

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

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In re: :
 : Case No. 06-51848
CEP HOLDINGS, LLC, et al.,¹ : (Jointly Administered)
 :
Debtors. : Chapter 11
 :
 : Honorable Marilyn Shea-Stonum
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**MOTION FOR ORDER (A) GRANTING AUTHORITY FOR THE SALE OF ASSETS
PURSUANT TO § 363(b); (B) APPROVING THE ASSUMPTION AND ASSIGNMENT
OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN
CONNECTION WITH SUCH SALE AND DETERMINING AND ADJUDICATING
CURE AMOUNTS WITH RESPECT TO SUCH CONTRACTS AND LEASES
PURSUANT TO § 365; (C) ESTABLISHING BIDDING PROCEDURES;
(D) SETTING DATE FOR AUCTION AND HEARING ON APPROVAL
OF SALE OF ASSETS; AND (E) APPROVING FORM OF NOTICE**

CEP Holdings, LLC and its affiliated debtors and debtors in possession (each a “Debtor” and collectively, the “Debtors” or “CEP”) in the above-captioned Chapter 11 cases (the “Cases”), hereby move (the “Motion”) for Order (A) Granting Authority for the Sale of Assets Pursuant to § 363(B); (B) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with such Sale and Determining and Adjudicating Cure Amounts with respect to such Contracts and Leases Pursuant to § 365; (C) Establishing Bidding Procedures; (D) Setting Date for Auction and Hearing on Approval of Sale of Assets; and (E) Approving Form of Notice. In further support of this Motion, the Debtors

¹ The Debtors include: CEP Holdings, LLC, Creative Engineered Polymer Products, LLC and Thermoplastics Acquisition, LLC.

represent as follows:

BACKGROUND

1. On September 20, 2006 (the "**Petition Date**"), the Debtors each filed a voluntary petition in this Court for relief under title 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors and debtors-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

2. No trustee or examiner has been appointed in the Debtors' chapter 11 cases. An official committee of unsecured creditors was appointed in these cases on September 28, 2006.

3. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

4. The statutory predicates for the relief requested herein are Bankruptcy Code sections 363 and 365.

B. The Debtors' Business

5. The Debtors are custom molders and extruders of rubber and plastic products, primarily for the OEM automotive market. The Debtors have achieved a unique position as preferred suppliers of high quality products to major customers, including General Motors, Delphi Corporation, Visteon, Nissan, Daimler-Chrysler, Honda and GKN Automotive.

6. Debtor Creative Engineered Polymer Products, LLC (“**CEPP**”) operates six plants in Ohio, Michigan and Alabama. Debtor Thermoplastics Acquisition, LLC operates one plant in Ohio and one plant in South Carolina. CEPP’s nondebtor Mexican subsidiary operates two plants in Mexico.

C. The Proposed Sales

7. On September 26, 2006, the Court entered its Emergency Order re: Motion for Emergency Order Authorizing Debtors to: (A) Use Certain Cash Collateral on an Emergency Basis; (B) Incur Postpetition Debt on an Emergency Basis; (C) Grant Adequate Protection and Provide Security and Other Relief to Wachovia Capital Finance Corporation (Central); and (D) Grant Certain Related Relief (the “**Financing Order**”). As the Debtors explained in the motion seeking approval of the Financing Order, prior to the Petition Date, they explored both an out-of-court restructuring and an in-court restructuring. Despite their efforts, the Debtors concluded that a sale of substantially all their assets under the protection of the Bankruptcy Code is the only viable method to maximize the value of their assets for their creditors. As such, the Debtors negotiated the terms of the Financing Order with its secured lender, Wachovia Capital Finance Corporation (Central) (“**Lender**”) and its major customers, General Motors, Delphi and Visteon (collectively, the “**Participating Customers**”) which represent roughly 55% of the Debtors’ prepetition revenue. It was important for the Debtors to include the Participating Customers in the negotiations because no going concern sale would be possible without the support and agreement of the Participating Customers not to resource production away from the Debtors’ facilities.

8. The provisions of the Financing Order are the results of weeks of arms-length negotiations between the Debtors, Lender and Participating Customers. As reflected in the Financing Order, the Lender and Participating Customers have agreed to fund a ninety-day sale process, as to those facilities one or more Participating Customers may designate as a Sale Facility. Although the Participating Customers have decided to resource from most of the Debtors' facilities, certain of the Participating Customers have designated certain of the Debtors' plants as "Sale Facilities" where such Participating Customers will support a going concern sale. As part of such designation, such Participating Customers have agreed not to resource with respect to such facility and to support in good faith a going concern sale at such facility.

