

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

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In re: : Case No. 06-51848  
: (Jointly Administered)  
CEP HOLDINGS, LLC, et al.,<sup>1</sup> :  
: Chapter 11  
Debtors. :  
: Honorable Marilyn Shea-Stonum  
: :  
: Hearing Date: N/A  
: Objection Deadline: 2/5/07 at 4:00 p.m.  
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**DEBTORS' NOTICE OF RECONCILED  
RECLAMATION CLAIMS UNDER ORDER ESTABLISHING  
PROCEDURES FOR RESOLVING RECLAMATION CLAIMS ASSERTED  
AGAINST THE DEBTORS AND GRANTING CERTAIN RELATED RELIEF**

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 file this notice (the “**Reclamation Notice**”), pursuant to the *Order Establishing Procedures for Resolving Reclamation Claims Asserted Against the Debtors and Granting Certain Related Relief* (Docket No. 127) (the “**Reclamation Order**”). In support of this Reclamation Notice, the Debtors respectfully represent as follows:

**Background**

1. On September 20, 2006 (the “**Petition Date**”), each Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Pursuant to an order entered by the Court on September 26, 2006, the Cases are being jointly administered for procedural purposes only.

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<sup>1</sup> The Debtors are: CEP Holdings, LLC, Creative Engineered Polymer Products, LLC and Thermoplastics Acquisition, LLC.

2. The Debtors are operating their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. On September 28, 2006, the United States Trustee appointed an official committee of unsecured creditors. No trustee or examiner has been appointed.

### **The Reclamation Order and Report Requirement**

3. On the Petition Date, the Debtors filed the *Motion of Debtors and Debtors in Possession for the Entry of an Order: (I) Establishing Procedures for Resolving Reclamation Claims Asserted Against the Debtors; and (II) Granting Certain Related Relief* (Docket No. 14) (the “**Reclamation Motion**”). By the Reclamation Motion, the Debtors sought the entry of an order establishing procedures for resolving reclamation claims in the Cases.

4. On October 13, 2006, the Court entered the Reclamation Order and established the reclamation procedures proposed in the Reclamation Motion in the Cases (the “**Reclamation Procedures**”) as the sole and exclusive method for the resolution and payment of reclamation claims (the “**Reclamation Claims**”) against the Debtors. Reclamation Order at ¶ 3. A copy of the Reclamation Order is attached hereto as **Exhibit A** and is incorporated herein by reference.

5. Pursuant to the Reclamation Procedures, the Debtors are required, on or before the 120th day after the Petition Date (*i.e.*, before January 18, 2007), to file a notice listing the Reclamation Claims and the amount, if any, that the Debtors believe to be valid for each such Reclamation Claim. Reclamation Order at ¶ 2(c). This pleading constitutes the Reclamation Notice required under the Reclamation Order.

### **Reclamation Report**

6. On or prior to the date of this Reclamation Notice, approximately seven parties (collectively, the “**Reclamation Claimants**”) sent reclamation letters (collectively, the “**Demand Letters**”) to the Debtors demanding the return of certain goods previously shipped to

the Debtors pursuant to section 546(c) of the Bankruptcy Code and/or section 2-702 of the Uniform Commercial Code. The number of Demand Letters received by the Debtors is unusually low given the size and complexity of the Cases, and is a product of the fact that most of the Debtors' suppliers placed the Debtors on cash in advance terms or cash on deliver terms in the months preceding the Petition Date. Accordingly, most of the Debtors' suppliers were paid in full for the goods delivered to the Debtors within 45 days of the Petition Date (*i.e.*, between August 6, 2006 and September 20, 2006) and, thus, do not hold valid Reclamation Claims against the Debtors.<sup>2</sup>

7. Following the receipt of the Demand Letters, the Debtors organized these demands and initiated a comprehensive review of the Reclamation Claims. On October 26, 2006, to assist in the Debtors' review of the Reclamation Claims, Debtors' counsel sent a letter (each an "**Information Request Letter**") to each of the Reclamation Claimants requesting that the Reclamation Claimants provide the Debtors with certain information in support of their Reclamation Claims (the "**Supporting Information**").<sup>3</sup> Specifically, in the Information Request Letters, the Debtors requested that the Reclamation Claimants: (a) identify the total amount of their Reclamation Claim; (b) provide detailed information regarding the shipment of the goods to the Debtors that provides the basis for their Reclamation Claim; (c) verify that no part of their

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<sup>2</sup> Pursuant to section 101 of the Bankruptcy Code, a creditor holds a claim against a bankruptcy estate only to the extent that it has a "right to payment" for the asserted liability. *See* 11 U.S.C. § 101(5) (defining a "claim" in pertinent part as a "right to payment" or "the right to equitable remedy for breach of performance if such breach gives rise to a right to payment[.]"); 11 U.S.C. § 101(10) (defining a "creditor" in pertinent part as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor[.]"). By contrast, there is no right to payment — and, therefore, no claim — where the asserted liabilities already have been paid or otherwise are not due and owing by a debtor.

