UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

OBJECTION OF DEBTORS AND DEBTORS IN POSSESSION TO WASHINGTON PENN PLASTIC COMPANY, INC.'S MOTION TO APPOINT EXAMINER PURSUANT TO 11 U.S.C. § 1104(c)(1)

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 object (the "**Objection**") to *Washington Penn Plastic Company, Inc.'s Motion to Appoint Examiner Pursuant to 11 U.S.C. 1104(c)(1)* (the "**Motion**"). In support of this Objection, the Debtors respectfully represent as follows:

PRELIMINARY STATEMENT

1. This Court has broad discretion regarding appointment of an examiner under Section 1104(c)(1) of the Bankruptcy Code.

2. Washington Penn has the burden of proof regarding the propriety of the appointment of an examiner. Washington Penn must show this Court by conclusive evidence that (i) the substantial costs that will be incurred by an examiner are outweighed by the likely benefit to the Debtors' estates and (ii) the appointment of an examiner is in the best interests of

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

all the Debtors' creditors, not just Washington Penn. As discussed herein, Washington Penn cannot meet its burden of proof. The relief requested by Washington Penn is wholly inappropriate and should be denied.

BACKGROUND

General Background

3. On September 20, 2006, each Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Pursuant to an order entered by the Court on September 26, 2006, the Cases are being jointly administered for procedural purposes only.

4. The Debtors are operating their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. On September 28, 2006, the United States Trustee appointed an official committee of unsecured creditors (the "**Committee**"). No trustee or examiner has been appointed.

The Prepetition Forbearance Agreement

5. Based on breaches of the Debtors' Loan and Security Agreement (the "**Loan Agreement**") with Wachovia Capital Finance Corporation (Central) ("**Wachovia**") in early 2006, Wachovia issued default notices to the Debtors. Without access to the revolving credit facility under the Loan Agreement, the Debtors would have been required to close down operations immediately. Realizing that a restructuring or organized wind down would be in the best interests of the Debtors' creditors and would be the best hope for a substantial return to unsecured creditors, the Debtors requested that Wachovia forbear from exercising its rights under the Loan Agreement and continue lending to the Debtors. The terms of a forbearance agreement were negotiated by the parties, and Wachovia agreed to continue to lend to the Debtors pursuant to the terms and conditions of that certain Second Amended Forbearance

Agreement (the "**Forbearance Agreement**") dated May 9, 2006. A copy of the Forbearance Agreement is attached as Exhibit A.

6. One of the key terms of the Forbearance Agreement was Section 8.6 entitled "Release" (the "**Original Release**") whereby the Debtors released Wachovia from Claims (as defined in the Forbearance Agreement) held by the Debtors. The term "Claims" included claims arising from and related to the LBO (as defined in the Motion). Without the Forbearance Agreement, the Debtors would not have been able to wind down their estate in an orderly fashion, and Wachovia would not have entered into the Forbearance Agreement without the Original Release.

7. Thus, at the time that the Debtors filed for bankruptcy protection on September 20, 2006, the Debtors had already released Wachovia from claims related to the LBO.

The DIP Facility

8. The Debtors could not have operated post-petition and ultimately could not have successfully wound down their affairs without access to a financing facility (the "**DIP Facility**"). The DIP Facility was negotiated both pre-petition and post-petition by the Debtors, the Committee, Wachovia and the Participating Customers (as defined in the DIP Facility). Wachovia made it clear at all times during the negotiations that an additional release was a condition to Wachovia entering into any DIP Facility.

9. 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**") (D.I. #192). The Final Order was the result of negotiations by the parties and multiple hearings and/or status conferences before the Court. The

Debtors believe, and the Court's records will show, that Washington Penn was represented telephonically by counsel at all, or virtually all, such hearings and/or status conferences.

10. Paragraph 8(b) of the Final Order provides for Wachovia's release (the "**Final Order Release**") with respect to the prepetition loans and other prepetition conduct of the Wachovia. Pursuant to Paragraph 12(a) of the Final Order, upon entry of the Final Order, the Final Order Release was binding on the Debtors, the Participating Customers, the Assisting Customers (as defined in the Final Order), the Committee and all members of the Committee, which includes Washington Penn. 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 Final Order 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).

11. 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 (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.

APPLICABLE LAW

12. Upon the motion of a party-in-interest, a bankruptcy court may appoint an examiner pursuant to Section 1104(c) of the Bankruptcy Code which provides, in part:

> (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 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;

11 U.S.C. § 1104(c)(1).

13. The Bankruptcy Court has broad discretion to determine whether or not an examiner should be appointed pursuant to Section 1104(c)(1). *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S. Inc.),* 898 F.2d 498, 501 (6th Cir. 1990). "A bankruptcy court retains broad discretion to direct the examiner's investigation, including its nature, extent and duration." *Id.*.

14. A request to appoint an examiner pursuant to Section 1104(c)(1) must be substantiated with factual support. *See In re Gliatech, Inc.* 305 B.R. 832, 835 (Bankr. N.D. Ohio 2004); *In re Mechem Fin. Of Ohio Inc.,* 92 B.R. 760, 761 (Bankr. N.D. Ohio 1988). The costs of the examiner must be considered in relation to the potential benefit provided to all parties with a stake in the case. *Id.* Therefore, a party moving for the appointment of an examiner must

provide factual support that it is in the best interests of all parties and that the benefits provided to all parties will be greater than the costs of the examiner.