9. The parties have agreed that those facilities which were not designated as Sale Facilities could not be sold as going-concerns due to lack of customer support. Unfortunately, these facilities will have to be closed. These facilities are termed "Closing Facilities." While the Debtors realized that it will have to shut down the Closing Facilities, all parties realized that the value of the Debtors assets related to the Closing Facilities will be maximized if the Debtors orderly wind down these facilities. The Participating Customers have agreed to several accommodations in order to maximize value of the Closing Facilities during a wind down, including: (i) limitations of set offs which increases the value of accounts receivable; (ii) allowing for the build out of existing inventory which leads to the creation of new accounts receivable, thus, maximizing the value of the inventory on hand; (iii) purchase of certain unused inventory, some of which would have little value on the open market; (iv) an equipment purchase option (the "**Equipment Purchase Option**") through which the Participating Customers, if they exercise the option, will pay far in excess of current value for certain designated equipment; and

(iv) the prepayment of wind down costs, including employee related costs such as healthcare. At the end of the build out of Component Parts (as defined in the Financing Order), it was agreed that the remaining machinery and equipment at each Closing Facility (excluding any machinery and equipment subject to any Equipment Purchase Option approved pursuant to a final form of the Financing Order) will be liquidated by a nationally recognized industrial liquidator/auctioneer.

10. The sale procedures proposed by this Motion effectuate the agreement described above and represent the most efficient method to maximize the value for the Debtors' estates.

RELIEF REQUESTED

11. Pursuant to this Motion, the Debtors are requesting that this Court, among other things:

- a. Approve the sales procedures for both the Closing Facilities and Sale Facilities as set forth in the proposed Sales Procedures Order, a copy of which is attached hereto as Exhibit C;
- b. Approve the form of notice (the "**Sale Auction and Sale Hearing Notice**") in substantially the form attached hereto as Exhibit A, as well as a notice to parties holding executory contracts or unexpired leases with the Debtors (other than customers) that are likely to be assumed and assigned in conjunction with the Proposed Sale, in substantially the form attached hereto as Exhibit B (the "**Cure Notice**");
- c. Approve the sale of substantially all of the Debtors' assets free and clear of all liens, encumbrances, interests and claims; and
- d. Order that such liens, encumbrances, interests and claims will attach to the proceeds of such sales.

A. Sale Procedures for the Closing Facilities

12. Under the terms of the Financing Order, the Participating Customers are required to designate which of the Debtors' plants will be Closing Facilities. The Closing Facilities will not be sold as going-concerns. Financing Order, Exhibit 1, ¶ 13. The parties agreed that the Closing Facilities will be liquidated by an auctioneer once the production of Component Parts for the Participating or Assisting Customers (as defined in the Financing Order), as the case may be, ceases. Specifically, the Debtors have agreed with Lender that with respect to each Closing Facility, the Debtors will:

close one or more transactions to sell substantially all of the Debtors' assets at the Closing Facility on terms acceptable to Lender within fourteen (14) days of the later of (i) the Exit Date or (ii) the expiration of the Occupancy Period under the Access and Security Agreement if a Right of Access at the Closing Facility is exercised by a Participating Customer.

Financing Order, Exhibit 1, ¶ 13(b). The later to occur of the Exit Date and the expiration of the Occupancy Period is herein referred to as the "**Closing Date**" with respect to each Closing Facility.

13. The Debtors propose the following procedures with respect to Closing Facilities:

- a. The Debtors will file an application to employ a nationally recognized liquidator/auctioneer (the "**Auctioneer**") as the auctioneer and liquidator with respect all Closing Facilities;
- b. Except for those sales of machinery and equipment at Closing Facilities which are the subject of a separate sale motion or which are purchased by the Participating Customers pursuant to any Equipment Purchase Option approved in the final form of the Financing Order, all machinery and equipment at the Closing Facilities will be liquidated and sold by the Auctioneer;
- c. Upon filing of the application to employ Auctioneer, Auctioneer will commence preparation for a liquidation auction of each

Closing Facility. With respect to each Closing Facility, each auction will be deemed a “**Closing Facility Auction**”;