<sup>3</sup> An Information Request Letter was not sent to Safeway Packaging because (a) Safeway Packaging did not submit its Reclamation Claim until November 1, 2006, more than 5 days after the Information Request Letter was mailed to the other Reclamation Claimants, and (b) its Demand Letter was not received within the time period set forth in section 546(c) of the Bankruptcy Code and must be disallowed in its entirety on this basis alone for the reasons set forth below.

Reclamation Claim is attributable to services; (d) verify that they have not received any payment for the goods that provide the basis of their Reclamation Claim; and (e) verify that they were not on cash in advance terms or cash on deliver terms with the Debtors within 45 days of the Petition Date.

8. Based on the Debtors' review of the Demand Letters, the Supporting Information provided by the Reclamation Claimants and the Debtors' books and records, and an analysis of applicable law in the Sixth Circuit and elsewhere, the Debtors prepared a chart (the "**Claim Summary Chart**") identifying all asserted Reclamation Claims and the amount, if any, that the Debtors believe to be valid for each such Reclamation Claim (as required by paragraph 2(c) of the Reclamation Order). The Claim Summary Chart is attached hereto as **Exhibit B** and is incorporated herein by reference.

***The Reclamation Claims Are Invalid to the Extent That They Do Not Establish the Prima Facie Elements of a Valid Reclamation Claim or Are Subject to a Valid Legal Defense***

9. The Reclamation Order requires that "any Seller asserting a Reclamation Claim must satisfy all procedural and timing requirements under applicable law and demonstrate that it has satisfied all legal elements entitling it to a right of reclamation." Reclamation Order at ¶ 2(a). Each Reclamation Claimant bears the burden of establishing, by a preponderance of the evidence and as a threshold matter, each element of a reclamation claim under section 546(c) of the Bankruptcy Code. *See McLouth Steel Prods. Corp. v. Quaker Chem. Co. (In re McLouth Steel Prods. Corp.)*, 213 B.R. 978, 984 (E.D. Mich. 1997) (stating that a reclamation claimant has the burden of establishing each element of a reclamation claim); *In re Phar-Mor, Inc.*, 301 B.R. 482, 493 (Bankr. N.D. Ohio 2003) (same); *accord In re Diary Mart Convenience Stores, Inc.*, 302 B.R. 128, 133 (Bankr. S.D.N.Y. 2003) (stating that "[t]he reclaiming seller has the burden of establishing each element of § 546(c) by a preponderance of the evidence.").

10. The *prima facie* elements of a valid reclamation claim under section 546(c) of the Bankruptcy Code, at minimum, are as follows:

- a. the reclaimed goods were shipped in the ordinary course of the seller's business
- b. the buyer of the reclaimed goods was insolvent at the time it received such goods;
- c. the buyer received the reclaimed goods within 45 day period prior to the commencement of the bankruptcy case; and
- d. the seller made an adequate written reclamation demand within 45 days of the buyer's receipt of the reclaimed goods (or within 20 days of the commencement of the case if the 45-day period expired after the commencement of the buyer's bankruptcy case).

11 U.S.C. § 546(c); *see also* *Yenkin-Majestic Paint Corp. v. Wheeling Pittsburgh Steel Corp. (In re Pittsburgh-Canfield Corp.)*, 309 B.R. 277, 285 n.1 (B.A.P. 6th Cir. 2004); *McLouth Steel Prods. Corp.*, 213 B.R. at 984.

