

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

In re:

CEP HOLDINGS, LLC, *et al.*,¹

Debtors.

Case No. 06-51848

Chapter 11

Judge Marilyn Shea-Stonum

**AMENDED² MOTION OF THE INDEPENDENT CONTRACTORS PURSUANT
TO 11 U.S.C. §§ 503(b)(1), 105(a), AND 363 FOR ALLOWANCE OF
ADMINISTRATIVE EXPENSE AND DIRECTING PAYMENT OF SAME**

Fabnet Associates, Inc. (“Fabnet”), Norris Sales Associates, Inc. (“Norris”), and C.H. Raches, Inc. (“Raches”) (together collectively, “the Independent Contractors”), by and through their undersigned counsel, hereby move the Court, pursuant to, *inter alia*, 11 U.S.C. § 503(b)(1), 105, and 363, for entry of an Order (a) allowing an administrative expense claim for commissions earned by the Independent Contractors for sales made in the period subsequent to Debtors’ filing of its bankruptcy petition, and (b) directing immediate payment of same in full. In support of this Motion, the Independent Contractors state as follows:

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

² This Amended Motion merely corrects errata in the amounts set forth in the table on page 4. In all other respects, the Amended Motion is identical to the original Motion.

Introduction

1. On September 20, 2006 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.
2. The Debtors continue in possession of their respective properties and management of their respective businesses as debtors-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108.
3. Debtors’ chapter 11 cases are being jointly administered for procedural purposes only.
4. On February 2, 2007, Debtors filed their Joint Plan of Liquidation.
5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
6. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334.
7. Venue is proper in this Court.
8. The statutory predicates for the relief requested in this Motion are 11 U.S.C. §§ 105(a), 363, and 503(b)(1).

Background Facts

9. At the time of the commencement of these bankruptcy cases, Debtors employed the Independent Contractors to perform essential employee functions on a cost effective basis.
10. Debtors engaged the Independent Contractors through written contracts, copies of which are attached hereto and incorporated herein as Exhibits A (Fabnet), B (Norris), and C (Raches).³

³ The agreements are actually between each of the Independent Contractors and Debtors’ predecessors-in-interest. However, Debtors succeeded to all rights and liabilities under those agreements pursuant to written assignments, which are also contained within the exhibits attached hereto and incorporated herein.

11. The written contracts generally provide that, within a defined territory, each of the Independent Contractors had “the right to take orders for the products manufactured by the Company.” (Exhibit A, ¶ A(1).)

12. Also pursuant to those written contracts, the Independent Contractors were entitled to receive commission payments for certain parts purchased from Debtors by various customers, such as General Motors, Delphi, and the like.

13. The sales functions that the Independent Contractors provided to Debtors were critical and instrumental to the day-to-day operation of Debtors’ businesses, both before and after the filing of the bankruptcy petitions, particularly (but not exclusively) during the post-petition period during which Debtors were seeking to reorganize and were operating their businesses in the normal course.

14. Debtors themselves, in their first-day motion seeking authority to make payments to the Independent Contractors for various pre-petition commissions they were owed, acknowledged that the Independent Contractors “provide critical sales services to the Debtors in connection with the day-to-day operation of their business.” (Motion of Debtors * * * For Entry Of An Order * * * To Pay * * * Independent Contractor Wages * * *, Docket Entry No. 8, at p. 10.)

15. Based on commission statements and other documents provided to the Independent Contractors, the Independent Contractors are owed the following amounts for goods purchased from Debtors in the post-petition time period pursuant to their written agreements:

| | <u>Fabnet</u> | <u>Norris</u> | <u>Raches</u> |
|--|---------------|---------------|---------------|
| September 2006 (post-petition only) | \$29,045.60 | \$14,258.64 | \$49,965.19 |
| October 2006 | \$82,387.39 | \$52,428.58 | \$81,277.36 |
| November 2006 | | \$25,000.00 | |
| December 2006 | | \$25,000.00 | |
| Bishopville | | \$6,900.00 | |
| Less any payments received | | \$-29,346.12 | |
| TOTAL | \$111,432.99 | \$94,241.10 | \$131,242.55 |

Law and Argument

16. Section 503(b) of the Bankruptcy Code provides in pertinent part that an administrative expense “shall be allowed” for “the actual, necessary costs and expenses of preserving the estate including . . . wages, salaries, and *commissions* for services rendered after the commencement of the case.” 11 U.S.C. § 503(b)(1)(A)(i) (emphasis added).