- d. The last Participating or Assisting Customer to leave a Closing Facility will provide Auctioneer with written notice (the “**Closing Notice**”) of the proposed Closing Date, as the case may be, at least ten (10) days prior to such date. The Auctioneer will promptly schedule an Auction after receipt of the Closing Notice. Auctioneer will promptly issue a notice of the auction (a “**Notice of Auction**”). Unless otherwise ordered by this Court or otherwise agreed to by Lender, in no case will any Closing Facility Auction for a Closing Facility be held more than 14 days after the Closing Date for such facility;
- e. Such Notice of Auction will be immediately filed with the Court by the Debtors and served according to the Case Management Order approved by this Court on September 29, 2006;
- f. Auctioneer will conduct each Closing Facility Auction in a manner that complies in all respects with the “commercially reasonable disposition” standard under § 9-610 of the Uniform Commercial Code;
- g. Nothing herein shall limit the ability of Lender to credit bid pursuant to Section 363(k) of the Bankruptcy Code at any Closing Facility Auction;
- h. Within three (3) business days of completion of the Closing Facility Auction, Auctioneer will file with the Court a full accounting and report regarding the Closing Facility Auction;
- i. Unless any party-in-interest files an objection in this Court objecting to the Closing Facility Auction within three (3) business days after the completion of such Closing Facility Auction on the grounds that the Closing Facility Auction was not conducted in a “commercially reasonable” manner under the Uniform Commercial Code, all sales at the Closing Facility Auction will be final without further order of this Court; and
- j. By virtue of this Order, the assets sold by Auctioneer at the Closing Facility Auction will be sold free and clear of all liens, claims, interests and encumbrances which will attach to the proceeds of the Closing Facility Auction.

B. Sale Procedures for Sale Facilities

14. The Participating Customers are required to designate which of the Debtors’ plants will be Sale Facilities. The Sale Facilities are facilities which the Debtors will attempt to sell as going-concerns. Financing Order, Exhibit 1, ¶ 12. On the Petition Date, the

Debtors filed an application to employ Giuliani Capital Advisors as its investment banker with respect to the Sale Facilities. Giuliani will market for sale as a going concern all of the Sale Facilities.

15. The Debtors have agreed with Lender that with respect to each Sale Facility, the Debtors will:

Obtain Court approval no later than December 1, 2006 to close a sale transaction no later than December 19, 2006.

Financing Order ¶ 12(b). Based on the sale covenants with respect to the Sale Facilities, the Debtors request that the Court approve the following procedures (the “**Sale Facilities Procedures**”) for the sale of each of the Sale Facilities:

Bidder Qualifications

16. Only qualified bidders (the “**Qualified Bidders**”) may submit an offer to purchase one or all of the Sale Facilities, including any executory contracts or unexpired leases to be assumed in connection with the purchase of such Sale Facilities. Persons or entities who wish to become Qualified Bidders (“**Proposed Qualified Bidders**”) with respect to any Sale Facility must submit an offer to purchase one, several or all of the Sale Facilities on or before 5:00 p.m. EST time on November 27, 2006 (the “**Bid Deadline**”), and must comply with each of the following requirements for its bid to be considered by the Debtors (a “**Qualified Bid**”):

- a. Provide the Debtors with evidence that, in the reasonable discretion of the Debtors, establishes that the Proposed Qualified Bidder has sufficient financial ability to close and consummate a sale on the terms set forth in its bid and that the Proposed Qualified Bidder will be able to provide adequate assurance of future performance with respect to all executory contracts or unexpired leases to be assigned with the Sale Facilities pursuant to the Form

Purchase Agreement (as defined below). Any Proposed Qualified Bidder will provide Debtors and Debtors' counsel, within twenty-four (24) hours after Debtors' request, with financial statements and other documents requested by the Debtors relating to its business activities and its ability to perform in the event that its bid is accepted;

- b. Unless previously delivered to Debtors, execute and deliver to the Debtors a confidentiality agreement (the "**Confidentiality Agreement**") to be provided by Debtors, prior to conducting any due diligence or obtaining information considered confidential by Debtors;
- c. The Debtors will provide all interested parties with a form asset purchase agreement (the "**Form Purchase Agreement**"). All Qualified Bidders will submit an executed Form Purchase Agreement (a "**Proposed Purchase Agreement**"), marked to show all changes from the Form Purchase Agreement and include with such submission all schedules and exhibits with respect thereto;
- d. Provide that the transactions under the Proposed Purchased Agreement must close on or before December 19, 2006;
- e. Tender a good faith deposit in the form of an electronic wire transfer of immediately available funds, or a bank or certified check, in the amount of 10% of the bid amount contained in the Proposed Purchase Agreement to counsel to the Debtors (or, in the case of a wire transfer of immediately available funds, to an account designated by Debtors' counsel), which will be deposited and maintained in a segregated escrow account subject to the terms hereof. If a Proposed Qualified Bidder becomes the Successful Bidder (as defined below), its deposit will be applied towards the amount of the Successful Bid (as defined below);
- f. Provide a written statement that (i) it agrees, and intends its bid to comply, with the Bidding Procedures and the terms of the Sale Procedures Order, as well as with such other terms and procedures as may be imposed by the Court or the Debtors on the Sale Facility Auction, at or prior to the Sale Facility Auction; (ii) its bid (as the same may be enhanced at the Sale Facility Auction) will be irrevocable through the later to occur of the conclusion of the Sale Hearing or December 20, 2006 if it is the Successful Bidder or is determined by the Debtors have submitted the second or third highest bid (as augmented at the auction); (iii) that it believes in good faith that its bid constitutes a Qualified Bid; (iv) its deposit will be treated in accordance with the provisions of Sales Procedures Motion; and (v) its bid (as the same may be enhanced at the Sale Facility Auction) is not subject to any due diligence or financing conditions; and
- g. All deposits of Qualified Bidders will be held by the Debtors and returned without interest on the earlier to occur of (x) the date of

