

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO (AKRON)

In re: : Case No. 06-51848
: :
CEP HOLDINGS, LLC, *et al.* : Chapter 11
: :
: Judge Shea-Stonum
Debtors. :
:

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

ARJ Manufacturing LLC ("ARJ"), as and for its Reply to the Objection (the "Objection") of the Debtors to ARJ's Motion Pursuant to 11 U.S.C. §§503(b)(9) and 363 to Compel Allowance and Payment of Administrative Expense Claim (the "Motion"), respectfully states as follows:

Summary of Facts and Relief Requested

_____1. Equality of Distribution- that is one of the key focal points which ARJ's request for allowance and payment of its 503(b)(9) Administrative Claim boils down to. ARJ is simply seeking to have its undisputed¹, administrative expense obligation owed by the Debtor paid and accorded the same priority and treatment that the Debtors are already according numerous other administrative expenses of their Chapter 11 cases which are on the same parity with ARJ's administrative expense claim. The fact that ARJ's right to seek allowance and payment of its administrative expense claim at this time was created by BAPCPA², does not detract from its

¹ The Debtors, in their Objection have again conceded and acknowledged the size and scope of ARJ's debt as being one of the twenty largest unsecured claims in the bankruptcy cases and the Debtors have not disputed the \$101,553.18 portion of the debt that ARJ provided detail on as being delivered in the 20-day period prior to the Petition Date and therefore, encompassed by Section 503(b)(9) of the Bankruptcy Code.

² Capitalized terms, not otherwise defined herein, shall have the meanings ascribed to them in the Motion.

priority or its parity with the other administrative expenses claims that the Debtors have already paid and/or sought and obtained Bankruptcy Court approval to pay in these cases.

2. There is a significant level of irony in the Debtors' suggestion in the Objection that ARJ's request that its 503(b)(9) Administrative Expense Claim be allowed and paid at this time would somehow create an improper, "superpriority" for ARJ. In fact, it is the exact opposite that ARJ seeks to ensure by its Motion. The Debtors have sought and obtained authority to pay numerous other pre-petition debts/obligations as administrative expenses of the estate and have certainly not taken the position that they are improperly elevating those obligations to superpriority status. ARJ simply seeks a level playing field with respect to its administrative expense claim so that other administrative creditors of the Debtors are not given an unfair and inappropriate priority to payment of their administrative expenses at the expense of ARJ's administrative expense claim.

_____3. Indeed, in making the assertion in the Objection that payment of ARJ's administrative expense claim should not be viewed as authorized by the statute, the Debtors cut-against their own position by, in virtually the same breath, acknowledging that they have sought and obtained this Court's authority to pay other prepetition obligations as administrative expenses under Section 503(b). The Debtors' position on this point appears to be that, although they have the right to request that the Bankruptcy Court grant them authority to pick and choose which prepetition administrative expenses to pay, a particular administrative expense holder should not be given standing to seek to compel the Debtors to give similar treatment and payment to its administrative claim on parity with those the Debtors have chosen to pay. That is simply not the law with respect to Section 503 of the Bankruptcy Code.

_____4. The Debtors have asserted the following four reasons why ARJ's Motion should be denied: (i) that the Motion diverts the Debtors and the Court's attention away from the sale process, (ii) that ARJ's administrative expense claim should be determined through the proof of claims objection and resolution process, and procedures which may, at some unidentified point in time in the future, be established by the Debtors, (iii) that the Debtors' should not be compelled under the language of 503(b)(9) to make immediate payment to ARJ of its administrative expense due, and (iv) that the Debtors should be permitted to force ARJ to await a plan confirmation and effective date to receive payment of its administrative expense claim. Each of these bases asserted by the Debtors is unsupported by the law, the facts or both. Accordingly, the Debtors' Objection must be overruled and the Motion granted in full.

