

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

In re:	)	Case No. 06-51848
	)	(Jointly Administered)
CEP HOLDINGS, LLC, <i>et al.</i> ,	)	Chapter 11
	)	
Debtors.	)	Honorable Marilyn Shea-Stonum
_____	)	United States Bankruptcy Judge
	)	
WASHINGTON PENN PLASTIC	)	
COMPANY, INC.,	)	Document No. _____
	)	
Movant,	)	
	)	
V.	)	
	)	
NO RESPONDENT.	)	
_____	)	

**MOTION TO APPOINT EXAMINER PURSUANT TO 11 U.S.C. § 1104(c)(1)**

AND NOW, comes Washington Penn Plastic Company, Inc. (“Washington Penn”), by and through its undersigned counsel, and files the within Motion to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c)(1) (the “Motion”) and in support thereof avers as follows:

1. On September 20, 2006 (the “Petition Date”), CEP Holdings, LLC, Creative Engineered Polymer Products, LLC, and Thermoplastics Acquisition, LLC (the “Debtors”) filed Voluntary Petitions for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §101 *et seq.*

2. The Debtors reported in their bankruptcy schedules that Wachovia Capital Finance Corporation (“Wachovia”) held a secured claim against the Debtors in the amount of \$27.55 million, making Wachovia the largest of the Debtors’ creditors.

3. On September 28, 2006, an Official Committee of General Unsecured Creditors (“Committee”) was appointed in the above matter by the office of the United States Trustee.

4. On October 6, 2006, the Committee filed an Application for Entry of an Order Pursuant to 11 U.S.C. §§105 and 1103(a) of the Bankruptcy Code Authorizing and Approving the Employment and Retention of McGuireWoods LLP (“McGuireWoods” or “Committee Counsel”) as Counsel for the Committee Nunc Pro Tunc as of September 20, 2006 (the “Retention Application”). See Docket No. 109.

5. The F.R.B.P. No. 2014 Affidavit of counsel accompanying the Retention Application indicates that Wachovia is a current client of McGuire Woods.

6. On February 21, 2007, Washington Penn filed an Amended Proof of Claim indicating debt owing from the Debtors to Washington Penn in the amount of \$3,232,805.65.

7. On October 12, 2006, Washington Penn was added to the Official Committee of Unsecured Creditors by the Office of the United States Trustee.

8. On October 27, 2006, Wachovia and the Committee, among others, consented to a Final Order Authorizing Debtors to: (A) Use Cash Collateral; (B) Incur Postpetition Debt; (C) Grant Adequate Protection and Provide Security and Other Relief to Wachovia Capital Finance Corporation (Central); and (D) Grant Certain Related Relief (the “DIP Order”).

9. Under the DIP Order, the Debtors and the Committee agreed to release Wachovia from any of the Debtors’ direct claims or the Committee’s derivative claims

for, among other things state and federal fraudulent conveyance, fraudulent transfer, deepening insolvency and similar type actions (the “Release”).

10. On November 8, 2006, this Court entered an Order approving the Retention Application of McGuire Woods.

11. On February 5, 2007, the Debtors filed the 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 “Joint Plan”).

12. Contemporaneous with the filing of the Joint Plan, the Debtors filed a 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 “Disclosure Statement”).

13. The Plan currently contemplates providing Wachovia, Debtor’s counsel and Committee’s counsel with full releases.

14. On March 2, 2007, Washington Penn filed an objection to the Disclosure Statement averring, among other things, that the Disclosure Statement lacked adequate information upon which a creditor could make an informed decision on whether to vote to accept a Joint Plan, which contains releases of non-debtor third parties, including but not limited to, releases of the Debtor’s professionals and the Committee’s professionals.

### **BACKGROUND**

15. It is the understanding of Washington Penn that during the last half of 2005, The Reserve Group and certain individual insiders thereof acquired substantially all of the assets that now comprise the Debtors through two highly leveraged transactions (“LBO’s”) which were financed by Wachovia (the “Wachovia Financing”). This

information was contained in the Motion of the Unofficial Committee of Pre-Petition Trade Creditors to Convert the Debtors' Chapter 11 cases to Chapter 7 cases Pursuant to 11 U.S.C. § 1112(b) ("Conversion Motion").

16. These highly leveraged transactions leave questions as to what percentage of the approximately \$25 million in debt, and the liens created thereunder, from the Wachovia Financing may be subject to avoidance actions under section 548 of the Bankruptcy Code and under applicable and similar state fraudulent transfers laws.

