

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

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

**OPPOSITION OF WACHOVIA CAPITAL FINANCE CORPORATION (CENTRAL)  
TO MOTION TO APPOINT EXAMINER PURSUANT TO 11 U.S.C. § 1104(C)(1)  
FILED BY WASHINGTON PENN PLASTIC COMPANY, INC.**

Wachovia Capital Finance Corporation (Central) ("Lender") hereby opposes the Motion To Appoint Examiner Pursuant to 11 U.S.C. § 1104(c)(1) (the "Examiner Motion") filed by Washington Penn Plastic Company, Inc. ("Washington Penn") as it attempts to undermine this Court's final order approving Lender's postpetition loans to the Debtors. In further support of its opposition, Lender states as follows:

1. On October 27, 2006, the Court entered the 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 "Final Order") (Docket #192).

---

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

2. Paragraph 8(b) of the Final Order provides for Lender's release with respect to the prepetition loans and other prepetition conduct of the Lender. In pertinent part, it reads:

Debtors, their respective estates, CEP Mexico and the Committee, hereby release, discharge, and acquit Lender . . . of and from any and all claims . . . of every type, which occurred on or prior to the date of the entry of this Order (including, without limitation, any and all derivative or direct claims or causes of action against Lender in respect of the extent, validity or priority of the Prepetition Documents, Prepetition Debt or Prepetition Liens, any state or federal fraudulent conveyance, fraudulent transfer, preference, deepening insolvency and other similar causes of action, and any causes of action of these estates arising under any section of Chapter 5 of the Code[.]

Final Order ¶ 8(b) (the "Release"). Pursuant to Paragraph 12(a) of the Final Order, upon entry of the Final Order, the Release was binding on the Debtors, the Participating Customers, the Assisting Customers (as defined in the Final Order), the Official Committee of Unsecured Creditors (the "Committee") and all members of the Committee, which included Washington Penn. See Amended Appointment of Committee of Unsecured Creditors, attached hereto as Exhibit A.

3. Further, in part to address concerns raised by the Court, all other parties in interest were given an additional thirty (30) days to object to the Release and certain other provisions in the Final Order. Specifically, Paragraph 12(a) of the Final Order also states that:

[The] release contained in Paragraph 8(b) of this Order shall be binding on all other parties in interest in the Case (and their respective successors and assigns) who do not file an objection to such stipulations, representations and findings, relief and release within thirty (30) days of the date of this Order. Immediately upon entry of this Order, Debtors shall serve separate notice of the terms of Paragraph I, 8(b) and 12(a) of this Order to all parties in interest in the form attached hereto as Exhibit E.

Final Order ¶ 12(a). Indeed, on October 30, 2006, the Debtors served all known parties in interest with the required notice (the "Notice") referenced in Paragraph 12(a) of the Final Order. A full copy of the Notice is attached hereto as Exhibit B, which begins: "**PLEASE READ THIS NOTICE. YOUR RIGHTS MAY BE AFFECTED.**" (Notice, Ex. B) (emphasis in original). The Notice further states:

Pursuant to Paragraph 12(a) of the Final Financing Order, the [Release and related] provisions of the Final Financing Order shall be binding on you, without further notice or opportunity for hearing, unless you file an objection with the Court on or before November 27, 2006, in accordance with Paragraph 12(a) of the Final Financing Order.

(Id.). Washington Penn and its counsel were served with the Notice. See Affidavit of Service, attached hereto as Exhibit C.

4. As required by the Final Order, the Notice highlighted the Release and other stipulations of the Final Order, and indicated that the Release (and other provisions) would be binding on Washington Penn absent a timely objection, but no party in interest (including, without limitation, Washington Penn) filed an objection to the Release in accordance with the Notice. Washington Penn only first raised an issue with respect to the Release on March 2, 2007, when it filed its Objection to the Approval of 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 "Disclosure Statement Objection").<sup>2</sup>

5. With the Examiner Motion, Washington Penn brings a direct attack on the Final Order and Release in at least two ways. First, it requests that the Court appoint a

---

<sup>2</sup> In its objection to approval of the Disclosure Statement, Washington Penn's trouble with the Release appeared to arise only to the extent Washington Penn was questioning the disinterestedness of Committee counsel. The Examiner Motion goes significantly beyond that.

special examiner to investigate whether Lender provided consideration for the Release it received under the Final Order, thereby suggesting if Lender did not provide consideration for the Release it should not be enforced. Second, Washington Penn requests that an examiner be appointed to determine whether potential claims exist against Lender arising out of Lender's prepetition loans to Debtors (i.e., on fraudulent transfer grounds). This request assumes that prepetition claims by the Debtors against Lender still exist notwithstanding the Release.

