

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

----- X
In re: :
: Case No. 06-51848
CEP HOLDINGS, LLC, et al.,¹ : (Jointly Administered)
: :
Debtors. : Chapter 11
: :
: Honorable Marilyn Shea-Stonum
----- X

**MOTION FOR AN ORDER PURSUANT TO SECTION 365 OF THE BANKRUPTCY
CODE AUTHORIZING DEBTORS TO ASSUME AMENDED
EMPLOYMENT AGREEMENT**

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 authorizing Debtors to assume the Amendment to Employment and Noncompetition Agreement (the “**Amended Agreement**”) with Joseph Mallak, the CEO and President of each of the Debtors. A copy of the Amended Employment Agreement is attached hereto as Exhibit A. The Amended Agreement represents the results of good faith negotiations between the Debtors, the Official Committee of Unsecured Creditors (the “**Committee**”) and Mr. Mallak. As such, the Debtors and Committee respectfully

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

request that this Court authorize the Debtors to assume the Amended Agreement. In support of this Motion, the Debtors respectfully represent as follows:

BACKGROUND

A. The Debtors' Cases

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 predicate for the relief requested herein is Bankruptcy Code section 365.

B. Mr. Mallak's Employment

5. In the Fall of 2005 and Winter of 2006, the Debtors faced a severe liquidity crisis which necessitated the need for new management. On February 27, 2006, the Debtors entered into an Employment and Noncompetition Agreement (the "**Agreement**") with

Mr. Mallak whereby Mr. Mallak became the President and CEO of each of the Debtors. A copy of the Agreement is attached hereto as Exhibit B. Since such time, Mr. Mallak has also assumed such roles with the Debtors' non-debtor subsidiary, Composite Parts de Mexico S.A. de C.V. ("**CEP Mexico**").

6. The Debtors, Committee and Wachovia agree that Mr. Mallak's leadership has been instrumental in the successful liquidation of the Debtors' business operations. Due to Mr. Mallak's leadership, the Debtors' have wound down their businesses substantially faster than expected which benefited the Debtors estates on two fronts. First, the efficient liquidation has resulted in a substantial return of over \$10 million for unsecured creditors where initial projections showed little to no return. Second, the liquidation has taken approximately half the time initially expected by the Debtors. This resulted in a substantial saving for the estate with respect to administrative carrying costs.

7. Although the liquidation is substantially complete and Mr. Mallak is no longer needed as a full time employee, the Debtors and Committee agree that Mr. Mallak will continue to be need to, among other things:

- (a) Continue to serve as President and Chief Executive of the Company and CEP Mexico;
- (b) Exercising business judgment with respect to decisions that must be made on behalf of the Company's bankruptcy estate.
- (c) Executing all documents required to be executed in the Company's bankruptcy case.
- (d) Continuing to supervise collection of accounts receivable; and
- (e) Coordinating the orderly wind down and liquidation of CEP Mexico, including exercise of business judgment and execution of all necessary documentation.

8. To this end, the Debtors and Committee requested that Mr. Mallak, commencing February 1, 2007, convert his employment to an hourly basis without benefits. The Debtors and Committee have agreed to pay Mr. Mallak \$250 per hour for his services as requested by the Debtors and Committee. The Debtors, Committee and Mr. Mallak expect that Mr. Mallak will commit roughly 10 to 20 hours per week for the month of February 2007 with the time requirements decreasing substantially thereafter.

9. The Amended Agreement is in the best interests of the Debtors' estates for multiple reasons. First, the Debtors are able to continue to rely on Mr. Mallak's leadership, experience and business judgment without paying for a fulltime CEO. The Debtors are able to obtain services as needed, thus, minimizing the cost of their liquidation. Additionally, Mr. Mallak is the sole authorized signatory for the Debtors and CEP Mexico. The delay caused by appointing new signatories, especially with respect to CEP Mexico where delay would be significant under Mexican law, could substantially derail the liquidation and distribution of the Debtors and CEP Mexico's assets.

10. Second, the Amended Agreement represents a great saving for the Debtors estates because Mr. Mallak has agreed to waive potential rejection damages. If the Amended Agreement is not authorized, the Debtors will have to reject the original Agreement. If the Debtors reject the Agreement, as opposed to assuming the Amended Agreement, Mr. Mallak would be entitled to assert a rejection claim, as capped by Section 502(b)(7) of the Bankruptcy Code. The Debtors have calculated this claim, as capped, to be approximately \$400,000. In addition, Mr. Mallak has earned and is due a 2006 year-end bonus of \$80,000 which is guaranteed under the Agreement. If the Agreement is rejected, the Debtors believe that Mr.

Mallak will have a claim for payment of \$80,000 plus a general unsecured claim of approximately \$400,000. Under the terms of the Amended Agreement as negotiated by the Committee, Debtors and Mr. Mallak, Mr. Mallak has agreed to waive his rejection claim upon receipt of the one-time \$80,000 payment. Thus, a potential \$400,000 claim against the Debtors' estates is removed by operation of the Amended Agreement.