closing of the transactions under the Successful Bidder's Proposed Purchase Agreement and (y) the date the Debtors abandon the sales process contemplated hereby. Any deposit tendered by a Qualified Bidder that becomes the Successful Bidder will be (i) forfeited to the Debtors (without prejudice to any other remedies available to the Debtors for such breach) in the event that such Successful Bidder breaches its obligations under its Proposed Purchase Agreement, or (ii) returned without interest to such Successful Bidder in the event that such Successful Bidder's Proposed Purchase Agreement is terminated other than by reason of any breach by such Successful Bidder of any of its obligations in connection therewith.

Delivery of Qualified Bids

17. Any Qualified Bids for the Sale Facilities will be on terms and conditions at least as favorable (as determined by Debtors in their commercially reasonable discretion) as the terms of the Form Purchase Agreement.

18. All Qualified Bids will be in writing (and will be accompanied by a redline of such bid against the Form Purchase Agreement). Copies of such bids (including accompanying redlined Form Purchase Agreement) shall be served on and received by the Bid Deadline by:

- a. the Debtors' counsel, Joseph F. Hutchinson, Jr. and Thomas M. Wearsch, Baker & Hostetler LLP, 3200 National City Center, 1900 East Ninth Street, Cleveland, Ohio 44114;
- b. the Debtors' investment bankers, James Carter, Giuliani Capital Advisors, 101 W. Big Beaver Rd., Suite 545, Troy, Michigan;
- c. counsel to the Creditors Committee – Mark Freedlander and Sally Edison, McGuire Woods, Dominion Tower, 625 Liberty Avenue, 23rd Floor, Pittsburgh, Pennsylvania 15222-3142;
- d. counsel to the Lender – Jeremy Downs, Goldberg Kohn, 55 East Monroe, Suite 3700, Chicago, Illinois 60603;
- e. counsel to Visteon – Michael Hammer, Dickinson Wright PLLC, 301 East Liberty, Suite 500, Ann Arbor, MI 48104; and

- f. the United States Trustee – Maria Giannirakis, Office of the United States Trustee, Howard M. Metzenbaum U.S. Courthouse, 201 Superior Ave., East, Suite 441, Cleveland, Ohio 44114.

19. Only Qualified Bidders that submit Qualified Bids will be entitled to participate in the Sale Facility Auction.

Confidentiality

20. The Debtors will not provide access to any information about the Sale Facilities or their business related thereto to any person or entity who has not signed a Confidentiality Agreement.

The Sale Auction

21. The Debtors will conduct the auction for the Sale Facilities (the “**Sale Facilities Auction**”) at the offices of Debtors’ counsel, Baker & Hostetler LLP, 3200 National City Center, 1900 East Ninth Street, Cleveland, Ohio 44114, on November 29, 2006 at 9:00 a.m. Eastern time. At the beginning of the Sale Facilities Auction, the Debtors will explain the rules of the auction to all bidders in attendance. The Debtors will then answer all reasonable questions from Qualified Bidders. Bidding at the Sale Facilities Auction with respect to each Sale Facility will commence with the highest or otherwise best Qualified Bid (as determined by the Debtors in their reasonable business judgment) or Stalking Horse Bid (as discussed below), as the case may be, on each of the Sale Facilities and bidding will continue in increments announced by the Debtors at the beginning of the auction, until all Qualified Bidders have made their final offers with respect to each of the Sale Facilities.