17. The following represents a summary of the facts relative to the LBO's that have been set forth in prior motions filed with this Court:

- a. In August 2005, The Reserve Group and certain individual insiders thereof acquired substantially all of the assets of CEP from the CRT Capital Group through CEP Holdings, a wholly owned affiliate of The Reserve Group. The acquisition price for CEP was approximately \$13.5 million, of which \$12.5 million was funded through secured term debt with Wachovia, which debt was secured by the assets of the Debtors and not by the acquiring shareholders. The remaining \$1 million on the purchase price was funded by The Reserve Group as a cash investment, or an equity contribution;
- b. In December 2005, The Reserve Group, through Thermoplastics, a wholly owned subsidiary of CEP, acquired substantially all of the assets of the Thermoplastics division from Parker-Hannifin Corporation for purchase price consideration of approximately \$7.1 million; the entire purchase price of which was funded from the proceeds of loans by

Wachovia as well as a \$4.2 million seller-retained secured note, which debt was secured by the assets of the Debtor and not the acquiring shareholders; and

- c. The Debtors failed to operate profitably or at “break-even” in any month since the acquisition of the Debtors’ facilities by The Reserve Group in August 2005 and December 2005, respectively.

*See Conversion Motion at ¶¶ 6, 7 and 15(a).*

18. These facts demonstrate that out of the \$20.6 million used to create the Debtor entities, equity invested only \$1 million, or 4.8 %.

19. These transactions raise serious question as to whether the Debtors received any reasonable equivalent value or other benefit in consideration of their assets being used to collateralize the Wachovia Financing. It is Washington Penn’s understanding that the proceeds of the loans were used to pay the former shareholders of CRT Capital Group and Thermoplastics and did not provide any additional working capital for the Debtors. Accordingly, a reasonable investigation should have been conducted into these transactions to determine whether there were a any potential claims against Wachovia under state and federal law for the transfers of the Debtors’ interest in property to Wachovia arising out of and relating to the LBO’s.

20. On February 28, 2007. McGuire Woods filed its First Interim Fee Application for Interim Allowance of Compensation and Reimbursement of Expenses as Counsel to the Official Committee of Unsecured Creditors for the Period from September 20, 2006 Through January 31, 2007 (“MW Fee. App.”). The MW Fee App. revealed that prior to the Committee agreeing to the release of Wachovia under the DIP Order, the

Committee professionals spent very little time investigating pre-petition sales transactions, including the LBO with Wachovia that led to the creation of the Debtors. *See* MW Fee. App. ¶ 13(03) indicating 3.3 hours of time expended in the category identified as Investigation of Prepetition transactions.

**RELIEF REQUESTED**

21. In light of the above, Washington Penn submits that an Examiner should be appointed in this case in order to conduct the following specific tasks:

- a. Undertake an investigation into the LBO's described above and make an independent evaluation/determination of whether potential claims exist against Wachovia under applicable state and federal avoidance/fraudulent transfer statutes arising out of or relating to the LBO's described above;
- b. To determine whether consideration was provided by Wachovia in exchange for the Committee's agreement to release Wachovia of these and other claims under the DIP Order;
- c. To determine whether the Debtors' and Committee's professionals were disinterested persons, whether they had adverse interests to the Debtors' Estate, and whether they conducted a reasonably prudent investigation of the potential claims against Wachovia before agreeing to the release of Wachovia under the DIP Order; and
- d. Opine whether it is appropriate for general unsecured creditors to vote to accept the Joint Plan containing releases of the Debtors' and the Committee's professionals.

22. 11 U.S.C. § 1104(c) provides:

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on the request of a party in interest or the United States trustee and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if -

(1) such appointment is in the interests of creditors, any equity security holders and other interests of the estate;

23. This Court has not previously ordered the appointment of a trustee under 11 U.S.C. § 1104.

24. The appointment of an Examiner is appropriate in this case, and within the interests of creditors, because the pre-petition highly leveraged transactions that formed Debtors must be investigated before any releases are provided to any parties relative to the same.

25. Further, Washington Penn submits that no individual creditor should have to carry the burden of the expense of an investigation into potential claims against Wachovia, but said expense should be paid by the Debtors' estates.

26. To date, Washington Penn believes that no such investigation has been conducted in such a fashion to warrant the release of Wachovia and other parties under the Joint Plan.

27. As evidenced by the MW Fee App., Washington Penn submits that Committee counsel failed to conduct the appropriate investigation into the LBO transactions before recommending to the Committee, and ultimately agreeing to, the release of Wachovia under the DIP Order and the Joint Plan.

28. While the Affidavit attached to the Retention Application reveals that Wachovia is a current client of McGuire Woods LLP, it fails to describe the extent of that relationship (considering Wachovia is the single largest creditor in these cases) and the Affidavit only identifies Wachovia as a client among a list of approximately forty (40) other clients.

29. At a meeting between Washington Penn's counsel and Committee's counsel held at the offices of Washington Penn's counsel, counsel for the Committee acknowledged that no investigation was conducted into the LBO's by his office, but even if it were determined that claims existed McGuire Woods would not assert those claims on behalf of the Committee given its relationship with Wachovia.

