IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION TO THE DISCLOSURE STATEMENT TO ACCOMPANY JOINT PLAN OF LIQUIDATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE PROPOSED BY THE DEBTORS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS DATED FEBRUARY 5, 2007

The Pension Benefit Guaranty Corporation ("PBGC"), a creditor in the above-captioned case, hereby objects to the Disclosure Statement to Accompany Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code Proposed by the Debtors and the Official Committee of Unsecured Creditors ("Proponents") Dated February 5, 2007 ("Disclosure Statement").

PRELIMINARY STATEMENT

1. PBGC is a wholly-owned United States government corporation and an agency of the United States that administers the insurance program for defined benefit pension plans established under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended*, 29 U.S.C. §§ 1301-1461. When an underfunded pension plan terminates, PBGC typically becomes trustee of the plan and, subject to certain statutory limitations, pays the plan's unfunded benefits with its insurance funds. *See* 29 U.S.C. § 1322.

2. Debtor Creative Engineered Polymer Products, LLC ("CEP") is the sponsor of the Pension Plan for Bargaining Unit Employees of the Canton Ohio Plan of Geauga Company Division of Carlisle Corporation ("Canton Plan") and the Pension Plan for Bargaining Unit

Employees of Carlisle Engineered Products - Crestline ("Crestline Plan") (collectively, the "Pension Plans"). Both Pension Plans are defined benefit pension plans covered by Title IV of ERISA.

3. CEP is the wholly-owned subsidiary of Debtor CEP Holdings, LLC ("Holdings"), and Debtor Thermoplastics Acquisition, LLC ("Thermoplastics") is a wholly-owned subsidiary of CEP. Thus, Holdings and Thermoplastics are members of CEP's controlled group.[1]

4. In November 2006, CEP's foreign, non-debtor subsidiary, Composite Parts Mexico S.A. de C.V. ("CEP Mexico"), sold its assets to two different parties. Currently, Debtors' estates are holding in escrow $5,408,597 in net proceeds from the sale of CEP Mexico's assets. Disclosure Statement at 16. As a subsidiary of CEP, CEP Mexico, along with Holdings and Thermoplastics, is a member of CEP's controlled group.[2]

5. Under ERISA, upon termination of a covered pension plan, the contributing sponsor and each member of its controlled group are jointly and severally liable to PBGC for (1) the total amount of unfunded benefit liabilities (as of the termination date) owed to all participants and beneficiaries under the pension plan; and (2) the unpaid minimum funding contributions for contributions necessary to satisfy the minimum funding standards under the Internal Revenue Code and ERISA. 26 U.S.C. § 412(c)(11), 29 U.S.C. §§ 1082(c)(11), 1362(b) & (c). The contributing sponsor and each member of the its controlled group are also jointly and severally liable to PBGC for unpaid statutory premiums under 29 U.S.C. § 1307, including a

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[1] A group of trades or businesses under common control, referred to as a "controlled group," includes, for example, a parent and its 80-percent owned subsidiaries. 29 U.S.C. § 1301(a)(14); 29 C.F.R. § 4001.3; 26 U.S.C. § 414(b), (c); Treas. Reg. § 1.414(b)-1, (c)-2.

[2] *Id.*

termination premium amount contingent upon the termination of the pension plan.

6. On March 1, 2007, PBGC filed the following estimated claims against each of the three Debtors: (1) priority claims for unfunded benefit liabilities in the amount of $1,325,313 for the Canton Plan and $1,996,582 for the Crestline Plan; (2) claims for minimum funding contributions in the amount of $20,060 for the Canton Plan (a portion of this claim is entitled to priority in the amount of $4,414) and $90,958 for the Crestline Plan (a portion of this claim is entitled to priority in the amount of $25,362); and (3) claims for premiums in the amount of $843,610.15 for the Canton Plan (a portion of this claim is entitled to priority in the amount of $820,672) and $1,127,496.39 for the Crestline Plan (a portion of this claim is entitled to priority in the amount of $1,096,810).

7. The proposed Disclosure Statement and Joint Plan of Liquidation contemplates substantive consolidation of the Debtors' assets and liabilities with the assets and liabilities of a non-debtor, CEP Mexico. Disclosure Statement at 19 and Joint Plan of Liquidation at 10. Substantive consolidation is inconsistent with PBGC's statutory joint and several claims against the individual estates of the Debtors and CEP Mexico. The Disclosure Statement fails to provide justification for the proposed substantive consolidation, which includes the extraordinary provision for the consolidation of a non-debtor with Debtors' estates.

8. The proposed Disclosure Statement fails to disclose the Debtors' ultimate intention regarding the Pension Plans. Although the Disclosure Statement discusses the possibility of The Reserve Group assuming the Pension Plans, it includes no discussion of the factors that will influence that decision. The Joint Plan of Liquidation described in the Disclosure Statement also improperly proposes to defer resolution of Pension Plan issues until

after confirmation. Joint Plan of Liquidation at 20.

9. For the foregoing reasons, and as set forth below, PBGC requests that this Court deny approval of the proposed Disclosure Statement.