22. The Debtors will have the sole right and discretion to conduct the Sale Facilities Auction in the manner the Debtors determine is best and most advantageous method to maximize value of the Sale Facilities. At the conclusion of the Sale Facilities Auction, the Debtors in consultation with Lender will announce their determination as to the highest or otherwise best bid for each Sale Facility (with respect to each Sale Facility, the “**Successful Bid**”), and the Qualified Bidder who Submitted the Qualified Bid will become the “Successful Bidder.” With respect to each Sale Facility, the Debtors will have the right to determine which Qualified Bid, if any, is the highest or otherwise best bid at the Sale Facility Auction.

23. The selection of the Successful Bid for any Sale Facility is conditioned upon no Qualified Bidder making an offer for all the Debtors’ assets which is higher or otherwise better than the combined “successful bids” received from the separate auctions of the Debtors’ Sale Facilities. In consultation with Lender, the Debtors will have the sole right and discretion to determine the manner and timing of the separate auctions for the sale of all the Sale Facilities. In consultation with Lender, the Debtors will have the right to determine whether the highest or otherwise best joint bid, if any, or the combined “successful bids” for the Sale Facilities selected at the auctions is the highest and otherwise best bid for their Sale Facility assets.

24. The Debtors’ choice of the highest or otherwise best bid for each Sale Facility may not necessarily be the highest dollar amount Qualified Bid. The Debtors have the right to take into account any and all matters that the Debtors, in the sound exercise of their business judgment, deem appropriate to take into account in making the determination as to which bid is the highest and otherwise best bid. Formal acceptance of a Successful Bid, however, will not occur unless and until the Court enters an order (a “**Sale Order**”) in form and

substance satisfactory to the Debtors and the Successful Bidder approving the Successful Bid and authorizing the Debtors to consummate the sale to the Successful Bidder in accordance with the Proposed Purchase Agreement following the conclusion of the Sale Hearing.

25. Upon the failure to consummate the sale of any Sale Facility to the respective Successful Bidder in accordance with its Proposed Purchase Agreement because of a breach or failure to consummate the sale by such Successful Bidder, the Debtors will (with the prior written consent of Lender) contact the bidder having the next highest or otherwise best Qualified Bid with respect to that Sale Facility, if any, which bidder will be designated as the Successful Bidder and required to buy such facility under its Proposed Purchase Agreement. If the second highest bidder fails to close, then the Debtors will require the third highest bidder, if any, with respect to such Sale Facility, to close as the Successful Bidder. If a Successful Bidder fails to close, the Debtors, with the consent of Lender, may decline to declare a new Successful Bidder and may conduct a new auction.

Stalking Horse Purchasers

26. The Debtors reserve the right to designate a “Stalking Horse Purchaser” with respect to any or all of the Sale Facilities on terms and conditions as the Debtors and Lender deem acceptable, including, but not limited to, reasonable overbid protection, reasonable expense reimbursement and/or breakup fee, and/or any other customary buyer protection. The following procedure will be employed for the designation of a Stalking Horse Purchaser:

- a. The Debtors will file a motion (a “**Designation Motion**”) which attaches an executed Proposed Purchase Agreement with a proposed Stalking Horse Purchaser which motion will seek approval of the stalking horse status of the proposed Stalking

Horse Purchaser including any buyer protection contained in the Proposed Purchase Agreement;

- b. If no party files an objection to the Designation Motion within ten days of the filing of the Designation Motion and the Court has no objection to same, the Court will enter an order approving the proposed Stalking Horse Purchase as a Stalking Horse Purchaser with respect to the Sale Facility covered by its Proposed Purchase Agreement;
- c. The Debtors reserve the right to request in the Designation Motion that the Sale Facility Auction and Sale Hearing with respect to the Sale Facility covered by such motion occur earlier than what is requested herein;
- d. The Stalking Horse Purchaser shall automatically be deemed a Qualified Bidder; and
- e. All other procedures set forth herein regarding bidding procedure will be applicable to any such auction and hearing.

Notice

27. The Debtors request that this Court schedule the Sale Hearing on November 30, 2006 at 10:00 a.m. (eastern time).

28. Pursuant to Bankruptcy Rules 2002, 6004, 6006 and 9014, the Debtors request that they be authorized to give notice of the Sale Motion, the Sale Facilities Auction, and the Sale Hearing by mailing a copy of the Sale Auction and Sale Hearing Notice in substantially the form of Exhibit A hereto by first class mail, to the following (collectively, the “**Notice Parties**”):

- a. All creditors (if any) asserting a security interest, lien, encumbrance or other interest against all or any portion of the Sale Facilities;
- b. The Office of the United States Trustee;
- c. All creditors of the Debtors;
- d. All applicable federal, state and local taxing and environmental authorities;

- e. All parties who have requested notice in these Chapter 11 cases;
- f. all other parties on the General Service List maintained in this case;
- g. All other persons or entities who in the last six months have expressed an interest in writing in acquiring the Sale Facilities, if any; and
- h. all counterparties to any executory contract or Lease to be assigned under the Proposed Purchase Agreement.