11. Courts have further ruled, consistent with the provisions of the Bankruptcy Code, that reclamation claims may be invalid when such claims are subject to the superior rights of a holder of a security interest in the goods sought to be reclaimed. 11 U.S.C. § 546(c)(1); *see Pittsburgh-Canfield Corp.*, 309 B.R. at 288 (applying former section 546(c) of the Bankruptcy Code and holding that reclamation claimants are not entitled to a replacement lien or an administrative expense claim when their reclamation claims are subject to the superior claims of a secured creditor and the subject goods are used to satisfy the secured claim); *Phar-Mor, Inc.*, 301 B.R. at 496-97 (“In priority terms, the reclaiming seller stands behind the insolvent buyer’s secured creditors who have security interests in the goods subject to reclamation demands.”); *accord Pester Ref. Co. v. Ethyl Corp. (In re Pester Ref. Co.)*, 964 F.2d 842, 847 (8th Cir. 1992); *In re Nitram, Inc.*, 323 B.R. 792, 800 (Bankr. M.D. Fla. 2005); *Diary Mart Convenience Stores*,

*Inc.*, 302 B.R. at 134; *Galey & Lord Inc. v. Arley Corp. (In re Arlco, Inc.)*, 239 B.R. 261, 273 (Bankr. S.D.N.Y. 1999).

**The Debtors' Reconciliation and Analysis of the Reclamation Claims Is Set Forth in the Claim Summary Chart**

12. The Claim Summary Chart includes information related to the foregoing elements of a *prima facie* reclamation claim and other factual and legal bases for the reduction or disallowance of the Reclamation Claims. Each column of the Claim Summary Chart either: (a) provides basic or summary information about the Reclamation Claims and the Debtors' reconciliation of those claims or (b) explains the bases for the Debtors' reduction in amount of the Reclamation Claims. The following is a description of each column of the Claim Summary Chart:

- a. The column labeled "**Claimant**" sets forth the name of the Reclamation Claimant and the contact information for each Reclamation Claimant set forth in the Reclamation Claimant's Demand Letter.
- b. The column labeled "**Letter Assertion Amount**" sets forth the amount, if any, asserted in each Reclamation Claimant's Demand Letter.
- c. The column labeled "**Supporting Document Demand Amount**" sets forth the amount asserted in the Supporting Information provided by each Reclamation Claimant. To the extent that the Supporting Information provided by a Reclamation Claimant identifies a portion of the Reclamation Claim as including goods delivered within 20 days of the Petition Date, the amount set forth in this column is reduced to reflect only those goods that were delivered between August 6, 2006 (*i.e.*, 45 days before the Petition Date) and August 31, 2006 (*i.e.*, 20 days before the Petition Date). Additionally, to the extent that a Reclamation Claimant did not provide the Debtors with the requested Supporting Information in time for the Debtors to review a Reclamation Claim (*i.e.*, by December 1, 1006), the Debtors treat such Reclamation Claimant as having failed to meet its burden to establish a *prima facie* case for the validity of its Reclamation Claim.
- d. The column labeled "**Goods Not Sold to a Debtor**" sets forth the value of the goods sought to be reclaimed by a Reclamation Claimant that, based upon the Supporting Information provided by such Reclamation Claimant, were not sold to one of the Debtors.

- e. The column labeled “**Total Value of Goods Received by Debtors**” sets forth the value of the goods actually received by the Debtors from each Reclamation Claimant between August 6, 2006 and August 31, 2006, as set forth in the Debtors’ books and records. A copy of the relevant portion of the Debtors’ books and records is attached hereto as **Exhibit C** (hereinafter referred to as the “**Books and Records**”).
- f. The column labeled “**Goods Not Received During Reclamation Period**” sets forth the variance, if any, between the value of the goods identified in the Supporting Documentation and the Books and Records. Because the Debtors believe that the Books and Records accurately reflect the value of the goods received from the Reclamation Claimants between August 6, 2006 and August 31, 2006, goods identified in the Supporting Documentation that are not reflected in the Books and Records are presumed to have been delivered outside of the relevant time period.
- g. In some cases, the Debtors paid for the goods sought to be reclaimed by certain Reclamation Claimants. These amounts are identified in the column labeled “**Invoice Paid.**” None of the cash payments made to Reclamation Claimants on cash in advance terms or cash on deliver terms were dishonored.<sup>4</sup>
- h. The column labeled “**Amount Disallowed**” sets forth the aggregate amount by which the Debtors believe that the Reclamation Claims should be reduced (relative to the amount asserted in the Supporting Documentation and/or the Demand Letter<sup>5</sup>) based upon the various legal defenses to a Reclamation Claim described above (*i.e.*, untimely demand, failure to provide Supporting Documentation, goods not sold to a Debtor, goods not received during the reclamation period, and invoice paid) and before accounting for other legal defenses.
- i. The column labeled “**Validated Claim Before Legal Adjustment**” sets forth the amount of the Reclamation Claim that the Debtors believe may be valid before applying certain available legal defenses.
- j. After arriving at the amounts for each Reclamation Claim set forth in the column labeled “Validated Claim Before Legal Adjustment,” the Debtors reviewed their available legal defenses to the Reclamation Claims. In doing so, the Debtors determined that approximately \$29,330,000.00 of

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<sup>4</sup> See *Catalina Yachts v. Old Colony Bank & Trust Co. of Middlesex County*, 497 F. Supp. 1227, 1237 (D. Mass. 1980) (holding that a cash seller cannot assert reclamation rights unless the debtor’s check is first dishonored by the bank after presentment).

