UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	
	:	Case No. 06-61796
CEP HOLDINGS, LLC, et al.,[1]	:	(Jointly Administered)
	:	
Debtors.	:	Chapter 11
	:	
	:	Honorable Russ Kendig

MOTION OF DEBTORS AND DEBTORS IN POSSESSION, PURSUANT TO SECTION 366 OF THE BANKRUPTCY CODE, FOR INTERIM AND FINAL ORDERS: (A) PROHIBITING UTILITIES FROM ALTERING, REFUSING OR DISCONTINUING SERVICES TO, OR DISCRIMINATING AGAINST, THE DEBTORS ON ACCOUNT OF PREPETITION INVOICES; (B) DETERMINING THAT THE UTILITIES ARE ADEQUATELY ASSURED OF FUTURE PAYMENT; (C) ESTABLISHING PROCEDURES FOR DETERMINING REQUESTS FOR ADDITIONAL ASSURANCE; AND (D) PERMITTING UTILITY COMPANIES TO OPT OUT OF THE PROCEDURES ESTABLISHED HEREIN

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**"), pursuant to section 366 of title 11 of the United States Code (the "**Bankruptcy Code**"), for interim and final orders: (a) prohibiting utilities from altering, refusing or discontinuing services to, or discriminating against, the Debtors on account of prepetition invoices; (b) determining that the utilities are adequately assured of future payment; (c) establishing procedures for determining requests for additional assurance; and (d) permitting utility companies to opt out of the procedures established herein. In support of the Motion, the Debtors refer to and rely upon the Affidavit of Joseph Mallak in Support of Chapter

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

11 Petitions and First Day Motions (the "**Mallak Affidavit**"), filed contemporaneously herewith, and respectfully represent as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicate for the relief requested herein is section 366 of the Bankruptcy Code.

BACKGROUND

4. On the date hereof (the "**Petition Date**"), each Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtors have requested that the Cases be jointly administered for procedural purposes only.

5. The Debtors are operating their business as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee, examiner or official committee of unsecured creditors has been appointed.

A. Summary of Capital Structure and Current Business Operations

6. Creative Engineered Polymer Products, LLC, ("**CEPP**") is a limited liability company formed under the laws of the State of Ohio. CEPP is wholly owned by CEP Holdings, LLC ("**Holdings**"), a privately-held limited liability company formed under the laws of the State of Ohio. Holdings is a holding company whose sole asset is its membership interests in CEPP. CEPP has three subsidiaries: (i) Composite Parts Mexico S.A. de C.V. (the "**CEP Mexico**"), a Mexican corporation which is 99.9% owned by CEPP and .01% owned by non-debtor Reserve Capital Group, Ltd; (ii) Thermoplastics Acquisition, LLC ("**Thermoplastics**"), an Ohio limited liability company which is wholly owned by CEPP and is a debtor in these cases; and (iii) CEP

Latin America, LLC ("**CEP LA**"), a non-debtor Ohio limited liability company which is wholly owned by CEPP. CEP LA was never funded and has no operations or debt. The principal place of business of the Debtors is 3560 West Market Street, Suite 340, Akron, Ohio 44333.

7. The Debtors operate 10 manufacturing plants in Ohio, Michigan, Alabama, South Carolina and Mexico, including a plant in Canton, Ohio. CEPP operates six plants in Ohio, Michigan and Alabama. Non-debtor CEP Mexico operates two plants in Mexico. Thermoplastics operates one plant in Ohio and one in South Carolina.

8. CEP and its debtor subsidiaries 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. CEP has maintained this position as a leader in the marketplace through innovative manufacturing techniques and by continuously improving its broad base of material and process technology.

9. Gross sales for the Debtors' businesses are projected to be approximately $190 million for fiscal 2006. The Debtors' nearly 1,106 employees manufacture the Debtors' products at ten strategically located manufacturing facilities in Ohio, Michigan, South Carolina, Alabama and Mexico.[2] The Debtors also maintain a Technical Center in Livonia, Michigan which offers design assistance and program management services for the Debtors' businesses.

B. Prepetition Debt Structure

10. The Debtors were formed as part of two separate purchase transactions on August 16, 2005 and December 20, 2005, respectively. As part of the August 16, 2005 transaction, the

[2] CEP Mexico, a non-debtor, produces high quality plastic products at two factories in Mexico.