11. The Debtors and Committee believe that (i) Mr. Mallak is necessary to the Debtors wind down efforts and (ii) the Amended Agreement is in the best interests of the Debtors, their creditors and their estates.

RELIEF REQUESTED

12. By this Motion, Debtors seek entry of an order pursuant to Section 365 of the Bankruptcy Code and Rule 6006 of the Bankruptcy Rules authorizing Debtors to assume Amended Agreement.

BASIS FOR RELIEF

13. The Amended Agreement represents the good faith negotiations between the Debtors, Committee and Mr. Mallak. As such, the Amended Agreement was an arms-length transaction and represents the business judgment of the Debtors and Committee.

14. Section 365(a) of the Bankruptcy Code provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease." 11 U.S.C. § 365(a). Courts routinely approve motions to assume or reject executory contracts or unexpired leases upon a showing that such assumption or rejection will benefit the debtor's estate and is an exercise of sound business judgment. *See, e.g., City of Covington v. Covington Landing Ltd. Partnership*, 71 F.3d 1221, 1226 (6th Cir. 1995); *In re Terrell*, 892 F.2d 469, 471

(6th Cir. 1989); *Borman's, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187, 189 (6th Cir.), *cert. denied*, 464 U.S. 908 (1983); *In re DWE Screw Prods., Inc.*, 157 B.R. 326, 328 (N.D. Ohio 1993).

15. Debtors' assumption of executory contracts is subject to review under the business judgment standard. Courts generally will not second-guess a debtor's business judgment concerning the assumption or rejection of an executory contract or unexpired lease. *See Phar-Mor, Inc. v. Strouss Bldg.*, 204 B.R. 948, 951-52 (Bankr. N.D. Ohio 1997) ("Whether an executory contract is 'favorable' or 'unfavorable' is left to the sound business judgment of the debtor....Courts should generally defer to a debtor's decision whether to reject an executory contract."); *In re Albrechts Ohio Inns, Inc.*, 152 B.R. 496, 501-02 (Bankr. S.D. Ohio 1993) ("[A] court must be persuaded that as a matter of business judgment, a debtor ought to be allowed to reject an [executory] contract."); *Allied Technology, Inc. v. R.B. Brunneman & Sons, Inc. (In re Allied Technology, Inc.)*, 25 B.R. 484, 495 (Bankr. S.D. Ohio 1982) ("Court approval of a debtor in possession's judgment that assumption of a lease is in the best interest of the debtor's business should not be withheld on the basis of a second-guessing of the debtor's judgment."); *see also Sharon Steel Corp. v. National Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989) (noting that the propriety of a trustee's decision to reject a contract is measured under the traditional "business judgment test," requiring only that the trustee demonstrate that rejection will benefit the estate).

16. The "business judgment" test is not a strict standard; it merely requires a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the debtor's estate. *See Allied Technology*, 25 B.R. at 495 ("As long as assumption of a

lease appears to enhance a debtor's estate, Court approval of a debtor in possession's decision to assume the lease should only be withheld if the debtor's judgment is clearly erroneous, too speculative or contrary to the provisions of the Bankruptcy Code."); *see also Borman's*, 706 F.2d at 189 (noting that "as a general rule, a bankruptcy court presented with an application to disaffirm the obligations of an executory contract need determine only whether it is indeed executory and whether disaffirmance would be advantageous to the debtor").

17. The Court should approve the proposed amendment and assumption because Debtors have exercised sound business judgment. In order to alleviate any concern that the Debtors were acting in the self-interest of Mr. Mallak, the Debtors negotiated the amendment with the Committee. As such, the Amended Agreement represents an arms-length transaction within the business judgment of the Debtors and Committee.

18. Additionally, due to the waiver of rejection damages by Mr. Mallak, the Amended Agreement represents a substantial savings for the Debtors' estates, thus, increasing distributions to other creditors.

19. Section 365(b)(1) of the Bankruptcy Code requires that a debtor cure, or provide adequate assurance that it promptly will cure, any outstanding defaults under an agreement to be assumed. 11 U.S.C. § 365(b)(1). By paying the one-time \$80,000 bonus which is owing to Mr. Mallak, the Debtors will have cured the Amended Agreement.

NOTICE

20. Notice of this Motion has been served upon (a) the Office of the U.S. Trustee, (b) the Core Service List in these cases; and (c) all parties who have properly requested notice. The Debtors respectfully submit that the notice provided is sufficient, and request that

this Court find that no further notice of the relief requested herein is required under the circumstances.

WHEREFORE, the Debtors respectfully request that this Court enter an Order authorizing Debtors to assume the Amended Agreement and granting Debtors such other and further relief as is just and proper.

Dated: February 6, 2007
Cleveland, Ohio

Respectfully submitted,

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

By: /s/ Thomas M. Wearsch
One of Their Attorneys

Joseph F. Hutchinson, Jr. (0018210)
Thomas M. Wearsch (0078403)
Eric R. Goodman (0076035)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, Ohio 44114-3485

Counsel for the Debtors and Debtors-in-possession