johnson*, 232 B.R. 319, 321 (Bankr. D. N.J. 1999) (quoting *In re Kirwan*, 164 F.3d 1175, 1177 (8th Cir. 1999)).

12. The Committee requests that the Order be modified to provide that the Debtors' determination as to which M&M Lien Claims are to be paid shall be made only after the Committee and other parties in interest have had a reasonable opportunity to review and provide substantive input on the Debtors' schedule of payments (defined in the Debtors' Emergency Motion and Order as the "M&M Lien Schedule") to be made, to the extent necessary. Furthermore, the Committee respectfully requests that the Order be modified to provide that, in

the event the Committee or other parties in interest object to the proposed satisfaction of any M&M Lien Claims on the M&M Lien Schedule, that a hearing be held prior to the satisfaction of the disputed M&M Lien Claims on the M&M Lien Schedule, and not at some point thereafter, as the Order currently provides.

13. In the jointly administered bankruptcy cases *In re Texas Petrochemicals LP, et al.*, Jointly Administered under Case No. 03-40258-H3-11 and pending in the Bankruptcy Court in the Southern District of Texas ("Texas Petrochemicals"), the debtors requested authority to grant administrative expense priority status to certain prepetition claims of vendors who the debtors determined to be necessary and critical to the continued operation and viability of the debtors' businesses (the "Texas Petrochemicals Motion").¹ The basis for the relief requested by the Texas Petrochemicals debtors is substantially similar to the basis for the relief requested by the Debtors in the instant Emergency Motion.

14. In the order entered by the Bankruptcy Court on the Texas Petrochemicals Motion (the "Texas Petrochemicals Order"), a true and correct copy of which is attached hereto as **Exhibit "A"**, and which the Debtors cited to in the Emergency Motion, the Court did not grant the debtors (nor did the debtors request) unfettered discretion to decide which prepetition vendor claims to satisfy.² Instead, the Texas Petrochemicals Order provides for a reasonable, streamlined procedure whereby the unsecured creditors committee and one of the debtors' lenders (Bank of America) would be provided a list of those vendors which the debtors determined to be critical vendors. The committee then had five (5) calendar days to object to the inclusion of any proposed critical vendor on the list. If the committee did not object in writing

¹ See *Emergency Motion for Order Granting Administrative Expense Priority Status to Pre-Petition Claims of Critical Vendors Which Agree to Extend Post-Petition Trade Credit to the Debtors and Request for Interim and Final Hearings*; Bankruptcy Case No. 03-40258-H3-11, Docket no. 8.

² See *Order Granting Administrative Expense Priority Status to Pre-Petition Claims of Critical Vendors Which Agree to Extend Post-Petition Trade Credit to the Debtors*; Bankruptcy Case No. 03-40258-H3-11, Docket no. 85.

within the five (5) calendar day period the debtors had authority to grant administrative expense priority status to the critical vendor's claim. If the committee timely objected in writing to the inclusion of a particular critical vendor, the debtors set the objection for hearing on the next regularly scheduled weekly hearing date and the debtors did not grant administrative expense priority status to the claim of the critical vendor to which there was an objection.

15. The Committee asserts that some oversight procedure is necessary and would not prejudice the Debtors in this case. The Committee proposes that, prior to paying any M&M Claims, the Debtors serve and file a notice (the "M&M Lien Schedule") identifying with specificity those M&M Lien Claims the Debtors have determined should be paid. If no objection is filed to the M&M Lien Schedule within fifteen (15) days from the date of its filing, the Debtors shall be authorized to pay the M&M Lien Claims listed on the M&M Lien Schedule and such payments shall not be subject to disgorgement. Further, simultaneously with the filing of the M&M Lien Schedule, the Debtors should provide the Committee with copies of all relevant documents supporting the Debtors' determination which M&M Lien Claims should be paid.

16. As the representative body for all unsecured creditors of the Debtors' estates, the Committee has a keen interest in the funds that the Debtors propose to use to satisfy prepetition obligations. To the extent that such funds would otherwise, arguably, be used to satisfy the claims of all unsecured creditors, the Committee should be involved in the process of validating which prepetition obligations are satisfied by the Debtors.

17. Furthermore, making the satisfaction of M&M Lien Claims subject to disgorgement in the event an interested party successfully objects to the satisfaction of any particular M&M Lien Claim creates not only the potential for additional costs for the estates, but also, more importantly, uncertainty for those M&M Lien Claimants who release their liens upon

satisfaction of their claims and pursuant to the Order. Instead, any potential objections should be resolved prior to the satisfaction of the claims and the release of liens by the claimants.

18. Thus, the determination as to which M&M Lien Claims are satisfied should not be left to the Debtors' "sole and absolute discretion". At a minimum, the Committee should be involved in the process of validating which prepetition claims are to be satisfied and, to the extent the Committee disagrees with any claims the Debtors propose to satisfy, a mechanism should be in place to resolve those disagreements prior to such claims being satisfied and liens being released.

19. It is not the Committee's intention to unnecessarily or unreasonably withhold its approval of the satisfaction of any proposed M&M Lien Claims. Nevertheless, the Committee, as the representative of the unsecured creditor body, should be involved throughout the process and not merely at some point subsequent to such payments being made.

V.

CONCLUSION

WHEREFORE, the Committee respectfully requests that (i) the Court modify the Order previously entered to provide for the following: (a) a reasonable opportunity for the Committee to review and, if necessary, object in writing to the proposed satisfaction of any M&M Lien Claim listed on the M&M Lien Schedule prior to the satisfaction of such claims listed on the M&M Lien Schedule, and (b) a hearing before the Bankruptcy Court to resolve any timely written objections lodged by the Committee, prior to the satisfaction of an objected-to M&M Lien Claim; and (ii) the Court grant the Committee such other and further relief to which the Committee may be justly entitled.

Dated this 19th day of May, 2004.

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PROPOSED ATTORNEYS FOR THE
OFFICIAL COMMITTEE OF UNSECURED
CREDITORS

CERTIFICATE OF SERVICE

This is to certify that the undersigned caused a true and correct copy of the foregoing Limited Motion for Reconsideration of Order Granting Authority to Pay Prepetition M&M Lien Claims to be served via telecopy on Charles Gibbs and Keith Aurzada, counsel for the Debtors (214.969.4343) and on the parties listed on the service list attached hereto as **Exhibit "B"** by depositing same in the United States Mail, first class postage prepaid, and properly addressed, on the 19th day of May, 2004.

/s/ Kevin M. Lippman

Kevin M. Lippman, Esq.

EXHIBIT A

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