CEPP and CEP Mexico businesses were purchased from the Carlisle Companies. In conjunction with the transaction, CEP Acquisition LLC n/k/a CEPP entered into a Loan and Security Agreement, dated as of August 16, 2005 (the "**Prepetition CEPP Credit Agreement**") with Wachovia Capital Finance Corporation (Central) ("**WCFC**"), as both Agent and Lenders thereunder. The Prepetition CEPP Credit Agreement provided two term loans and a revolving credit facility to CEPP in the maximum amount of $45 million (collectively, the "**CEPP Prepetition Loan**"). The CEPP Prepetition Loan is secured by substantially all the assets of CEPP, including, without limitation, all accounts, general intangibles, goods, inventory, equipment, real property, accounts receivable, other personal property and proceeds thereof (collectively, the "**Prepetition CEPP Collateral**"). As of the Petition Date, the amount outstanding under the CEPP Prepetition Loan was not less than $21,693,507.60 (not taking into account pre-petition and post-petition interest, fees and expenses to which Agent may be entitled under the Prepetition CEPP Credit Agreement and applicable law).

11. As part of the December 20, 2005 transaction, CEPP purchased the Thermoplastics business from Parker Hannifan Corporation. In conjunction with the transaction, Thermoplastics entered into a Loan and Security Agreement, dated as of December 21, 2005 (the "**Prepetition Thermoplastics Credit Agreement**" and together with the Prepetition CEPP Credit Agreement, the "**Prepetition Credit Agreements**") with WCFC, as both Agent and Lenders. The Prepetition Thermoplastics Credit Agreement provided a term loan and a revolving credit facility to Thermoplastics in the maximum amount of $5 million (collectively, the "**Thermoplastics Prepetition Loan**" and together with the CEPP Prepetition Loan, the "**Prepetition Loans**"). The Thermoplastics Prepetition Loan is secured by substantially all the assets of Thermoplastics, including, without limitation, all accounts, general intangibles, goods,

inventory, equipment, accounts receivable, other personal property and proceeds thereof (collectively, the "**Prepetition Thermoplastics Collateral**" and together with the Prepetition CEPP Collateral, the "**Prepetition Collateral**"). As of the Petition Date, the amount outstanding under the Thermoplastics Prepetition Loan was not less than $4,219,688.58 (not taking into account pre-petition and post-petition interest, fees and expenses to which Agent may be entitled under the Prepetition Thermoplastics Credit Agreement and applicable law). The Prepetition Credit Agreements are cross-defaulted and cross-collateralized.

12. Prior to the Petition Date, Visteon Corporation, General Motors Corporation and Delphi Corporation (collectively, the "**Customers**") and WCFC entered into a Subordinated Participation Agreement dated June 30, 2006 and a First Amendment to Subordination Participation Agreement dated August 18, 2006 pursuant to which the Customers purchased subordinated, last out participation interests (the "**Participation Interests**") in the Prepetition Loan Facilities. The Customers purchased $2.9 million of Participation Interests, the proceeds of which were used by the Debtors to fund their operations and the building of the Customers' parts.

C. Events Leading To The Filing Of These Chapter 11 Cases

13. The Debtors and other automotive suppliers and manufacturers have faced a series of unanticipated operational and market challenges that have adversely affected their operations and cash flows. These challenges have impaired both the Debtors' suppliers and customers which in turn have severely affected the Debtors' operations and businesses.

14. With respect to suppliers, the September 2005 hurricanes in the Gulf Coast region have disproportionately damaged manufacturers who rely on plastic resins. Shortly after the hurricanes, the Debtors began experiencing sharp increases in their principal raw materials (plastic resins) which increases were attributable to interrupted refining capacity. With prices

already high due to increased global demand, insecurity and supply constraint issues, the hurricanes magnified the rise in the price of crude oil and natural gas. The Debtors have continued to experience significantly higher costs for raw materials.