Legal Discussion

A. The Bankruptcy Code's Fundamental Policy of Equality of Distribution to Creditors of the Same Priority Requires that ARJ's 503(b)(9) Administrative Expense Claim be Allowed and Paid Immediately.

5. With respect to the Debtors' assertion that ARJ's 503(b)(9) Administrative Expense Claim need not be paid now pursuant to Section 503(b) of the Bankruptcy Code, but rather, that ARJ should be compelled to await confirmation of a plan of reorganization, this proposition is at odds with both the fundamental principle of the Bankruptcy Code and Chapter 11 regarding equality of distribution to creditors and is not supported by the facts in these cases.

6. The caselaw is uniform that one of the most fundamental principles of the Bankruptcy Code as a whole and Chapter 11 itself is **equality of distribution**, and it has been held that this fundamental policy would be ***vitiated*** if one administrative claimant was permitted to receive more than pro rata share of its debt at the expense of another administrative claimant

of the same parity. *See, e.g. In re Specker Motor Sales Co. v. Eisen*, 393 F.3d 659, 664 (6th Cir. 2004)("equality of distribution would be vitiated if one equally situated administrative claimant received more than his pro rata share."); *In re Telesphere Commun. Inc.*, 148 B.R. 525, 529 (Bankr. N.D. Ill. 1992) (pro rata payment of administrative claims required unless claim involved is given an express superpriority); *In re Western Farmer's Ass'n*, 13 B.R. 132, 134 (Bankr. W.D. Wash. 1981)("it is clearly the law, that all administrative expenses are on a parity as to payment."); *In re Vernon Sand & Gravel, Inc.*, 109 B.R. 255, 257 (Bankr. N.D. OH 1989)(if administrative claims are paid on an interim basis and the estate is thereafter found to be administratively insolvent, disgorgement of the administrative claims paid to ensure a pro rata distribution to administrative claimants is appropriate); *Delgado Oil Co. v. Torres*, 785 F.2d 857, 860 (10th Cir. 1986)(Chapter 11 Trustee bound to achieve the Bankruptcy Code requirement of Equality of Distribution); *In the Matter of Holly's, Inc.*, 140 B.R. 643 (Bankr. W.D. MI. 1992)(covenant in contract which would enable Chapter 11 Debtor to avoid paying priority obligations owed to creditor was unenforceable as a violation of the Bankruptcy Code's principle of equality of distribution); *In re Holley Garden Apts., Ltd.*, 238 B.R. 488, 495 (Bankr. M.D. Fla. 1999)(fundamental principle of Chapter 11 is to promote equality of distribution).

_____. 7. It has been well-recognized that profit is not the test for payment of a Section 503(b) administrative expense, and even in such cases as where the debtor is unable to sell post-petition inventory supplied on credit, it must still pay the trade vendor its administrative expense claim for the goods sold and likewise, a debtor must pay for the use of a nondebtor's property, even where that use turns out to be unprofitable. *In re Patient Education Media, Inc.*, 221 B.R. 97, 103 (Bankr. S.D. N.Y. 1998).

_____8. In the present case, ARJ has fully complied with the requirements set forth in Section 503(b), by timely making a request for allowance and payment of its statutorily authorized administrative expense claim which BAPCPA created for the goods sold and delivered by ARJ in the 20-days preceding the Petition Date.

9. The Debtors have elected to pay and to seek authority to pay, a variety of prepetition obligations as administrative expenses of their estates, including, (i) prepetition employee wages and benefits (Order entered on September 22, 2006, Doc. No 50); and (ii) prepetition shipments of goods delivered to the Debtor's postpetition (Order entered on October 13, 2006, Doc. No. 128).