30. In fact, McGuire Woods is currently representing Wachovia Bank, N.A. in the bankruptcy case filed on behalf of Le-Nature's, Inc., which is currently pending before the U.S. Bankruptcy Court for the Western District of Pennsylvania at case number 06-25454 (MBM). McGuire Woods entered its appearance on behalf of Wachovia Bank, N.A., in the Le-Nature's, Inc. case, on November 3, 2006. This was less than one month after McGuire Woods filed the Retention Application in this case. The Wachovia Bank, N.A. credit facility in the Le-Nature's, Inc. case is at least \$278 million. Attached hereto and marked as Exhibit "A" is a copy of the Notice of Appearance filed by McGuire Woods in the Le-Nature's, Inc case. Attached hereto and marked as Exhibit "B" is a copy of Schedule D filed in the Le-Nature's, Inc.

31. "The integrity of the bankruptcy system demands that the professionals serving the committee not place themselves in a situation where their independence, loyalty and integrity can be questioned by the unsecured creditor body whom they



represent.” *In re Greystone Holdings, LLC, et al.*, 305 B.R. 456, 460 (Bankr.N.D.Ohio 2003).

32. Due to the relationship that exists between McGuire Woods and Wachovia, and in conjunction with the minimal amount of time expended by Committee counsel in connection with the investigation of pre-petition transactions, including investigation into the LBO transactions, the best interests of creditors warrants the appointment of an Examiner to carry out the specific tasks identified above in Paragraph 21 before the Committee’s professionals are granted a release of liability under the terms of the Joint Plan.

33. Similarly, the Debtor and its counsel had a fiduciary obligation to the Debtors’ estates and its creditors in examining potential claims against Wachovia that may benefit the estate. It does not appear that the Debtor or its professionals conducted a reasonably prudent investigation into the LBO transactions before agreeing to a release of Wachovia under the DIP Order. Thus, as is the case with the Committee’s professionals, the best interests of creditors warrants the appointment of an Examiner to carry out the specific tasks identified above in Paragraph 21 before the Debtors’ professionals are granted a release of liability under the terms of the Joint Plan.

#### **DUTIES OF AN EXAMINER UNDER 11 U.S.C. §1106**

34. The duties of an Examiner are set forth in 11 U.S.C. §1106(b) as follows:

(b) An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

11 U.S.C. §1106(b).

35. 11 U.S.C. §1106(a)(3), which is made applicable by operation of 11 U.S.C. §1106(b), requires the examiner to “except to the extent that the court orders otherwise, investigate the acts conduct, assets, liabilities, and financial condition of the debtor . . . and any other matter relevant to the case or to the formulation of a plan.” 11 U.S.C. §1106(a)(3).

36. The U.S. Court of Appeals for the Sixth Circuit has stated “that the bankruptcy court retains broad discretion to direct the examiner’s investigation, including its nature, extent and duration” *In re Revco D.S., Inc.*, 898 F.2d 498, 501 (6th Cir. 1990).

37. The role of any Examiner appointed by this Court may, and should be, very limited. It should be limited to an investigation into the highly leveraged transactions that created debtors and the Committee decision to release Wachovia. In the *Revco* case, the U.S. Trustee requested an examiner to investigate the leveraged buyout that created the Debtors. Although the order of the Sixth Circuit in the *Revco* case does not reveal the duties given to the Examiner, it is noteworthy that a request was made, in that case, to investigate a pre-petition, leveraged, buyout.<sup>1</sup> *See also, In re ENRON*, 2002 WL 32150478, \*5 (Bankr.S.D.N.Y. 2002) (appointing examiner “to investigate and report to creditor constituencies on any inter-corporate transactions.”); *In re Loral Space Communications, Ltd.*, 2004 WL 2979785, \*5 (Bankr.S.D.N.Y. 2004) (appointing examiner “to review whether appropriate procedures were followed in valuing [debtor’s] assets.”); *In re UAL Corp.*, 307 B.R. 80 (Bankr.N.D.Ill. 2004) (examiner appointed to investigate debtors decision to pursue relief under 11 U.S.C. §1114.).

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<sup>1</sup> Also noteworthy is that the appointment of an examiner is mandatory under 11 U.S.C. §1104(c)(2) when “the debtor’s fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.” If a Debtor has specified debt under this section of 1104, the court would have no discretion and an examiner would be mandatory. In the case of the instant Debtors, general unsecured debts exceed \$22 million.

38. Washington Penn will be obliged to defer to the findings and conclusions of the Examiner.

WHEREFORE, Washington Penn respectfully requests this Court enter an Order appointing an Examiner pursuant to 11 U.S.C. §1104(c)(1) and such other and further relief as the Court deems appropriate under the circumstances.

Respectfully submitted,

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