15. With respect to the Debtors' customers, the Debtors have been unsuccessful in recovering much of these increases in raw material costs from their customers through price increases. The structure of the American automotive industry is such that it is difficult for manufacturers such as the Debtors to pass rising material costs on to customers. Faced with rising costs, the Debtors have expended substantial effort in attempting to source cheaper alternatives (such as recycled materials and alternative formulations) for substitution of higher cost materials. Despite these efforts, most of the Debtors' customers have delayed approving these material substitutions. Although the Debtors are now starting to experience success in receiving approvals of the material substitutions, the damage to the Debtors' liquidity is irreversible outside the protections of the Bankruptcy Code.

16. In addition to increased material costs, the general instability of the industry has directly harmed the Debtors' liquidity. For example, the Debtors have been impaired by the bankruptcy filing of several large OEM's, including Delphi Corporation, the Debtors' second largest customer. The bankruptcy filing of Delphi in October 2005 alone resulted in a cash loss to the Debtors of nearly $1.7 million based on the Debtors' unpaid prepetition claim in that case.

17. In addition to bankruptcy filings in the industry, the general credit downgrade has led to delays and increasingly delinquent customer payments for approved tooling programs. These programs are typically managed and paid for by the Debtors for the benefit of a particular customer which subsequently reimburses the Debtors. The increased delays and failure of customers to pay for these programs have decreased the portion of accounts receivable against

which Wachovia will lend under the Prepetition Credit Agreements. This, in turn, has further impaired the Debtors' liquidity.

18. The Debtors have further experienced excess capacity at their plants due to decisions by their customers. For example, GM's transfer from the GMT800 platform to the GMT900 platform has led to substantial idling of capacity. In late 2005, GM started phasing out the GMT800 platform, a manufacturing platform in which the Debtors were heavily involved. The Debtors have been harmed by this action because (i) the Debtors have significant up front costs invested in the GMT800 platform and (ii) GM has not provided the Debtors with replacement work in the new GMT900 platform. Thus, the Debtors have not recovered their costs associated with the GMT800 platform and are operating at significantly lower capacity at several manufacturing plants due to a failure to receive work under the GMT900 platform.

D. Prepetition Activities

19. In an attempt to create maximum value for the Debtors' creditors, the Debtors worked with the Customers and WCFC to allow the Debtors to formulate a restructuring plan which would reorganize the Debtors outside of a chapter 11 proceeding. As part of this plan, in May 2006 the Debtors entered into a series of forbearance, accommodation and access and security agreements with WCFC and the Customers, which agreements provided a 120-day window for the Debtors to effectuate an out-of-court restructuring plan. This window expired September 6, 2006.

20. Given the size and complexity of the Debtors' operations and the continuation of the market circumstances described above, the Customers, WCFC and the Debtors ultimately determined that an out-of-court restructuring was not feasible. Thus, after exploring all options and faced with a severe liquidity crisis, the Debtors have no choice but to commence these cases

as the only means of preserving the Debtors as going concerns, and, thus, maximize the value of the Debtors' assets for their creditors.

21. With the aide of this Court and the support of WCFC and the Customers, the Debtors' goal is to stabilize their business operations and financial situation and sell their assets in a manner to maximize value for the Debtors' Creditors. As detailed in the Debtors' DIP Financing Motion,[3] filed contemporaneously herewith, WCFC and the Customers have agreed to provide post-petition financing and cash infusions to the Debtors which financing and cash infusions will fund the Debtors' costs of operations, wind down, restructuring and liquidation until such time that the Debtors' assets are sold pursuant to section 363 of the Bankruptcy Code. The Debtors believe that this course of action will maximize the value of their assets for all creditors.

RELIEF REQUESTED

22. Pursuant to section 366(a) of the Bankruptcy Code, the Debtors hereby seek entry of an interim order (the "**Interim Order**"): (a) prohibiting those utility companies currently providing services, or that will provide services, to the Debtors (collectively, the "**Utility Companies**" and each, individually, a "**Utility Company**") from altering, refusing or discontinuing services to, or discriminating against, the Debtors on account of prepetition invoices, pending entry of a final order granting the relief sought herein (the "**Final Order**"); (b) determining that the Utility Companies have received adequate assurance of payment for future utility services, pending entry of the Final Order; (c) establishing certain procedures for determining requests for additional assurance; (d) permitting Utility Companies to opt out of the

[3] The full title of the DIP Financing Motion is CEP Holdings, LLC's Motion for Emergency Order Authorizing Debtors to: (A) Use 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.

procedures established herein and (e) scheduling a final hearing on the Motion (the "**Final Hearing**") within 30 days of the Petition Date. The Debtors also seek the entry of a Final Order granting this relief on a permanent basis.