17. Section 105(a) of the Bankruptcy Code authorizes this Court to “issue any order, process, or judgment that is necessary and appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

18. Numerous courts have allowed administrative expenses for post-petition sales commissions, even where those commissions were owed pursuant to agreements entered into pre-petition.

19. For example, in *In re Pre-Press Graphics Co.*, 300 B.R. 902 (Bankr. N.D. Ill. 2003), the Court allowed an administrative expense in favor of one of debtor’s employees who, pursuant to a pre-existing employment agreement, was entitled to collect sales commissions. The court found that commissions on sales that the employee made after the filing of the petition had to be allowed as an administrative claim. *Id.* at 914-15.

20. Likewise, in *In re Ingram*, No. 94-165, 1994 U.S. Dist. LEXIS 4359 (E.D. La. April 6, 1994) (copy attached as Exhibit E), the district court affirmed the decision of the bankruptcy court allowing an administrative expense in favor of Gertrude Gardner, Inc. for a real

estate commission for property sold post-petition pursuant to an agreement entered into before the petition. *Id.* at *7-*8. In fact, the court also impliedly approved of the post-petition payment of administrative expenses to Gertrude Gardner, Inc., of commissions for the monthly rentals that the tenant had paid prior to its decision to purchase the building in question. *Id.*

21. The Independent Contractors seek the same relief here: Allowance of their claims for administrative expenses for commissions due on post-petition sales pursuant to the terms of their written agreements. Those sales generated considerable income for the Debtor, income that was critical to its post-petition operations and which ultimately benefits the estate and Debtors' many creditors. It would be grossly inequitable not to compensate the Independent Contractors for their critical role in generating those sales and the resulting income realized by Debtors. Indeed, absent the efforts of the Independent Contractors, those sales may not have been made in the first place.

22. It is well-settled that administrative expenses incurred in the ordinary course of the debtor's business may be paid in full in the ordinary course of the proceedings and are not subject to pro rata reductions even where the estate is administratively insolvent. *See, e.g., In re Vernon Sand & Gravel, Inc.*, 109 B.R. 255 (Bankr. N.D. Ohio 1989); *see also In re Holley Garden Apartments, Ltd.*, 238 B.R. 488 (Bankr. M.D. Fla. 1999); *In re Telesphere Communications, Inc.*, 148 B.R. 525 (Bankr. N.D. Ill. 1992); *In re Western Farmers Ass'n*, 13 B.R. 132 (Bankr. W.D. Wash. 1981).

23. Because the monies owed to the Independent Contractors constitute an administrative claim under Section 503(b)(1) of the Bankruptcy Code, they must be paid in full and in preference to any other unsecured claims owed by the Debtors. *See Alabama Surface Mining Commission v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1450 (11th Cir.

1992) (holding that “[i]f a claim is accorded administrative-expense priority under section 503(b), that claim is paid in the first level of priority, ahead of, *inter alia*, the unsecured creditors; no other claim is paid until every administrative-expense claim is paid in full.”).

24. It is therefore appropriate for this Court to authorize and direct that the Independent Contractors’ administrative claims be allowed in the amounts listed above and paid promptly following this Court’s entry of an order to that effect.

WHEREFORE, for the foregoing reasons, Fabnet Associates, Inc., Norris Sales Associates, Inc., and C.H. Raches, Inc., respectfully request that this Court enter an order (a) allowing and directing immediate payment in full of each of their administrative claims for post-petition sales commissions, and (b) granting such other and further relief as is just, equitable, and proper under the circumstances.

Respectfully submitted,

/s/ Darrell A. Clay

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2007, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Darrell A. Clay
Darrell A. Clay