29. The Debtors will serve the Sale Auction and Sale Hearing Notice on the Notice Parties within five days or earlier after entry of the Sale Procedures Order by this Court, by first-class mail, postage prepaid. The Sale Auction and Sale Hearing Notice will provide that any party that has not received a copy of the Sale Motion or the Sale Procedures Order that wishes to obtain a copy of the Sale Motion or the Sale Procedures Order, including all exhibits hereto, may view and download such document by visiting the Debtors' bankruptcy website www.bmcgroup.com/cep.

30. Within thirty (30) days of the filing of this Motion, Debtors will also serve a proposed cure notice (the "**Cure Notice**") in substantially the form of Exhibit B hereto on all non-debtor counterparties (collectively, the "**Counterparties**" and each, a "**Counterparty**") to executory contracts and unexpired leases which may be assumed by the Debtors and assigned to a purchaser of a the Sale Facility under the Proposed Purchase Agreement. The Cure Notice will state the amount of cure with respect to each Counterparty's contract or lease.

31. If a Counterparty disagrees with the cure amount stated on its respective Cure Notice or contests the assumption of its contract, it must file an objection (a "**Cure Objection**") with this Court within ten (10) days of service of the Cure Notice. Any objection to a Cure Amount must (i) describe in detail any default related to the executory contract or

unexpired lease, and (ii) claim a specific monetary cure amount that differs from the amount (if any) specified by the Debtors in the Cure Notice.

32. If a Counterparty fails to timely object to the Cure Notice, such Counterparty will be deemed to have consented to (i) the Cure Amount and any adequate assurance of future performance proposed to be provided to the Counterparty, (ii) the assumption by the Debtors of its contract or unexpired lease, and (iii) the assignment by the Debtors of its contract or unexpired lease to the Successful Bidder, as applicable.

33. Cure Objections will be resolved by the Court at the Sale Hearing.

34. The assignee of any such contracts or unexpired leases will be relieved of any liability to the Counterparty to such contract or unexpired lease that accrued or arose before the closing date of the transaction and the Debtors will be relieved of all liability accruing or arising thereafter pursuant to 11 U.S.C. § 365(k).

35. The Successful Bidder will have until the earlier of (i) December 19, 2006 or the date of the closing on its Proposed Purchase Agreement to indicate those contracts (the “**Assumed Contracts**”) of which it will accept assignment. All contracts not so designated by the Successful Bidder(s) will not be deemed assumed by the Debtors.

Proceeds

36. The proceeds of all sales of the Debtors’ assets pursuant to this Motion shall be applied pursuant to the Financing Order, including any final order thereon.

APPLICABLE AUTHORITY

A. Sale Free and Clear of Liens, Claims and Other Encumbrances Generally.

37. The Debtors seek authority, pursuant to Section 363(b), to enter into one or more sale transactions (the “Transactions”) for the sale of the Closing Facilities and Sale Facilities free and clear of any and all liens, claims, encumbrances, or other interests.

38. Section 363(b) provides in pertinent part that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b). In general, a debtor may sell property of the estate outside of the ordinary course of business where the sale of such property represents an exercise of the debtor’s sound business judgment. *See e.g., Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 389-90 (6th Cir. 1986) (citing *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983)); *See also In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991)); *In re Work Recovery, Inc.*, 202 B.R. 301, 303 (Bankr. D. Ariz. 1996) (affirming that a debtor selling estate property should do so with good business judgment); *In re WBQ P’ship*, 189 B.R. 97, 102 (Bankr. E.D. Va. 1995) (affirming the sound business test as “a more sensible approach for providing creditors with a measure of protection outside the plan-confirmation process”); *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 145-47 (3d Cir. 1986) (implicitly adopting the articulated business judgment test of *In re Lionel Corp.*).

39. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See, e.g., In re Food Barn Stores, Inc.*, 107 F. 3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, “a primary objective of the Code [is] to

enhance the value of the estate at hand”); *In re The Ohio Corrugating Co.*, 59 B.R. 11, 13 (Bankr. N.D. Ohio 1985); *In re Atlanta Packaging Prod., Inc.*, 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988) (“It is a very well-established principle of bankruptcy law that the objective of bankruptcy sales and the [debtor’s] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.”)