The Utility Companies

23. The Debtors currently use electric, natural gas, heat, water, sewer and other similar services[4] under 97 separate accounts provided by approximately 32 different Utility Companies, including the Utility Companies identified on the attached **Exhibit A** (the "**Utility Service List**").[5] The Debtors estimate that their aggregate average monthly obligations to the Utility Companies on account of services rendered total approximately $486,039.40.

24. Uninterrupted utility service is essential to the Debtors' ongoing operations and, therefore, to the success of the Debtors' reorganization. As described above, the Debtors are an important manufacturer of automotive parts, operate eight manufacturing and various other facilities throughout the United States.[6] The Debtors could not maintain these facilities and, therefore, could not operate their business, in the absence of continuous utility service. Should any Utility Company refuse or discontinue service, even for a brief period, the Debtors would be

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[4] The Debtors' Utility Companies provide traditional utility *services* related to the day-to-day operation of the Debtors' various facilities.

[5] The Debtors have made an extensive and good faith effort to identify all Utility Companies and include them on the Utility Service List. For each Utility Company, the Utility Service List identifies: (a) the name and address of the Utility Company; (b) to the extent known, the account number under which the Utility Company provides services to the Debtors; (c) the type of utility services provided by the Utility Company; and (d) the proposed Adequate Assurance Deposit (as defined below). The inclusion of any entity on, or any omission of any entity from, the Utility Service List is not an admission by the Debtors that such entity is or is not a utility within the meaning of section 366 of the Bankruptcy Code, and the Debtors reserve their rights with respect thereto. In addition, the Debtors are requesting that this Motion apply to all of the Debtors' Utility Companies, whether or not any given Utility Company is included on the Utility Service List. The Debtors have proposed a procedure for supplementing the Utility Service List. Additionally, it is possible that certain entities may have been mistakenly included on the Utility Service List and, therefore, the Debtors reserve the right to assert that any such entities are not Utility Companies for the purposes of this Motion or section 366 of the Bankruptcy Code.

[6] The Debtors operate two manufacturing facilities in Mexico through CEP Mexico.

forced to cease the operation of each affected facility, resulting in a substantial disruption of operations and loss of revenue. The temporary or permanent discontinuation of utility services at any of the Debtors' facilities could irreparably harm the Debtors' efforts to maximize the value of its assets.

25. The Debtors represent that they have anticipated access to sufficient debtor in possession financing to pay all postpetition obligations to the Utility Companies, to the extent described herein, as such amounts become due in the ordinary course of their businesses

The Adequate Assurance Deposit

26. Pursuant to section 366(c)(2) of the Bankruptcy Code, a utility may alter, refuse or discontinue a Chapter 11 debtor's utility service if the utility does not receive from the debtor or the trustee adequate "assurance of payment" within 30 days of the commencement of the debtor's chapter 11 case.[7] Section 366(c)(1)(A) of the Bankruptcy Code defines the phrase "assurance of payment" to mean, among other things, a cash deposit. Accordingly, the Debtors propose to provide a deposit to any requesting Utility Company in an amount equal to the Debtors' calculation of the cost of two weeks' worth of utility service, based on the historical

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[7] There is an apparent discrepancy between subsections (b) and (c) of section 366 of the Bankruptcy Code because these two subsections set forth different time periods during which a utility is prohibited from altering, refusing or discontinuing utility service. Specifically, section 366(b) of the Bankruptcy Code allows a utility to alter, refuse or discontinue service "if neither the trustee nor the debtor, within 20 *days* after the date of the order for relief, furnishes adequate assurance of payment," while section 366(c)(2) of the Bankruptcy Code allows a utility in "a case filed under chapter 11" to alter, refuse or discontinue service to a chapter 11 debtor "if during the *30-day period* beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service...." (emphases added).

