

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO (AKRON)

In re: : Case No. 06-51848  
: :  
CREATIVE ENGINEERED POLYMER : Chapter 11  
PRODUCTS, LLC, *et al.* : :  
: : Judge Shea-Stonum  
Debtors. : :  
: :

**MOTION OF ARJ MANUFACTURING, LLC PURSUANT TO 11 U.S.C.  
§§ 503(B)(9), AND 363 TO COMPEL ALLOWANCE AND PAYMENT  
OF ADMINISTRATIVE EXPENSE CLAIM**

ARJ Manufacturing LLC ("ARJ"), hereby moves the Court, pursuant to, without limitation, Sections 503(b)(9) and 363 of title 11 of the United States Code (the "Bankruptcy Code"), for entry of an order compelling the allowance and immediate payment of ARJ's administrative expense claim for goods sold to the Debtor and delivered and received at the Debtor's designated location in the ordinary course of business. In support of this Motion, ARJ respectfully states as follows:

**Introduction**

- \_\_\_\_\_1. The Debtor, Creative Engineered Polymer Products LLC (the "Debtor") and its affiliates commenced their Chapter 11 bankruptcy cases on September 20, 2006 (the "Petition Date").
2. The Debtor remains in possession of its properties and continues to operate its business as debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.
3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334.
4. This is a core proceeding pursuant to 28 U.S.C. §157(b) and 1334.

5. Venue of this case and of this motion is proper in this District pursuant to 28 U.S.C. §§1408 and 1409.

6. The statutory predicates for the relief requested in this Motion are Sections 503(b), 363 and 105 of the Bankruptcy Code.

7. ARJ was a supplier of goods to the Debtor. The Debtor has acknowledged the significance and size of ARJ's claim by listing ARJ on its List of Top Twenty Largest Unsecured Creditors filed in its bankruptcy cases, with a balance listed of \$317,013.48.<sup>1</sup> The Debtor did not contest ARJ's claim in the Top Twenty List by listing it as either contingent or disputed.

8. The amounts owed to ARJ for goods sold and delivered during the 20-days prior to the Petition Date (August 31, 2006 to September 19, 2006) is \$101,553.18 (the "503(b)(9) Administrative Claim")<sup>2</sup>. These amounts are set forth in the shipment history detail from ARJ attached hereto as Exhibit "A".

9. ARJ makes this request for allowance and payment of its 503(b)(9) Administrative Claim separate and apart from any applicable rights of reclamation that ARJ may have to seek reclamation treatment for any additional goods sold and received by the Debtor within the 45-day period to 20-day period prior to the Petition Date. ARJ reserves all of its rights under the Bankruptcy Code with respect to both its 503(b)(9) Administrative Claim and its separate reclamation claims.

10. ARJ seeks allowance and payment of its 503(b)(9) Administrative Claim at this time in order to ensure that its claim is properly budgeted for and paid for as part of any final

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<sup>1</sup> Although the balance shown by the Debtor is actually less than the amounts owed to ARJ, for purposes of this Motion, it is not necessary to have the matter determined. ARJ will timely file its proof of claim for the full amounts owed.

<sup>2</sup> Since Section 503(b)(9) of the Bankruptcy Code entitles a supplier of goods on credit to obtain administrative expense payment for such goods which were received within 20-days **before** the commencement of the Debtor's bankruptcy case, ARJ is requesting payment for the goods shipped from August 31, 2006 through the Petition Date, which, as shown on Exhibit A, total \$101,553.18.

approval of the Debtor's DIP Financing Facility or otherwise. From a review of the budget attached to the Debtor's Interim DIP Financing Facility, it does not appear that the Debtor has budgeted for payment of ARJ's 503(b)(9) Administrative Claim, or any other supplier's 503(b)(9) Administrative Claims.<sup>3</sup>

### Legal Discussion

11. Section 503(b)(9) of the Bankruptcy Code, created by the Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005 ("BAPCPA") provides that there shall be allowed as an administrative expense, a creditor's claim for "the value of any goods received by the debtor within 20 days before the petition date in which the goods have been sold to the debtor in the ordinary course of such debtor's business"<sup>4</sup>.

12. Pursuant to Section 546(c)(2) as amended by BAPCPA, this administrative expense claim is independent of a seller's right to seek reclamation of its goods by service of a reclamation demand.