6. It is incontrovertible and already of record that Lender provided significant and valuable consideration to the Debtors and other parties in interest for the Release. Without an obligation to do so, Lender agreed to continue making postpetition advances to the Debtors under the Final Order, which allowed the Debtors to complete the orderly liquidation of their facilities and maximize the value of these estates. Without the Release, Lender would not have otherwise consented to the terms of the Final Order, including its various provisions that were requested by the Debtors, the Committee and others, but not Lender. Attached hereto as Exhibit D is the affidavit of Mr. Steven S. Linderman, Portfolio and Relationship Manager of Lender, who was responsible for overseeing the day-to-day administration of Lender's loans to the Debtors (the "Linderman Affidavit"). The Linderman Affidavit confirms that the Release was a fundamental and necessary condition to Lender's agreement to consent to the Final Order. Without it, these cases would likely not have generated the millions of dollars that will be available to creditors.

7. As also described in the Linderman Affidavit, Lender made several concessions in exchange for the relief granted in the Final Order. Among other things, Lender:

(a) waived the balance of the postpetition facility fee (\$350,000) that was provided in the interim financing order, except in the event Lender needed funds from CEP Mexico to repay its loans (which it did not);

(b) agreed to escrow proceeds of assets located in Mexico and, therefore, not press a determination of its claims to and liens against such assets;

(c) accommodated the Participating Customers' (as defined in the Final Order) need to remain in Debtors' facilities longer than Lender desired, which facilitated the exit of the Participating Customers from such facilities and was an inducement for them to agree to certain payment terms with respect to the accounts they owed the Debtors; and

(d) accepted the Debtors' orderly liquidation Budget (as defined in the Final Order), which included items that did not benefit Lender and put Lender at risk if the value of the Debtors' assets were otherwise insufficient to repay Lender's claims.

8. From and after its entry, Lender has abided by and relied on the terms of the Final Order, including the Release for which it negotiated. Washington Penn's allegations that cause exists to appoint an examiner to investigate whether Lender gave consideration for the Release are fully rebutted by the terms of the Final Order and the Linderman Affidavit.

9. Moreover, the Release and other terms of the Final Order determined the claims it addressed, once and for all, with respect to all parties in interest in this case – including Washington Penn. By entry and operation of the Final Order, the potential claims

that Washington Penn wants investigated have been released and waived if they ever existed at all. The only way in which Washington Penn could possibly obtain the relief it seeks is under Federal Rule of Civil Procedure 60(b), made applicable by Federal Rule of Bankruptcy Procedure 9024, since it is more than ten days after entry of the Final Order. However, such an attempt by Washington Penn is not viable because none of the grounds for relief from the Final Order exist.

(a) The permanent relief in the Final Order did not arise from mistake, inadvertence, surprise or excusable neglect. In addition to being a member of the Committee, Washington Penn had separate counsel file a notice of appearance on October 2, 2006, and has been receiving all notices and pleadings filed in these cases. See Notice of Appearance and Request for Service of Notices, Pleadings and Orders, filed by Kimberly A. Coleman of Leech Tishman Fuscaldo & Lampl, LLC on October 2, 2006, attached hereto as Exhibit E. Throughout the proceedings related to the Final Order and the Release, Washington Penn has or should have been aware of the terms of the Final Order.

(b) There is no newly discovered evidence that due diligence could not have been uncovered in time to move for relief under Federal Rule of Civil Procedure 59(b). The claims and transactions that Washington Penn wants investigated occurred well prior to the commencement of these cases. The Conversion Motion (as defined in the Examiner Motion), from which Washington Penn draws its putative support, was filed on September 21, 2006 – over a month before the Final Order was entered and over two months before the Release became effective. What's more, Washington Penn's dispute with the Debtors began a year ago. Washington Penn has had ample time to learn all that it wants to know about any claims of the Debtors' against Lender, or ask the Court for more time to investigate such matters.