Under the statutory construction canon *lex specialis derogat legi generali* ("specific language controls over general"), the language of section 366(c)(2) controls here because the Debtors are chapter 11 debtors. *See* 3 COLLIER ON BANKRUPTCY ¶ 366.03[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006) ("It is unclear how the 30-day period [in section 366(c)(2) of the Bankruptcy Code] meshes with the normal 20-day period in section 366(b). The better view is that, because section 366(c) is more specifically applicable to chapter 11 cases, the 30-day period, rather than the 20-day period in section 366(b), should apply.").

average over the past 52 weeks[8] and as specifically identified on the attached Utility Service List (each, an "**Adequate Assurance Deposit**"), provided that: (a) such request is made in writing no later than 30 days after the Petition Date (the "**Request Deadline**"); (b) such requesting Utility Company does not already hold a deposit equal to or greater than the Adequate Assurance Deposit (which existing deposit shall be deemed to be the Adequate Assurance Deposit for purposes of this Motion); and (c) such requesting Utility Company is not currently paid in advance for its services. A Utility Company's request for, and acceptance of, an Adequate Assurance Deposit shall be deemed an acknowledgement and admission from the Utility Company that the Adequate Assurance Deposit is the form of adequate assurance that is satisfactory to it, within the meaning of section 366 of the Bankruptcy Code.[9] Likewise, any Utility Company that does not request an Adequate Assurance Deposit by the Request Deadline and does not file a Procedures Objection to opt out of the Adequate Assurance Procedures (as described below), shall be deemed to have adequate assurance that is satisfactory to it, within the meaning of section 366 of the Bankruptcy Code.

27. The Debtors submit that the availability of the Adequate Assurance Deposit (if timely requested), in conjunction with the Debtors' demonstrated ability to pay for future utility services in the ordinary course of business (collectively, the "**Proposed Adequate Assurance**"), constitutes sufficient adequate assurance of future payment to the Utility Companies to satisfy the requirements of section 366 of the Bankruptcy Code. Nonetheless, if any Utility Company

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[8] Where any Utility has provided service for less than 52 weeks, the Debtors have determined the two-week average based upon such shortened time period.

[9] The Debtors further request that any Adequate Assurance Deposit requested by, and provided to, any Utility Company pursuant to the procedures described above be returned to the Debtors at the conclusion of these chapter 11 cases, if not returned or applied sooner.

believes additional assurance is required, they may request such assurance pursuant to the procedures described below.

The Adequate Assurance Procedures

28. To address the right of any Utility Company under section 366(c)(2) of the Bankruptcy Code to seek adequate assurance satisfactory to it, the Debtors propose that the following procedures (the "**Adequate Assurance Procedures**") be adopted:

(a) Any Utility Company desiring assurance of future payment for utility service beyond the Proposed Adequate Assurance must serve a request (an "**Additional Assurance Request**") so that it is received by the Debtors by the Request Deadline at the following addresses: (i) CEP Holdings, LLC, 3560 W. Market Street, Suite 340, Akron, OH 44333 (Attn: Joseph Mallak); and (ii) Baker & Hostetler LLP, 3200 National City Center, 1900 East 9th Street, Cleveland, OH 44114-3485, (Attn: Joseph F. Hutchinson, Jr., Esq.).

(b) Any Additional Assurance Request must (i) be made in writing; (ii) set forth the location(s) for which utility services are provided and the relevant account number(s); (iii) describe any deposits, prepayments or other security currently held by the requesting Utility Company and (iv) explain why the requesting Utility Company believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment.

(c) Upon the Debtors' receipt of an Additional Assurance Request at the addresses set forth above, the Debtors shall have the greater of (i) 14 days from the receipt of such Additional Assurance Request or (ii) 30 days from the Petition Date (collectively, the "**Resolution Period**") to negotiate with the requesting Utility Company to resolve its Additional Assurance Request. The Resolution Period may be extended by agreement of the Debtors and the applicable Utility Company.

(d) The Debtors, in their discretion, may resolve any Additional Assurance Request by mutual agreement with the requesting Utility Company and without further order of the Court, and may, in connection with any such resolution, in their discretion, provide the requesting Utility Company with additional adequate assurance of future payment in a form satisfactory to the Utility Company, including, but not limited to, cash deposits, prepayments and/or other forms of security, if the Debtors believe such additional assurance is reasonable.