13. The caselaw is well-established that administrative expenses incurred in the ordinary course of the debtor's business may be paid in full in the ordinary course during the case and are not subject to pro rata reductions even where the estate is administratively insolvent. *In re Vernon Sand & Gravel, Inc.*, 109 B.R. 255 (Bankr. N.D. Ohio 1989); *In re Holley Garden Apts., Ltd.*, 238 B.R. 488 (Bankr. M.D. Fla. 1999); *In re Telesphere Communications, Inc.*, 148

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<sup>3</sup> The Debtor is hopeful that consensual resolution and inclusion of payment of ARJ's 503(b)(9) Administrative Claim in the Final DIP Financing Facility budget can be obtained such that it will not be necessary for ARJ to object to final approval of the DIP Financing Facility. Regardless of the outcome and ARJ's receipt of any amounts due from the Debtor, ARJ reserves all rights to assert any claims it may have against any other entity for non-payment of the goods shipped which comprise ARJ's 503(b)(9) Administrative Claim or its other claims in the case, including, without limitation, JCI. This Motion is without prejudice to ARJ's rights and recourse as to any such other party.

<sup>4</sup> And "receipt" of the goods by the Debtor may be either actual or constructive, under well-recognized UCC and Bankruptcy authority- delivery to the Debtor's bailee/agent for the Debtor's benefit constitutes receipt by the Debtor. *In the Matter of Marin Motor Oil, Inc.*, 740 F.2d 220, 226 (3<sup>rd</sup> Cir. 1984); *In re: Bill's Dollar Stores, Inc.*, 164 B.R. 471, 475 (Bankr. D. Del. 1994); *See also*, , UCC 2-702, 2-705 and comments thereto.

B.R. 525 (Bankr. N.D. Ill. 1992); *In re Western Farmers Ass'n*, 13 B.R. 132 (Bankr. W.D. Wash. 1981).

14. Payment of a debtor's suppliers' 503(b)(9) administrative claims has been budgeted for and approved by the courts in DIP financing facilities authorized in other Chapter 11 cases filed since BAPCPA went into effect. *See, In re: Oneida Ltd.*, case no: 06-10489 (pending in S.D. N.Y., DIP Financing Motion which proposed payment of Section 503(b)(9) administrative claims as part of DIP Budget and DIP Financing Order are attached hereto as Exhibits "B" and "C"); *In re: Amcast Industrial Corporation*, case no: 05-33322 (pending in S.D. Ind., Financing Motion proposing cash collateral budget authorizing payment of vendors' 20-day pre-petition claims, and Order approving Financing Motion are attached hereto as Exhibits "D" and "E").

15. Court approval to pay other types of pre- and post-petition claims as priority expenses in a bankruptcy case have also been approved prior to and subsequent to the enactment of BAPCPA, including, pre-petition wages, critical vendor payments, professional fees for pre-bankruptcy planning and services and others. *See, e.g. In re: Ionosphere Clubs*, 98 B.R. 174 (Bankr. S.D. N.Y. 1989)(approving payment of pre-petition wages as priority expenses); *In re: Mirant Corp.*, 296 B.R. 427 (Bankr. N.D. Tex. 2003).

16. In this case, the Debtor has sought approval to pay a variety of other priority and administrative claims of other creditors in the case, which have claims that arose prior to and subsequent to the Petition Date, including claims for, pre-petition wages (Doc. No. 8), pre-petition shipments of goods by vendors which are delivered post-petition (Doc. No.11), and monthly professional fee compensation (Doc. No. 7).

17. Accordingly, it is appropriate for the Court to authorize and direct that ARJ's 503(b)(9) Administrative Claim be allowed and paid promptly upon entry of the Order from this Court.

WHEREFORE, for all the foregoing reasons, ARJ Manufacturing LLC respectfully requests that this Court enter an order (i) allowing and directing the immediate payment of ARJ Manufacturing LLC's 503(b)(9) Administrative Claim and (ii) granting such other and further relief as is just and equitable.

Respectfully submitted,

/s/Richard L. Ferrell

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**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that a true and accurate copy of the foregoing was served via electronic mail this 5<sup>th</sup> day of October, 2006 on the parties listed on the General Service List in this cas, as set forth below:

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