OBJECTIONS

PBGC objects to the Debtors' proposed Disclosure Statement because it fails to provide adequate information as required by section 1125(a) of the United States Bankruptcy Code ("Bankruptcy Code"), and because it describes a plan that cannot be confirmed pursuant to 11 U.S.C. § 1129(a)(1). Acceptance or rejection of a plan may be solicited only after a written disclosure statement approved by a court as containing adequate information is distributed. 11 U.S.C. § 1125(b). *See In re A.C. Williams*, 25 B.R. 173, 176 (Bankr. N.D. Ohio 1982). Adequate information is:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan . . . .

11 U.S.C. § 1125(a). A court may confirm a plan, only if, among other things, "the plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). A disclosure statement cannot be approved if the plan it describes cannot be confirmed. *See In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990); *In re Ronald L. Pecht*, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986).

1. The Disclosure Statement does not provide adequate information regarding the proposed substantive consolidation. Moreover, the Joint Plan of Liquidation described cannot be confirmed because the proposed substantive consolidation improperly includes assets of a non-debtor, impermissibly harms creditors of the individual estates, and is inconsistent with ERISA's statutory protection for the federal pension insurance program.

The Disclosure Statement and the Joint Plan of Liquidation both contemplate the substantive consolidation of the assets and liabilities of the Debtors with the assets and liabilities of CEP's non-debtor subsidiary, CEP Mexico. Disclosure Statement at 19 and Joint Plan of Liquidation at 10. The Disclosure Statement fails to provide information to support the need for substantive consolidation. In general, substantive consolidation is the "merger of separate entities into one action so that the assets and liabilities of both parties may be aggregated in order to effect a more equitable distribution of property among creditors." *In re Baker & Getty Financial Servs., Inc.*, 78 B.R. 139, 141 (Bankr. N.D. Ohio 1987), *aff'd.* 974 F.2d 712 (6th Cir. 1992) (citing *In re Vecco Construction Industries, Inc.*, 4 B.R. 407, 410 (Bankr. E.D. Va. 1980). Substantive consolidation is an "extreme remedy" because it affects substantive rights of debtors and creditors. *In re Colfor, Inc.*, Nos. 96-60306 and 96-60307, 1997 Bankr. LEXIS 1535, at *7 (Bankr. N.D. Ohio Sept. 4, 1997), *Consol. Freightways of Del., Inc. v. Creditors Serv. Corp. (In re Creditors Serv. Corp.)*, 195 B.R. 680, 689 (Bankr. S.D. Ohio 1996).

In considering whether substantive consolidation is warranted, this Court has considered various factors, including:

(1) the difficulty in segregating assets;

(2) presence of consolidated financial statements;

(3) profitability of consolidation at a single location;

(4) commingling of assets and business function;

(5) unity of interests in ownership;

(6) existence of intercorporate loan guarantees; and

(7) transfer of assets without observance of corporate formalities.

In re Baker, 78 B.R. at 142. The factors are not considered alone but are part of the inquiry into the "balancing of interests" of creditors and debtors. *Id.* at 142. The need for substantive consolidation must far outweigh the prospective harm to any particular creditor. *In re Evans Temple Church of God in Christ & Community Center, Inc.*, 55 B.R. 976, 982 (Bankr. N.D. Ohio 1986). When the consolidation of non-debtors with debtors is proposed, caution must be taken not to impair the substantive rights of creditors of the non-debtor. *In re Baker*, 78 B.R. at 141-142. In the instant case, the Proponents have not demonstrated that the above factors have been met or that substantive consolidation of the Debtors with a non-debtor entity, CEP Mexico, is in fact warranted.

Substantive consolidation of CEP Mexico with the Debtors would result in the proceeds of the sale of the assets of CEP Mexico being included in the pool of assets for all the Debtors' creditors. Because of the joint and several status of PBGC's claims, this could significantly reduce PBGC's recovery against CEP Mexico. Currently, the Debtors' estates are holding the proceeds from the sale of CEP Mexico's assets in escrow. This occurred because this Court understood that CEP Mexico was not under the jurisdiction of the Bankruptcy Court. In *Colfor* this very Court rejected the notion of subjecting a non-debtor company to the jurisdiction of the bankruptcy court by substantively consolidating the assets of the non-debtor company with the assets of the debtors. 1997 Bankr. LEXIS 1535, at *3. The Court stated that this was a "patently

improper use of the Court's equitable powers." *Id.* In this case, the Proponents should not be allowed to prevent CEP Mexico's creditors from pursuing their claims against CEP Mexico outside the context of the Debtors' bankruptcy cases. In order to protect the creditors of CEP Mexico, the Disclosure Statement and Joint Plan of Liquidation should be modified to continue to segregate and preserve the CEP Mexico sale proceeds for the creditors of CEP Mexico, such as PBGC.