(e) If the Debtors determine that an Additional Assurance Request is not reasonable, and are not able to resolve such request during the Resolution Period, the Debtors, during or immediately after the Resolution Period, will request a hearing before this Court to determine the adequacy of assurances of payment made to the requesting Utility Company (the "**Determination Hearing**"), pursuant to section 366(c)(3)(A) of the Bankruptcy Code.[10]

(f) Pending the resolution of the Additional Assurance Request at a Determination Hearing, the Utility Company making such request shall be restrained from discontinuing, altering or refusing service to the Debtors on account of unpaid charges for prepetition services or on account of any objections to the Proposed Adequate Assurance.

(g) Other than through the Opt-Out Procedures (as such term is defined below), any Utility Company that does not comply with the Adequate Assurance Procedures is deemed to find the Proposed Adequate Assurance satisfactory to it and is forbidden from discontinuing, altering or refusing service on account of any unpaid prepetition charges, or requiring additional assurance of payment (other than the Proposed Adequate Assurance). The Interim Order shall be deemed the Final Order with respect to all Utility Companies that do not timely file and serve a Procedures Objection (as defined below).

The Opt-Out Procedures

29. As noted above, section 366(c) of the Bankruptcy Code requires the Debtors to provide Utility Companies, within 30 days of the Petition Date, with "adequate assurance of payment for utility service that is satisfactory to the utility." 11 U.S.C. § 366(c)(2). Thereafter, any such adequate assurance provided by the debtor may be modified by the Court after notice and a hearing under section 366(c)(3)(A) of the Bankruptcy Code. Under the Adequate Assurance Procedures, however, the Debtors may seek a determination of appropriate adequate assurance at a Determination Hearing held after the first 30 days of these cases, without providing interim assurances deemed "satisfactory" to the Utility Company. Although the Adequate Assurance Procedures are reasonable, certain Utility Companies might assert that the

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10 Section 366(c)(3)(A) of the Bankruptcy Code provides that "[o]n request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment ...." 11 U.S.C. §

procedures as implemented are not strictly in compliance with section 366 of the Bankruptcy Code if an adequate assurance dispute is not resolved within the 30 days following the Petition Date. If, as a result, any Utilities Companies wish to opt out of the Adequate Assurance Procedures, the Debtors submit that the Court should schedule a hearing and issue a ruling on the amount of adequate assurance to be provided such Utility Companies within 30 days of the Petition Date.

30. In particular, to avoid any argument that the Debtors have not fully complied with section 366 of the Bankruptcy Code, the Debtors propose the following procedures (the "**Opt-Out Procedures**"):

(a) A Utility Company that desires to opt-opt of the Adequate Assurance Procedures must file an objection (a "**Procedures Objection**") with the Court and serve such Procedures Objection so that it is *actually received* within 15 days of entry of the Interim Order by the Debtors at the following addresses: (i) CEP Holdings, LLC, 3560 W. Market Street, Suite 340, Akron, OH 44333 (Attn: Joseph Mallak); and (ii) Baker & Hostetler LLP, 3200 National City Center, 1900 East 9th Street, Cleveland, OH 44114-3485, (Attn: Joseph F. Hutchinson, Jr., Esq.).

(b) Any Procedures Objection must (i) be made in writing; (ii) set forth the location(s) for which utility services are provided and the relevant account number(s); (iii) describe any deposits, prepayments or other security currently held by the objecting Utility Company; (iv) explain why the objecting Utility Company believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment; and (v) identify, and explain the basis of, the Utility Company's proposed adequate assurance requirement under section 366(c)(2) of the Bankruptcy Code.

(c) The Debtors, in their discretion, may resolve any Procedures Objection by mutual agreement with the objecting Utility Company and without further order of the Court, and may, in connection with any such resolution and in their discretion, provide a Utility Company with additional adequate assurance of future payment, including, but not limited to, cash deposits, prepayments or other forms of security, if the Debtors believe such additional assurance is reasonable.

366(c)(3)(A).

(d) If the Debtors determine that a Procedures Objection is not reasonable and are not able to reach a prompt alternative resolution with the objecting Utility Company, the Procedures Objection will be heard at the Final Hearing.