40. Under Rule 6004, “[a]ll sales not in the ordinary course of business may be by private sale or by public auction.” Fed. R. Bankr. P. 6004(f)(1). A large measure of discretion is accorded a bankruptcy court in deciding whether a private sale of a debtor’s assets should be approved. *Matter of Embrace Sys. Corp.*, 178 B.R. 112, 123 (Bankr. W.D. Mich. 1995) (citing *In re Blue Coal Corp.*, 168 B.R. 553, 564 (M.D. Pa. 1994)). A private sale of a debtor’s assets is appropriate if the statutory requirements are met, the bid is fair, and the sale is in the best interests of the estate and its creditors. *Id.* In determining whether to authorize a sale of property outside the ordinary course of business, a court should evaluate whether the transaction is fair and equitable and in the best interest of all creditors, as demonstrated mainly by evidence that the value of the transaction to the debtor yields a fair market value. *See, e.g., Matter of Correa Rodriguez*, 123 B.R. 153, 155 (Bankr. D. Puerto Rico 1991). Evidence that a transaction involving estate property under Section 363 will be at fair market value permits the conclusion that the transaction is in the best interest of the estate. *In re Planned Sys., Inc.*, 82 B.R. 919, 923 (Bankr. S.D. Ohio 1988) (finding sufficient evidence of fair market value and adequate exposure where property was listed with a broker since the prior year).

B. The Proposed Transaction(s) Satisfies the Bankruptcy Code’s Requirements.

41. The Debtors believe that the proposed Transactions will accomplish a “sound business purpose” and will maximize the value of Debtors’ estates in the most expeditious way possible. As set forth above, any and all Transactions for the Closing Facilities and Sale Facilities will be the result of good faith arm’s length negotiation with a disinterested bidder or bidders. Any and all sales of the Closing Facilities and Sale Facilities will reflect a fair and reasonable value as determined by the Debtors based on competing bids or as determined by the Auctioneer based on a “commercially reasonable disposition.” The Debtors have determined that the sales as proposed herein will best achieve the intended purpose of expeditiously liquidating Debtors’ estate and maximizing returns for creditors. For these reasons, the Debtors submit that the proposed Transactions will be undertaken in good faith and will be for fair value within the meaning of 11 U.S.C. § 363(m). The Debtors further submit that the notice procedures requested herein will provide all parties with adequate notice and time to object to the sales requested hereunder.

42. The proposed Transactions satisfy the requirements of Section 363(f) for a sale free and clear of liens, claims, encumbrances and interests. Section 363(f) provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property as an entity other than the estate only if –

- (1) applicable non-bankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; or
- (4) such interest is in bona fide dispute;

- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

43. Because Section 363(f) is drafted in the disjunctive, satisfaction of any of these five (5) requirements will suffice to approve any proposed sale of some or all of the Property. *See In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793-96 (Bankr. D. Del. 2002) (Section 363(f) is written in the disjunctive; the court approved the sale “free and clear” where only one of the five subsections of section 363(f) were met); *In re Elliot*, 94 B.R. 343 (E.D. Pa. 1988).

44. Multiple courts have interpreted Section 363(f) broadly in authorizing free and clear sales. *See, e.g., In re Michigan Employment Sec. Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1149-50 (6th Cir. 1991); *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 582 (4th Cir. 1996) (finding the purchaser took the coal company’s assets free and clear of any successor liability under the Coal Act pursuant to Section 363(f)(5)); *Ragosa v. Canzano (In re Colarusso)*, 295 B.R. 166, 175 (B.A.P. 1st Cir. 2003) (stating “the range of interests under § 363(f) may be broader than under § 541(a)(1), because, unlike § 541(a)(1), § 363(f) has no *exceptions*”) (emphasis added); *In re Lady H Coal Co.*, 193 B.R. 233, 247 (Bankr. S.D. W. Va. 1996). The Bankruptcy Court for the Southern District of West Virginia has described application of Section 363 sales as follows:

The well established rule that sales within a bankruptcy proceeding occur free and clear of any interest is founded upon the principle that good faith purchasers receive clean title to the property and that any claims against the property attach to the proceeds. Accordingly, the definition of “interest” has been interpreted broadly, although not limitless.