10. ARJ's legitimate and significant concern that preservation and payment of its administrative expense claim could well be jeopardized if allowance and payment is not immediately ordered is fully supported by the record in this case. Shortly after the case was filed, the Unofficial Committee of Trade Creditors (the "Trade Committee") filed both an objection to the Debtors' proposed DIP Financing Motion (Doc. No. 36)(the "DIP Objection"), and a Motion to Convert the case to a case under Chapter 7 (the "Conversion Motion")(Doc. No. 40). In each of these filings, the Trade Committee expresses its significant concerns, based upon its prepetition analyses and efforts in negotiating with the Debtors, that the Debtor's Chapter 11 cases, with the proposed DIP facility, "affords little or no opportunity for a return to general unsecured creditors" and/or that the Debtors' continued operations in Chapter 11 are generating substantial more losses (See, ¶4 of DIP Objection, ¶¶26 and 27 of Motion to Convert). In fact,

the Trade Committee's Motion to Convert is still set for hearing on October 24, 2006, the same date as the hearing on final approval of the Debtor's DIP Financing Facility³ and ARJ's Motion.

_____ 11. Contrary to the Debtors' isolationist approach, ARJ's Motion is not to be considered in a vacuum. The reality of this Debtors' Chapter 11 cases is that, in a wind-down and liquidation, the Debtors are picking and choosing which administrative expense claimants they deem worthy of having their administrative expenses satisfied, and the Trade Committee has made filings indicating that the unsecured creditors could, in their view, well receiving nothing (and, by logical extension, the estate could well be administratively insolvent), thereby making it in the best interests of creditors, in the Committee's view, that a Chapter 7 liquidation be commenced. Needless to say, in the event that this Court orders conversion, ARJ's Chapter 11 503(b)(9) Administrative Claim would be further diluted and subjected to additional risk of non-payment by the Chapter 7 Trustee administrative fees. All the while, the Debtors have been successful in obtaining authority to pay Chapter 11 administrative expenses during the cases for their professionals, pre-petition wage and benefit claims, and pre-petition claims of shippers of goods received post-petition. And yet, the Debtors do not believe that ARJ is justified under Section 503(b) or the facts and circumstances of these cases in seeking payment now for its administrative expenses authorized by BAPCPA. The Debtors' Objection for these reasons, must fail as a matter of law.

³ In light of the fact that the Debtors have not disputed that they could choose to pay ARJ's Section 503(b)(9) Administrative Expense Claim under the DIP Facility, ARJ will refrain at this point from objecting to the DIP Financing Order. However, should the Debtors take a different approach at the hearing or thereafter, ARJ reserves all rights to seek appropriate modifications to the DIP Order authorized by Sections 105 and 364 of the Bankruptcy Code. See, *Official Committee of Unsecured Creditors of Cybergeneics Corporation v. Chinery*, 330 F.3d 548 (3rd Cir. 2003) (Bankruptcy Court as a court of equity eschews mechanical rules requires flexibility and has inherent power to give effect to the policy of the legislature); *In re Pan Am Corporation*, 162 B.R. 667 (S.D. N.Y. 1993) (Bankruptcy Court has authority under Section 105 to modify DIP Orders); *In re St. Mary Hospital*, 86 B.R. 393, 401 (Bankr. E.D. PA. 1988) (DIP Orders, to be approved under Section 364 must be fair, reasonable and adequate under the circumstances).

B. The Debtors May Not Deprive ARJ of its Statutory Right under Section 503(a) and (b) to Request Allowance and Payment of its Administrative Expense Claim at This Time, Rather than Await the Debtors' Schedule With Respect to Seeking Approval of Claim Resolution Procedures and/or a Plan of Reorganization/Liquidation.

12. The Debtors' proposition in their Objection that they should be able to force ARJ to seek allowance of its Section 503(b) Administrative Expense Claim by filing a proof of claim under Sections 501 and 502 of the Bankruptcy Code and going through the claims resolution process at the Debtors' timetable, is not only unsupported by any bankruptcy court authority (nor have the Debtors even cited to any), but it is also contradicted by the well-established bankruptcy court decisions which have addressed such arguments.

_____ 13. Section 503(a) of the Bankruptcy Code expressly provides that "an entity may timely file a request for payment of an administrative expense."