OBJECTION

15. The Motion is, in essence, a request to have the actions of the Committee's counsel investigated. The Debtors maintain that from their perspective McGuireWoods has acted in good faith at all times during these cases with a full belief that its actions were and are in the best interests of the Debtors' estates.

16. That being said, Washington Penn asserts a baseless allegation in paragraph 33 of the Motion that the Debtors and their counsel have breached their fiduciary duty by failing to examine the LBO transaction before agreeing to a release of Wachovia in the Final Order. This allegation is mooted by the both the Original Release and the Final Order Release.

17. Washington Penn has requested:

a. In Paragraph 21(a) of the Motion that an examiner be appointed to investigate the Wachovia LBO.

b. In Paragraph 21(b) that an examiner be appointed to review the consideration provided by Wachovia for the Final Order Release.

c. In Paragraph 21(c) that an examiner be appointed to review the disinterestedness of the estate professionals.

d. In Paragraph 21(d) that an examiner opine on the propriety of any releases in the Joint Plan.

Washington Penn's Allegation of Liability under the LBO is Moot and Adequate Consideration was Provided by Wachovia

18. Washington Penn seeks an examiner to investigate an action against Wachovia

related to the LBO and whether adequate consideration was provided by Wachovia. Any such investigation is moot and an examiner is not warranted.

19. In order to keep the doors open and maintain the possibility of a restructuring or organized wind down, the Debtors were required in April and May 2006 to assess the propriety of the Original Release against the harm to creditors that would be caused by an immediate shut down. In their sound business judgment, the Debtors determined that the Original Release was appropriate as the small likelihood of success on a claim against Wachovia was greatly offset by the devastating effect that a shut down would have on the value of their assets.

20. In negotiating the DIP Facility, Wachovia again required a release. Because the Debtors would receive cash infusions under the DIP Facility from the Participating Customers, the DIP Facility represented a substantial savings for the Debtors' estates. That being said, the Participating Customers required that Wachovia (and no other lender) continue to lend in formula. Wachovia was willing to do so, but required the Final Order Release as a condition to lending. Wachovia's requirement of a release from the Debtors is a common requirement by lenders providing debtor in possession financing. *See In re WCI Steel, Inc.* Case No. 03-44662 (October 29 2003), ¶ 1.(4); *In re Republic Engineered Products, LLC,* Case No. 03-55118 (October 29, 2003) ¶ F.

21. The Final Order is typical in that while the Debtors have granted a release, it provides a certain time period for the Committee to investigate Wachovia's liens. *See* Final Order; *see also In re WCI Steel, Inc.* Case No. 03-44662 (October 29 2003), ¶ 4.1; *In re Republic Engineered Products, LLC,* Case No. 03-55118 (October 29, 2003) ¶ 24. Given that granting a release is common practice and given that a release was already granted in the Forbearance Agreement, the Debtors determined not to further investigate the LBO.

22. The Final Order is atypical, however, in that it provided for the mailing of the Notice to all creditors. Pursuant to the express terms of the Notice, all parties, including Washington Penn, were specifically placed on notice of the Final Order Release and granted thirty days to object. Washington Penn failed to object or even raise the issue and should not now be able to collaterally attacked the Final Order Release. Had any colorable claim been presented, it would have been considered, but the time to present such a claim has passed.

23. Because the issue of an action against Wachovia is moot, Washington Penn cannot show that the cost of such an investigation can provide any benefit to the Debtors' estates.

24. Unless the Court is willing to overturn its own final order which it should be loathe to due on the circumstances, an examiner is not warranted.

It is inappropriate for an Examiner to Review Disnterestedness under the Circumstances

25. Washington Penn's request in Paragraph 21(c) that an examiner be appointed to review the disinterestedness of the estate professionals is also not appropriate. Both Baker Hostetler and McGuireWoods submitted full disclosures to this Court and the United States Trustee in seeking their respective retentions. Such disclosures were served on Washington Penn and the United States Trustee. No party objected on the basis of disinterestedness, and the retentions were approved at hearings attended by Washington Penn. The issue of disinterestedness is properly reserved for the Court which has already made a determination on the issue. Washington Penn has raised no new facts that were not previously disclosed to the Court. As such, the Court prior determination that the professionals are disinterested should stand, and it would be a waste of estate assets to needlessly investigate these issues.

It is inappropriate to Request that an Examiner give an Opinion regarding the Plan

26. Additionally, it is improper to request that an examiner opine on a plan issue. The role of an examiner is to investigate and report, "not to act as a protagonist in the proceedings." *Gliatech* at 836. While an examiner may report facts to the Court, it should not opine on a plan issue. It is the purview of the Committee, as the fiduciary for general unsecured creditors, to opine regarding the terms of the plan. As such, the Motion should be denied to the extent that an opinion of the examiner is sought.

CONCLUSION

27. Washington Penn's requested relief must be denied. Washington Penn has not and cannot show the benefit that the Debtors' estates will receive from the needless investigations that it proposes. Because the costs of the examiner will greatly outweigh any benefits, the Motion must be denied.

WHEREFORE, the Debtors request that this Court deny the Motion and grant such other relief as is just and proper.

Dated: March 26, 2007
Cleveland, OH

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

By: /s/ Joseph F. Hutchinson, Jr.
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