<sup>5</sup> Where a Demand Letter was received that did not identify the total amount of a Reclamation Claimant’s demand and no Supporting Documentation was provided, the amount demand in the Demand Letter is presumed to be the value of the goods set forth in the Books and Records.

the Debtors' outstanding prepetition indebtedness was secured by floating liens on, among other things, the Debtors' goods, inventory, equipment and other personal property (the "**Collateral**"), which liens were not released or in any way diminished by the Debtors' debtor in possession financing facility (the "**DIP Facility**") and which indebtedness was not satisfied by postpetition advances under the DIP Facility. This Collateral included the goods subject to the Reclamation Claims. Accordingly, the Debtors, following the analysis of *Pittsburgh-Canfield Corp., Phar-Mor, Inc.* and the plain language of section 546(c) of the Bankruptcy Code, concluded that the existence and satisfaction of these prior liens rendered any otherwise valid portion of the Reclamation Claims valueless. In addition to this defense, the Debtors determined that other legal defenses may be applicable, including without limitation the processed goods defense (*see, e.g., Bethlehem Steel Corp. v. Wheeling Pittsburgh Steel Corp. (In re Wheeling Pittsburgh Steel Corp.)*, 74 B.R. 656, 658 (Bankr. W.D. Pa. 1987)). The extent to which a Reclamation Claim has been reduced in light of this or other legal defenses is set forth in the column labeled "**Legal Defense Adjustment.**"

- k. The column labeled "**Valid Reclamation Claim**" sets forth the amount of the Reclamation Claim that the Debtors believe is valid based on all of the analyses described above. As a result of the various legal defenses, the valid claim amount identified for all of the Reclamation Claims is \$0.00.

#### **Debtors' Reservation of Rights and Defenses**

13. The various reductions of, and adjustments to, the Reclamation Claims set forth on the Claim Summary Chart (and as described in detail above) represent the Debtors' preliminary analysis of the Supporting Information received from Reclamation Claimants and the Debtors' Books and Records. The Debtors hereby reserve all rights to supplement or amend the Claim Summary Chart based upon their further (a) review of information already received from, or additional information supplied by, the Reclamation Claimants or (b) discussions and/or negotiations with the Reclamation Claimants with respect to the possible amendment, resolution or withdrawal of their Reclamation Claims. Moreover, the Debtors reserve the right to assert all available legal and factual defenses of any nature to each Reclamation Claim at any time (including, but not limited to, the eventual litigation of any Reclamation Claim), regardless of whether information relating to any such defense is set forth on the Claim Summary Chart.

***Procedures for Objecting to This Reclamation  
Notice and the Proposed Treatment of Reclamation Claims***

14. All Reclamation Claimants have the right and opportunity to object to the treatment of their respective Reclamation Claims proposed on the Claim Summary Chart and herein. Reclamation Order at ¶ 2(e). Objections, if any, must be made in writing, conform to the Federal Rules of Bankruptcy Procedure and the Local Rules for the United States Bankruptcy Court for the Northern District of Ohio and be filed with the Court and served in accordance with *General Order Number One Re: Establishment of (1) Status Conferences and Hearing Dates, (2) Certain Case Management Procedures and (3) General Background Information* (Docket No. 88) so as to be actually received by the Debtors and other parties entitled to service not later than February 5, 2007 at 4:00 p.m., Eastern Time (the “**Objection Deadline**”). Any Reclamation Claim included in this Reclamation Notice that is not the subject of an objection timely filed and served prior to the Objection Deadline shall be deemed finally established in the amount identified on the Claim Summary Chart. Reclamation Order at 2(f).

**Notice**

15. Notice of this Reclamation Notice has been given to the parties listed on the Core Group and the 2002 Service List maintained by the Debtors and any other parties in interest directly affected by the Reclamation Notice, including all parties listed on the Claim Summary Chart (as required by paragraph 2(c) of the Reclamation Order).

Dated: January 16, 2007  
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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