(e) Any Utility Company that does not timely file a Procedures Objection is deemed to consent to, and shall be bound by, the Adequate Assurance Procedures.

Final Hearing Date

31. To resolve any Procedures Objections within 30 days of the Petition Date, the Debtors request that the Court schedule the Final Hearing on any unresolved Procedures Objections approximately 25 days after the Petition Date.

Subsequent Modifications of Utility Service List

32. It is possible that, despite the Debtors' efforts, certain Utility Companies have not yet been identified by the Debtors or included on the Utility Service List. To the extent that the Debtors identify additional Utility Companies, the Debtors will file amendments to the Utility Service List, and shall serve copies of the Interim Order and Final Order (when and if entered) on such newly-identified Utility Companies. The Debtors request that the Interim and Final Orders be binding on all Utility Companies, subject to their rights to the Proposed Adequate Assurance and to request additional adequate assurance, regardless of when any given Utility Company was added to the Utility Service List.

Authority for the Requested Relief

33. The policy underlying section 366 of the Bankruptcy Code is to protect debtors from utility service cutoffs upon the filing of a bankruptcy case, while at the same time providing utility companies with adequate "assurance of payment" for postpetition utility service. See H.R. Rep. No. 95-595, at 350 (1978), *reprinted* in 1978 U.S.C.C.A.N. 5963, 6306. Section 366(c)(1) of the Bankruptcy Code, as recently modified in October 2005, defines "assurance of payment"

to mean several enumerated forms of security (*e.g.*, cash deposits, letters of credit, prepayment for utility service) while excluding from the definition certain other forms of security (*e.g.*, administrative expense priority for a utility's claim). In addition, section 366(c)(3)(B) of the Bankruptcy Code provides that a court may not consider certain facts (*e.g.*, a debtor's prepetition history of making timely payments to a utility) in making a determination of adequate assurance of payment.

34. While the recently-amended section 366(c) clarifies what does and does not constitute "assurance of payment" and what can be considered in determining whether such assurance is adequate, Congress, in enacting that section, did not divest the Court of its power to determine what *amount,* if any, is necessary to provide adequate assurance of payment to a Utility Company. Indeed, section 366(c) of the Bankruptcy Code not only fails to establish a minimum amount of adequate "assurance of payment," but explicitly empowers the court to determine the appropriate level of adequate assurance required in each case. *See* 11 U.S.C.§ 366(c)(3)(A) ("On request of a party in interest and after notice and a hearing, the Court may order modification of the amount of an assurance of payment ....").

35. Thus, there is nothing within section 366 of the Bankruptcy Code that prevents a court from ruling that, on the facts of the case before it, the amount required to adequately assure future payment to a utility company is nominal, or even zero. Prior to the enactment of section 366(c) of the Bankruptcy Code, courts enjoyed precisely the same discretion to make such rulings pursuant to section 366(b) of the Bankruptcy Code, and frequently did so. *See Va. Elec. & Power Co. v. Caldor, Inc.- N.Y.*, 117 F.3d 646, 650 (2d Cir. 1997) ("Even assuming that 'other security' should be interpreted narrowly, we agree with the appellees that a bankruptcy court's authority to 'modify' the level of the 'deposit or other security,' provided for under § 366(b),

includes the power to require no 'deposit or other security' where none is necessary to provide a utility supplier with "adequate assurance of payment.").