(c) The Release was not obtained by fraud upon the Court, Washington Penn, the Debtors, the Committee or any other party in interest, or by any other form of misrepresentation or misconduct by any party. The Final Order and the Release were, among other things (i) publicly noticed and filed, and widely served, in several ways and on several occasions, (ii) the products of protracted and difficult negotiations among well-represented and sophisticated parties, and (iii) subject to sanction, signed by counsel representing the primary parties in this case. The Final Order and Release wear no badges of fraud.

(d) The Final Order containing the Release is not void. It is quite the opposite: a valid and final order of this Court, entered with proper jurisdiction, notice and opportunity for hearing.

(e) Neither the Release nor other relief in the Final Order have been released or discharged by any party, and are not the subject of a prior judgment that has been

reversed or vacated. Further, no equitable reason exists to prohibit the prospective application of the Final Order or Release. Washington Penn is not unduly prejudiced by continued enforcement of the Release and other aspects of the Final Order. As discussed in several places above, Washington Penn was a significant participant in this Case and the Final Order proceedings. The prejudice it now faces by operation of the Release was expected and remains warranted.

(f) No other reason justifies giving Washington Penn relief from the Release or other provisions of the Final Order. At the heart of the Examiner Motion (and Washington Penn's Disclosure Statement Objection) is Washington Penn's suggestion that counsel for the Committee is not disinterested because of its representation of Lender's affiliates. The amount of work counsel for the Committee has done for Lender's affiliates was disclosed by such counsel at the beginning of this Case. In the event that the Court determines that the Committee's counsel was not disinterested and should not have been approved (which Lender believes is highly unlikely given its understanding of the facts) that still would not justify giving relief from the Final Order to grant the Examiner Motion. The Release and terms of the Final Order are not new issues, are not being raised by a party new to the Case, and are not insignificant aspects of this Case. Having acted at all times in good faith, and having relied on the Final Order, Lender would now suffer the singular punishment of losing a key to its consent to the Final Order – amounting to an after-the-fact, unilateral renegotiation of the Final Order. Regardless of the outcome of Washington Penn's disputes with the Committee's counsel, treating Lender in this way would be inequitable and, therefore, should bar parties from avoiding the effect of the Final Order.

10. In conclusion, no reasonable purpose is served by appointing an examiner to investigate whether Lender provided consideration for the Release or if fraudulent transfer claims lie against Lender. Granting any of such relief would undermine the Final Order and the extended, careful process by which it was entered and the Release made effective. Moreover, it would unnecessarily erode distributions to creditors with the examiner's fees, as well as the claims of Lender (and possibly other parties) for costs incurred responding to the examiner.

11. For the foregoing reasons, the relief requested in Sections 21(a) and (b) of the Examiner Motion should be denied in their entirety, and the balance of relief sought by the Examiner's Motion should be denied to the extent it seeks to modify, amend or otherwise collaterally attack the Final Order.

Cleveland, Ohio  
March 23, 2007

Respectfully submitted,

/s/ David M. Neumann  
Mark A. Phillips (OBR #0047347)  
David M. Neumann (OBR #0068747)  
Stuart A. Laven, Jr. (OBR #0071110)  
BENESCH, FRIEDLANDER, COPLAN  
& ARONOFF LLP  
2300 BP Tower  
200 Public Square  
Cleveland, Ohio 44114-2378  
(216) 363-4500  
(216) 363-4588 (fax)  
[dneumann@bfca.com](mailto:dneumann@bfca.com)

Alan Solow  
Jeremy Downs  
Shira Isenberg  
GOLDBERG KOHN BELL BLACK  
ROSENBLOOM & MORITZ, LTD.  
55 East Monroe St., Suite 3300  
Chicago, Illinois 60603

Counsels for Wachovia Capital Finance  
Corporation (Central)



**EXHIBIT A**

**Amended Appointment of Committee**

**EXHIBIT B**

**Notice**

**EXHIBIT C**

**Affidavit of Service**

**EXHIBIT D**

**Affidavit of Steven S. Linderman**

**EXHIBIT E**

**Notice of Appearance**