If the Pension Plans terminate, CEP and each member of its controlled group, whether a debtor or a non-debtor will be jointly and severally liable to PBGC for unfunded benefit liabilities, minimum funding contributions, and premiums. This liability will reduce the dividend received by the creditors of each of the Debtors and the amount available to satisfy creditors of the non-debtor, CEP Mexico, a member of CEP's controlled group. By seeking substantive consolidation, the Proponents would have the Court use its equitable powers to defeat a clear Congressional mandate that PBGC's claims be joint and several against all members of a pension plan sponsor's controlled group. *See* 26 U.S.C. § 412(c)(11), 29 U.S.C. §§1307(e)(2), 1362(a).

The Disclosure Statement and Joint Plan of Liquidation provide that "any joint and several liability of any of the Debtors (and/or CEP Mexico) shall be deemed to be one obligation of Consolidated Holdings". Disclosure Statement at 19 and Joint Plan of Liquidation at 10. PBGC is entitled to assert the full amount of its claims against each of the Debtors and the non-debtor, CEP Mexico. Under 29 U.S.C. § 1362, liability for all of the claims filed against CEP, based upon it status as sponsor of the Pension Plans, attaches as well to each member of its controlled group. Because of the nature of joint and several liability, to the extent that any claim is not paid in full by the contributing sponsor, PBGC may proceed against each member of the

contributing sponsor's controlled group until the full amount of the claim is paid. Thus, a claim against one member of the controlled group is entitled to be treated as a separate claim against each member. With respect to the Pension Plans, PBGC asserts that it has a right to seek payment on its claims in the case of each controlled group member, including the non-debtor, CEP Mexico. The proposed Disclosure Statement fails utterly to provide information, assuming there could be such information, that justifies utilizing substantive consolidation to improperly transfer non-debtor assets to the estates, and to defeat Congress' explicit protections for the Title IV insurance program. For that reason, approval of the Disclosure Statement should be denied. In addition, the consolidated balloting sought by the Proponents[3], based on the proposed substantive consolidation, should not be approved.

2. The Disclosure Statement does not provide adequate information regarding the Debtors' intended disposition of the Pension Plans. In addition, the Joint Plan of Liquidation described should not be confirmed because it does not properly address the Debtors' obligations regarding the Pension Plans.

The proposed Disclosure Statement and Joint Plan of Liquidation state that the Debtors are discussing the potential assumption of the Pension Plans by The Reserve Group. Disclosure Statement at 17 and Joint Plan of Liquidation at 20. The Disclosure Statement states that the Debtors believe that The Reserve Group may have some liability for the Pension Plans, however, neither the Disclosure Statement nor the Joint Plan of Liquidation indicate who or what The Reserve Group is or the relationship of The Reserve Group to the Debtors. The Disclosure Statement should give information regarding The Reserve Group, its relationship to the Debtors

[3] Proposed Order (A) Approving Proposed Disclosure Statement, (B) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Proposed Joint Plan of Liquidation and (C) Scheduling Certain Dates in Connection Therewith ("Proposed Order") at 3.

and the Pension Plans, and the factors influencing its decision regarding the Pension Plans.

In addition, the Joint Plan of Liquidation indicates that if The Reserve Group does not assume the Pension Plans on or prior to the Effective Date,

> the Liquidating Trustee, on the Effective Date, shall take such actions as necessary to cause the termination of the Pension Plans in a manner (either via standard termination or distressed termination) that most expediently causes the termination of the Pension Plans and creates the lowest possible Claims of the PBGC as against the Estates and the CEP Liquidating Trust.

Joint Plan of Liquidation at 20. This provision would abrogate the Debtors' responsibility for the Pension Plans and effectively abandon the Pension Plans to the CEP Liquidating Trust. A debtor-in-possession has an obligation to see to the disposition of a pension plan in accordance with ERISA.[4]

Moreover, this is an apparent attempt by the Debtors to reduce or avoid the liability owed to PBGC upon termination of the Pension Plans. Such liability includes priority claims against each of the Debtors. By attempting to delay the termination of the Pension Plans until the Effective Date of the Joint Plan of Liquidation, the Debtors seek to frustrate PBGC's ability to protect its rights and interests in Debtors' liquidating estates. The proposed treatment of the Pension Plans in the Joint Plan of Liquidation is an improper attempt by the Debtors to avoid their responsibility and liability to PBGC. Such conduct may be violative of ERISA. *See e.g.* 29 U.S.C. § 1369. The Disclosure Statement should set forth fully the Debtors rationale for such proposed treatment.

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[4] *See In re New Center Hospital*, 200 B.R. 592, 594 (E.D. Mich.1996) ("[E]ven in bankruptcy, it is the duty of the Plan Administrator to proceed with termination of the Plan.")

Finally, PBGC objects to the proposed voting procedures for claims deemed contingent[5] to the extent those procedures reduce the stated amount of PBGC's claims for voting purposes. Any contingency regarding the Pension Plans would be the result of Debtors' failure to finalize the status of the Pension Plans prior to confirmation.

CONCLUSION

For the foregoing reasons, PBGC respectfully requests the Court to deny the Proponents' motion to approve the Disclosure Statement.

Respectfully submitted,

Dated: March 2, 2007

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[5] Proposed Order at 5.