36. Moreover, Congress has not changed the requirement that the assurance of payment only be "adequate." Courts construing section 366(b) of the Bankruptcy Code have long recognized that adequate assurance of payment does not constitute an absolute guarantee of the debtors ability to pay. *See Hennen v. Dayton Power & Light Co. (In re Hennen),* 17 B.R. 720, 724 (Bankr. S.D. Ohio 1983) ("Adequate assurance does not require an absolute guarantee of payment, and is largely a factual determination."); *accord In re Caldor, Inc.-N.Y.*, 199 B.R. 1, 3 (S.D.N.Y. 1996) ("Section 366(b) requires [a] [b]ankruptcy [c]ourt to determine whether the circumstances are sufficient to provide a utility with 'adequate assurance' of payment. The statute does not require an 'absolute guarantee of payment.") (citation omitted), *affd sub nom. Va. Elec. & Power Co. v. Caldor, Inc - N.Y.*, 117 F.3d 646 (2d Cir. 1997); *In re Adelphia Bus. Solutions, Inc.*, 280 BR. 63, 80 (Bankr. S.D.N.Y. 2002) (same); *Steinbach v. Tucson Elec. Power Co (In re Steinebach)*, No. 4-02-04876-EWH, 2004 WL 51616, at *5 (Bankr. D. Ariz. Jan. 2, 2004) ("Adequate assurance of payment is not, however, absolute assurance.... all §366(b) requires is that a utility be protected from an unreasonable risk of non-payment"); *In re Penn Jersey Corp.*, 72 B.R. 981, 982 (Bankr. E.D. Pa. 1987) (stating that section 366(b) of Bankruptcy Code "contemplates that a utility receive only such assurance of payment as is sufficient to protect its interests given the facts of the debtor's financial circumstances").[11] Therefore, despite its language allowing a utility to take adverse action against the debtor should the debtor fail to provide adequate assurance of future payment "satisfactory to the utility," section 366 of the

[11] Courts have recognized that "[i]n deciding what constitutes 'adequate assurance' in a given case, a bankruptcy court must 'focus upon the need of the utility for assurance, and to require that the debtor supply no more than that, since the debtor almost perforce has a conflicting need to conserve scarce financial resources."' *Caldor*, 117 F.3d at 650 (emphasis in original) (quoting *Penn Jersey*, 72 B.R. at 985).

Bankruptcy Code does not require that the assurance provided be "satisfactory" once a party seeks to have the Court determine the appropriate amount of adequate assurances.

37. The Debtors submit that, given the foregoing, entry of the Interim Order is consistent with, and fully satisfies, the requirements of section 366 of the Bankruptcy Code. Far from offering the Utility Companies nominal (or even no) additional assurance of payment, the Debtors propose to provide the Utility Companies with (a) significant cash deposits and procedures pursuant to which the Utility Companies can seek greater or different security. When complemented by the Debtors' ability to pay through access to the DIP Financing, such assurance of payment significantly alleviates - if not eliminates - any honest concern of non-payment on the part of the Utility Companies, and is thus clearly "adequate."

38. Relief similar to the relief requested herein has been granted by courts in other chapter 11 cases since the enactment of BAPCPA. *See*, *e.g.*, *In re Dana Corp.*, No. 06-10354 (BRL) (Bankr. S.D.N.Y. Mar. 3, 2006); *In re Musicland Holding Corp.*, No. 06-10064 (SMB) (Bankr. S.D.N.Y. Feb. 2, 2006); *In re Calpine Corp.*, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Jan. 18, 2006); *In re Refco, Inc., Co.*, 05-60006 (RDD) (Bankr. S.D.N.Y. Dec. 9, 2005).[12]

Notice

39. Notice of the Motion has been given to (a) the Office of the United States Trustee for the Northern District of Ohio, (b) the Debtors' secured lenders, (c) the Debtors' fifty (50) largest unsecured creditors on a consolidated basis, and (d) the Utility Companies identified on the Utility Service List. The Debtors submit that, under the circumstances, no other or further notice need be given.

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[12] Because of the voluminous nature of these unreported orders, they are not attached to this Motion. Copies of such orders will be made available to parties upon request from the Debtors' counsel.

40. Because this Motion presents no novel issues of law and the authorities relied upon are stated herein, the Debtors respectfully request that this Court waive the requirement contained in Local Bankruptcy Rule 9013-1(a) that the Debtors file a separate memorandum of law in support of this Motion.

41. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062, 9014 or otherwise, the Debtors request the relief sought by this Motion be immediately effective and enforceable upon entry of the order requested hereby.

42. No previous motion for the relief sought herein has been made to this or any other court.

[Intentionally Left Blank]

CONCLUSION

WHEREFORE, the Debtors respectfully request that this Court enter an order, substantially in the form attached hereto as **Exhibit B**, granting the relief requested herein and such other or further relief as is just and proper under the circumstances.

Dated: September 20, 2006
Cleveland, OH

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

By: /s/ Joseph F. Hutchinson, Jr.
One of Their Attorneys

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