In re Lady H Coal Co., 193 B.R. at 247, *aff'd*, *Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573 (the bankruptcy court decision in *Lady H Coal Co.* was upheld by the Fourth Circuit Court of Appeals which noted that Congress did not intend to limit the scope of Section 363(f) to *in rem* interests; the Fourth Circuit declined to adopt such a restrictive reading of Section 363(f) and held that the debtors could sell their property free and clear of their obligations to a benefit plan arising under The Coal Act); *Volvo Whit Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948-49 (Bankr. N.D. Ohio 1987) (debtor's assets sold free and clear of existing tort claims); *P.K.R. Convalescent Ctr., Inc. v. Virginia Dept. of Med. Assistance Serv. (In re P.K.R. Convalescent Ctr., Inc.)*, 189 B.R. 90, 94 (Bankr. Va. E.D. 1995) (“[Section] 363 covers more situations than just sales involving liens”).

45. Any liens against the property at the Closing Facilities and Sale Facilities will be transferred from the Closing Facilities and Sale Facilities to the proceeds of such sale to the same extent and with the same priority and validity as such liens had in such Closing Facilities or Sale Facilities, as the case may be, prior to the closing of such Transaction.

C. Assumption And Assignment

46. As described above, the Debtors may seek to assume and assign the Assumed Contracts to the Successful Bidder(s). Pursuant to Section 365(a), (b) and (f), but conditioned on the closing of a Transaction, the Debtors requests entry of an order approving the assumption by the Debtors and the assignment by the Debtors to a Successful Bidder(s) of the Assumed Contracts. A schedule of the potential Assumed Contracts will be filed with the Court prior to the Sale Hearing.

47. Section 365(a) authorizes a trustee to assume an executory contract subject to the bankruptcy court's approval. Section 365(a) provides,

[e]xcept as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

48. A debtor's decision to assume or reject an unexpired lease or executory contract must only satisfy the business judgment rule and will not be subject to review unless such decision is clearly an unreasonable exercise of such judgment. *See In re Food Barn Stores, Inc.*, 107 F.3d 558, 567 n. 16 (8th Cir. 1996). *See also In re Mkt. Square, Inc.*, 978 F.2d 116, 121 (3d Cir. 1992) (the resolution of whether to authorize assumption or rejection of a lease is matter of business judgment by the debtor); *In re Phar-Mor, Inc. v. Strouss Bldg. Assoc.*, 204 B.R. 948, 952 (N.D. Ohio 1997); *In re Structurelite Plastics Corp.*, 86 B.R. 922, 925 (Bankr. S.D. Ohio 1988).

49. Section 365(b)(1) requires a debtor to satisfy certain requirements at the time of assumption if a default exists under the contract to be assumed. Additionally and prior to assignment of an executory contract, a debtor must comply with Section 365(f)(2) that provides:

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

50. In the instant case, the Transaction(s) will provide for the cure of any defaults under the Assumed Contracts at or before the closing satisfying Sections 365(b)(1)(A) and (B).

51. Adequate assurance of future performance depends upon the facts and circumstances of each case but should be given practical, pragmatic construction. *In re Tama Beef Packing, Inc.*, 277 B.R. 407 (Bankr. N.D Iowa 2002) (holding that “[i]n making the determination of ‘adequate assurance’, the Court must give a practical pragmatic construction of each case”); *See also In re Carlisle Homes*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989); *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985); *In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985). Evidence of adequate assurance of future performance can be established based upon the financial health and experience of the assignee in the type of enterprise and property involved. *In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986); *In re Alipat, Inc.*, 36 B.R. 274, 278 (Bankr. E.D. Mo. 1984) (holding that a business assigned to an experienced operator that will operate the business in substantially the same way will provide adequate assurance).

52. The Debtors, as necessary and appropriate, will provide evidence that any Successful Bidder(s) are financially sound and otherwise satisfy the provisions of Section 365 regarding adequate assurance of future performance.

53. Section 365(k) provides:

Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from

any liability for any breach of such contract or lease occurring after such assignment.

54. Based upon the foregoing, the Debtors' assumption and assignment of the Assumed Contracts subject to a Transaction complies with Section 365(k), and thus, upon the approval of such assumption and assignment, and pursuant to Section 365(k), after payment of the cure amount, the Debtors should be relieved of all liability on the assumed and assigned Leases and Contracts.

53. The Debtors further submit that the assumption and cure notice procedures described herein constitute adequate notice of any assumption and provide Counterparties with sufficient time to object to the assumption of their respective contracts.

No Prior Request

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

WHEREFORE, the Debtors respectfully request that this Court grant the relief requested herein and such other and further relief as this Court deems appropriate.

Dated: October 4, 2006
Cleveland, Ohio

Respectfully submitted,

CEP HOLDINGS, LLC, et. al.,
Debtors and Debtors-in-possession

By: /s/ Joseph F. Hutchinson, Jr.
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