14. It has been expressly held that a creditor's right to file an application/motion to request allowance and payment of an administrative expense claim under Section 503(b) of the Bankruptcy Code is completely separate and independent of the obligation and procedure for a creditor to follow in seeking allowance of an unsecured, non-administrative claim under Sections 501, 502 and 503 of the Bankruptcy Code. *In re Durango Georgia Paper Co.*, 297 B.R. 326, 329 (Bankr. S.D. GA. 2003)("a party seeking payment under Section 503 is to file a 'request' for payment, rather than a 'proof'" of claim); *In re First Century Corporation*, 166 B.R. 47, 49 (Bankr. M.D. PA. 1994)("proofs of claim are ***not*** the mechanism by which administrative claims should be advanced. Section 503(a) specifically indicates that an entity may file a request for payment of an administrative expense, The filing of a proof of claim is not a substitute for a request for administrative payment."); *In re Nuttall Equipment Co., Inc.*, 188 B.R. 732, 737

(Bankr. W.D. N.Y. 1995)(Section 503(a) is permissive in giving the claimant the option to request payment of its administrative expense claim.).

15. Obviously, the Debtors had full control of the first-day motion process. They elected to file first day motions to (i) seek approval of reclamation procedures, (ii) pay pre-petition wage-related claims, (iii) pay pre-petition claims of shippers of goods delivered post-petition, and (iv) pay professional fees. The Debtors' elected not to file a critical vendor motion, a motion to set up any procedures for the determination of Section 503(b)(9) administrative claims or a motion to set a proof of claim or administrative claim bar date or other related procedures.

16. The Debtors' apparent believe that, in spite of their elections with regard to which procedures-motions to file, that a holder of an administrative expense claim should be deprived of its statutory right to seek allowance and payment of an expense authorized by Section 503(b) is meritless and contravenes the letter and spirit of the statute.

C. ARJ's Claim Should Not and Need Not be a "Distraction" to the Debtors' Sale Process, but In Any Event, Exercise of ARJ's Rights Under Section 503(b) Are Matters a Debtor is Required to Address.

_____17. The Debtors' final point that ARJ's Motion should not be considered at this time because it distracts the Debtors from their efforts to sell their assets is immaterial to the statutory right of a creditor to seek allowance and payment of an administrative expense claim, is a matter a Chapter 11 debtor is charged with addressing in any event and could be addressed by the Debtors without having filed the Objection.

18. Again, the Debtors chose which first-day motions to file and which not to file. They cannot be heard to complain that a creditor seeks to avail itself early in the case, in the face of a Chapter 7 Conversion Motion, that the creditor's motion seeking to timely protect its interest

is inappropriate or should be impeded. Obviously, the Debtors were compelled to address and resolve the other "ad hoc" creditor filings made in the cases to date- such as the individual utilities which sought protection of their Section 366 rights. If the Debtors believed that they needed protection from 503(b)(9) claimants, they could have sought approval of special procedures like the procedures they sought approval of for reclamation claimants.⁴

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, (ii) denying the Debtors' Objection and (iii) granting such other and further relief as is just and equitable.

Respectfully submitted,

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⁴ The Debtors other irrelevant assertion in the Objection, that ARJ's Motion should not be granted because of the domino-effect of other "copycat" 503(b)(9) claimants filing similar motions is also misplaced. Again, the fact that one creditor has stepped forward and chosen to exercise its rights under the Bankruptcy Code and other creditors have not as yet, has nothing to do with the merits of ARJ's right to allowance and payment. Further, as previously stated, the Debtors controlled the process and procedures they chose to establish in their first day motions and orders- they sought and obtained reclamation procedures, they did not seek or obtain procedures with respect to creditors filing requests for allowance and payment of administrative expense claims.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and accurate copy of the foregoing was served via electronic mail this 20th day of October, 2006 on the parties listed on the General Service List in this case, as set forth below:

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